Case No. S215614

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

NYKEYA KILBY,
Plaintiff/Petitioner,

v.

CVS PHARMACY, INC,
Defendant/Respondent.

KEMAH HENDERSON, et al.
Plaintiffs/Petitioners,

v.

JPMORGAN CHASE BANK, et al.
Defendant/Respondent.

On Certified Questions from the United States Court of Appeals
for the Ninth Circuit Pursuant to California Rule of Court 8.548
Ninth Circuit Case Nos. 12-56130 and 13-56095

PETITIONERS' OPENING BRIEF

*MICHAEL RUBIN (#80618)
CONNIE K. CHAN (#284230)
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

KEVIN J. McINERNEY (#46941)
18124 Wedge Parkway. Suite 503
Reno, NV 89511
Telephone: (775) 849-3811
Facsimile: (775) 849-3866

(Additional Counsel Next Page)

Attorneys for Petitioners Nykeya Kilby, Kemah Henderson, Taquonna Lampkins, Carolyn Salazar, and Tamanna Dalton

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San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064

KEVIN J. McINERNEY (#46941)
18124 Wedge Parkway. Suite 503
Reno, NV 89511
Telephone: (775) 849-3811
Facsimile: (775) 849-3866

(Additional Counsel Next Page)

Attorneys for Petitioners Nykeya Kilby, Kemah Henderson, Taquonna Lampkins, Carolyn Salazar, and Tamanna Dalton

Additional Counsel for Petitioners

JAMES F. CLAPP (#145814)
JAMES T. HANNINK (#131747)
ZACH P. DOSTART (#255071)
DOSTART CLAPP & COVENEY, LLP
4370 La Jolla Village Drive, Suite 970
San Diego, CA 92122-1253
Telephone: (858) 623-4200
Facsimile: (858) 623-4299

MATTHEW RIGHETTI (#121012)
RIGHETTI GLUGOSKI, PC
456 Montgomery Street, Suite 1400
San Francisco, CA 94104
Telephone: (415) 983-0900
Facsimile: (415) 397-9005

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QUESTIONS PRESENTED FOR REVIEW

This Court has accepted certification of several questions concerning the proper interpretation of California's "suitable seating" law, which provides: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." 8 CCR §§11040(14)(A), 11070(14)(A).

As set forth in the Ninth Circuit's order requesting certification, the questions to be decided are:

1) Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe "nature of the work" holistically and evaluate the entire range of an employee's duties?

   a) If the courts should construe "nature of the work" holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat?

2) When determining whether the nature of the work "reasonably permits" the use of a seat, should courts consider any or all of the following: the employer's business judgment as to whether the employee should stand, the physical layout of the workplace, or the physical characteristics of the employee?

3) If an employer has not provided any seat, does a plaintiff need to prove what would constitute "suitable seats" to show the employer has violated §14(A)?[1/]

[1/] Alternative formulations of these questions were set forth in plaintiffs' January 22, 2014 letter brief in support of certification, pursuant to Rule 8.548(e)(1).

INTRODUCTION

These certified questions arise in two cases that were argued to a panel of the Ninth Circuit on December 2, 2013. The first case was brought as a class action by plaintiff Nykeya Kilby, a former CVS Pharmacy Clerk/Cashier, who alleged that CVS violated Wage Order 7-2001 §14(A) by failing to provide seating for its cashiers at the checkout cash registers where those cashiers performed such standard check-out functions as scanning and bagging merchandise, processing customer payments, and handing customers their receipts. *See Kilby v. CVS Pharmacy, Inc.* (9th Cir. No. 12-56130). The second case was brought as a class action by plaintiffs Kemah Henderson, Taquonna Lampkins, Carolyn Salazar, and Tamanna Dalton, all current or former JPMorgan Chase Bank ("Chase") tellers, who alleged that Chase violated Wage Order 4-2001 §14(A) by failing to provide seating at its teller counters where its tellers conducted such customer transactions as accepting deposits, cashing checks, and handling withdrawals. *See Henderson et al. v. JP Morgan Chase Bank, N.A.* (9th Cir. No. 13-56095).

The trial courts in both *CVS* and *Chase* denied class certification, and the trial court in *CVS* also granted summary judgment against plaintiff Kilby. In both cases, the courts construed §14(A) very narrowly, concluding that covered employees are only entitled to suitable seating under California law if: 1) all, or at least a majority, of the employee's assigned work tasks permit the use of seats; 2) the employer, in its "business judgment," agrees that its employee may work while seated; and 3) the employee has identified a particular type or make of seat that is "suitable."[2/]

[2/] Both *CVS* and *Chase* were brought pursuant to the Labor Code (continued...)

Plaintiffs proposed a far more practical construction of §14(A) that was based on the plain language of the Wage Order and the stated purpose of promoting worker health, welfare, and comfort. Under plaintiffs' construction, §14(A) requires California employers to provide suitable seating to covered employees whenever those employees are performing work that, viewed objectively, can reasonably be performed while seated, even if those employees are assigned other additional job tasks during the course of their shifts that cannot reasonably be performed while seated. So construed, §14(A) embodies the IWC's intent to ensure that employers provide seating to "all" covered employees during the periods of time ("when") those employees are engaged in tasks that, based on the inherent attributes of those tasks – such as their physical requirements, how long they take to perform, and how frequently they are performed ("the nature of the work") – objectively can be performed from a seated position ("reasonably permits the use of seats"). Plaintiffs also demonstrated that §14(A) does not impose any burden on employees to request a specific type or model of seat; and for that reason, that an employer's failure to provide *any* seating where suitable seating is required establishes the employer's prima facie liability.

[2/] (...continued)
Private Attorneys General Act of 2004 ("PAGA"), Labor Code §2698 *et seq.*, which creates a private right of action for any "aggrieved employee" to seek civil penalties, on behalf of him or herself and other current or former employees, for violations of certain provisions of the Labor Code. Although PAGA claims may proceed without class certification, *Arias v. Superior Court* (2009) 46 Cal.4th 969, 981 & n.5, plaintiffs in these cases chose to proceed on a class action basis. A third case involving similar claims was also argued before the Ninth Circuit on the same day as *CVS* and *Chase*, but the Ninth Circuit did not seek certification of the statutory construction issue in that case, *Brown v. Wal-Mart Stores, Inc.* (9th Cir. 12-17623), in which the district court had *granted* class certification to plaintiff cashiers asserting §14(A) claims.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statutory and Regulatory Framework

In 1913, the California Legislature established the Industrial Welfare Commission (IWC), which it authorized to regulate the wages, hours, and working conditions of California workers for the purpose of protecting worker health and welfare. *See Indus. Welfare Comm'n v. Superior Court* (1980) 27 Cal.3d 690, 700-01. The IWC was "vested with broad statutory authority to investigate 'the comfort, health, safety, and welfare' of the California employees under its aegis...and to establish...'[t]he standard conditions of labor demanded by the health and welfare of [such employees].'" *Id.* (citations omitted). Although the IWC's original mission was focused on promoting the health and welfare of women and minors, the Legislature in 1973 broadened the IWC's jurisdiction (without any change to the substance of its mandate) "to establish minimum wages, maximum hours and standard conditions of employment for *all* employees in the state, men as well as women." *Id.*

The Legislature authorized the IWC to promulgate a series of Wage Orders to establish minimum "standard conditions of labor," which are incorporated by reference into Labor Code §1198. Seventeen of those Wage Orders are industry- or occupation-specific, and include the two Wage Orders at issue: Wage Order 4-2001, which applies to all persons employed in "professional, technical, clerical, mechanical, and similar occupations;" and Wage Order 7-2001, which applies to all persons employed in the "mercantile industry."

Section 14 of the applicable Wage Orders imposes an affirmative obligation on employers in covered industries to provide suitable seating to their "working" employees. The suitable seating provisions in Wage Order

4-2001 and Wage Order 7-2001 are identical, and require in mandatory terms:

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

This language has not changed since 1980. *See* ER 54-56, 107, 111, 126, 147, 168-69.[3/] Identical "seating" requirements are mandated by 14 of the industry- or occupation-specific Wage Orders. *See* 8 CCR §11010(14) (manufacturing industry); *id.* §11020(14) (personal service industry); *id.* §11030(14) (canning, freezing, and preserving industry); *id.* §11050(14) (public housekeeping industry); *id.* §11060(14) (laundry, linen supply, dry cleaning, and dyeing industry); *id.* §11080(14) (industries handling products after harvest); *id.* §11090(14) (transportation industry); *id.* §11100(14) (amusement and recreation industry); *id.* §11110(14) (broadcasting industry); *id.* §11120(14) (motion picture industry); *id.* §11130(14) (industries preparing agricultural products for market, on the farm); *id.* §11150(14) (household occupations).[4/]

[3/] All citations to "ER" refer to the Excerpts of Record submitted to the Ninth Circuit in *CVS*. All citations to "*Chase*-ER" refer to the Excerpts of Record submitted to the Ninth Circuit in *Chase*.

[4/] Two other Wage Orders (Wage Order 14-2001, covering "agricultural occupations," and Wage Order 16-2001, covering "on-site occupations in the construction, drilling, logging and mining industries") contain seating mandates, but in different, industry-specific terms. *See* 8 CCR §11140(13) ("When the nature of the work reasonably permits the use (continued...)

Before 2004, no private right of action existed for aggrieved employees to enforce the seating requirement in any of these Wage Orders. Instead, §14 was previously enforceable only by the California Labor Commissioner, *see* Labor Code §§1193.5, 1194.5; and like many other laws governing the workplace that were only enforceable through State-initiated litigation, enforcement was sporadic and the law was frequently ignored. *See Arias*, 46 Cal.4th at 980; *Home Depot U.S.A., Inc. v. Superior Court* (2010) 191 Cal.App.4th 210, 223-24.

The Legislature enacted PAGA, the Labor Code Private Attorneys General Act of 2004 (Labor Code §2698 *et seq.*, Stats. 2003, ch. 906, §2, eff. Jan. 1, 2004), in 2003 after finding that the Labor Commissioner "was failing to effectively enforce labor law violations" because the State's enforcement agencies were understaffed and inadequately funded. Sen. Rules Comm. Floor Analysis, S.B. 796, 2003-04 Reg. Sess. (Sept. 11, 2003); *see* Stats. 2003, S.B. No. 796, §1. PAGA created a private right of action, allowing aggrieved employees to sue on behalf of themselves, the State, and their co-workers, to recover civil penalties for each pay period in which their employers violated Labor Code and IWC Wage Order provisions that previously only the Labor Commissioner could enforce. *See* Labor Code §2699(a), (f); *Home Depot*, 191 Cal.App.4th at 221-22, 226 (employer's noncompliance with suitable seating requirements of Wage

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[4/] (...continued)
of seats, suitable seats shall be provided for employees working on or at a machine."); *id.* §11160(12) ("Where practicable and consistent with applicable industry-wide standards, all working employees shall be provided with suitable seats when the nature and the process of the work performed reasonably permits the use of seats. This section shall not exceed regulations promulgated by the Occupational Safety and Health Standards Board."). Wage Order 17-2001, covering certain "Miscellaneous Employees," has no seating provision. *See id.* §11170. There is a separate Minimum Wage Order, which has no such provision either. *See id.* §11000.

Order 7-2001 §14(A) violates Labor Code §1198 and may be enforced through PAGA private action); *Bright v. 99¢ Only Stores* (2010) 189 Cal.App.4th 1472, 1478-79, 1481 (same). Under PAGA, aggrieved employees are entitled to 25% of the civil penalties recovered, with the remaining 75% paid to the California Labor and Workforce Development Agency to be used for increased labor law enforcement and training. Labor Code §2699(i).

The declared purpose of PAGA was "to supplement enforcement actions by public agencies, which lack adequate resources to bring all such actions themselves." *Arias*, 46 Cal.4th at 986. Because "[a]n employee plaintiff suing, as here, under the Labor Code Private Attorneys General Act of 2004, does so as the proxy or agent of the state's labor law enforcement agencies," an action to recover civil penalties under PAGA "'is fundamentally a law enforcement action designed to protect the public and not to benefit private parties.'" *Id.* (quoting *People v. Pac. Land Research Co.* (1977) 20 Cal.3d 10, 17).

II. Plaintiffs Presented Evidence That Their Employers Failed to Provide Any Seating For Employees Performing Stationary Work at Fixed Locations.

Because PAGA penalties accrue per pay period, plaintiffs seeking to obtain the full recovery of civil penalties permitted by PAGA need only establish that their employer failed to provide suitable seating at least once during any given pay period when the nature of the work reasonably permitted the use of seats. *See* Labor Code §2699(f)(2). Plaintiffs in *CVS* and *Chase* presented an abundance of evidence establishing that they regularly performed work that reasonably permitted the use of seats. Yet their employers never provided them any seating.

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A. The Evidence in *Kilby v. CVS Pharmacy, Inc.*

Plaintiff Kilby sued CVS on behalf of herself and approximately 17,000 other current or former CVS "Clerk/Cashiers" in California who were not provided with any seating when operating CVS's front-end cash registers. ER 786. Although CVS admitted that it provided workstation seating as a medical accommodation to its Clerk/Cashiers who were temporarily unable to stand while working, CVS otherwise had an undisputed policy that required all Clerk/Cashiers in its California retail stores to stand throughout their work day, except during meal periods and rest breaks. *See* ER 920-21.

The record evidence establishes that Ms. Kilby spent approximately 90% of her time operating a cash register at the front of the store. ER 697, 847-60. Her primary tasks while stationed at the cash register were standard checkout functions, namely scanning and bagging merchandise, processing customer payments, and handing customers their receipts. ER 697, 847-60. The rest of her work time – typically at the beginning and end of each shift – was spent on unrelated tasks (for which she does not assert any entitlement to seating) such as gathering shopping carts and re-stocking display cases. ER 249, 697.

Thirty CVS Clerk/Cashiers submitted declarations in support of Ms. Kilby's motion for class certification (and re-submitted those declarations in opposition to CVS's motion for summary judgment as to Ms. Kilby's individual seating claim), attesting that they, too, spent most of their shifts stationed at the cash register performing routine checkout functions.[5/]

[5/] *See* ER 705-06, 708, 710, 713, 715, 718, 721, 724, 727, 730-31, 733-34, 736, 738, 740-41, 743, 745-46, 748-49, 751-52, 754, 757, 759, 761, 763, 766, 769, 772, 775, 778, 780, 783. Although Clerk/Cashiers stationed at the cash register occasionally need to leave their workstations, for

(continued...)

CVS's own declarant, a CVS store manager, confirmed that even "[o]n slow days, the primary clerk/cashier may ... be ringing [up customer transactions] 75% of the time," while "[o]n busier days, a primary cashier might ring customer transactions approximately 85-90% of their shift." ER 684. A shift for a CVS Clerk/Cashier can last for as long as nine hours. *See, e.g.*, ER 677, 727, 743.

Ms. Kilby introduced considerable evidence that the nature of a CVS Clerk/Cashier's work while stationed at the cash register reasonably permits the use of seats. For example, seven CVS Clerk/Cashiers submitted declarations that they actually *had* performed their checkout functions successfully when permitted on occasion to use a chair or stool as a medical accommodation. *See* ER 710, 730, 740, 745-46, 769-70, 775-76, 783-84. Ms. Kilby also offered an expert report by an industrial and workplace ergonomics expert, Professor Steven L. Johnson, who concluded based on his observations of several CVS stores that the duties of a CVS Clerk/Cashier while operating a cash register reasonably permit the use of a seat. ER 26, 1021-33. Prof. Johnson also noted in his expert report that many supermarket and retail stores throughout Europe and Korea provide seating for their cashiers, further demonstrating that checkout functions performed by retail store cashiers like plaintiff can reasonably be performed from a seated position. ER 1018, 1027.

In response, CVS pointed to its own training and policy materials, which directed its Clerk/Cashiers to stand at all times including while

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[5/] (...continued)
example, to retrieve tobacco and other controlled merchandise, or to scan unusually large items that will not fit on the checkout counter, many Clerk/Cashiers testified that this happens only a "few times each shift." ER 713, 721, 736, 761, 766, 772, 778, 780. Others similarly testified that these duties occur only infrequently during the time Clerk/Cashiers are assigned to operate the cash register. *See* ER 710, 724, 730, 733, 745, 748, 751, 757.

ringing up customers at the cash register. CVS asked the district court to defer to its "business judgment that employees, including Clerk/Cashiers, best provide customer service by standing, as opposed to sitting or leaning." ER 200. However, CVS did not cite any evidence – such as actual surveys or studies regarding customer perceptions of seated cashiers or the impact, if any, of seating cashiers on checkout efficiency – to establish anything more than its naked belief that standing cashiers provide better customer service. *See* ER 300, 306-08, 904-05, 930-31. The *objective* evidence established (or at the very least created a genuine dispute) that the nature of a CVS Clerk/Cashier's checkout work at the cash register reasonably permits the use of seats.

B. The Evidence in *Henderson v. JPMorgan Chase Bank*

Plaintiffs Henderson *et al.* sued Chase on behalf of themselves and approximately 8,000 other current and former Chase bank tellers in California, based on the bank's classwide policy of not providing seats at the teller counters for tellers to use while assisting customers with financial transactions. Although Chase tellers perform a small number of discrete job duties away from the teller counter that require standing or movement (such as opening and closing the branch, occasionally walking to the vault, or maintaining the ATM (*see Chase*-ER 291-95) – tasks for which plaintiffs do *not* assert any entitlement to seating) – the district court found that the vast majority (at least 50%, and in many cases as much as 90%) of the Chase tellers' total work time is spent at the teller counters assisting customers. *Chase*-ER 13. Chase has a nationwide policy, applicable to all 900-plus California branches, not to provide any seating to its tellers. *Chase*-ER 301-02.

In support of class certification, plaintiffs submitted considerable evidence that the duties commonly performed by tellers at Chase's teller

counters can reasonably be performed while seated. According to Chase's own corporate designee, the essential and most common job duty for Chase tellers is to assist customers at the teller counter by accepting deposits, cashing checks, and handling withdrawals. *Chase*-ER 285-87; *see also Chase*-ER 296-99. Plaintiffs and other Chase tellers submitted declarations confirming that tellers spend most of their time performing those tasks. *See Chase*-ER 350, 355, 360, 365, 370, 375, 380, 385, 390. Performing these basic teller functions does not regularly require tellers to walk about, as the office tools and materials used most frequently by Chase tellers (such as the computer, cash drawer, PIN pad, card reader, sorting bins, scanner, and receipt printer) are physically located on the teller counter within arm's reach. *Chase*-ER 42, 44, 46, 272-73, 275-82, 393-94.

That Chase tellers could reasonably perform their teller-counter work while seated is further demonstrated by the undisputed fact, acknowledged by another corporate designee, that Chase has in the past provided teller stools as a medical accommodation to *hundreds* of its tellers for use at the teller counter, and that those tellers successfully performed their essential teller-counter functions even while seated. *See, e.g.*, *Chase*-ER 351, 361, 366. Moreover, tellers are permitted to sit at many of Chase's competitor banks in California, including Wells Fargo, Citibank, and Union Bank. *See, e.g.*, *Chase*-ER 345, 350, 355, 360, 365, 370. In fact, tellers were provided seats in the very Washington Mutual branches that Chase acquired when it first entered the California market in 2008, which seats Chase affirmatively *chose to remove* as part of its branch re-design. *See Chase*-ER 309-14. Indeed, the practice of providing seats for bank tellers is so commonplace throughout the banking industry that manufacturers have designed and marketed a stool *specifically* for use by tellers, called the Steelcase Teller Stool (Criterion). According to Chase's occupational health nurse manager

and corporate designee, the Steelcase Teller Stool "is a stool that is standard to be purchased for a [Chase] teller in any state, including California, if it is an approved accommodation." *Chase*-ER 322.

Although Chase attempted to justify its no-seating policy by asserting that "from a customer service perspective it's better to be standing," it was unable to point to a single study comparing or analyzing customer perceptions of standing tellers versus seated tellers. *Chase*-ER 306-07. As an objective matter, then, the evidence showed that the nature of a Chase teller's work at the teller counter reasonably permits the use of seats.

III. The Trial Courts Impermissibly Based Their Rulings on Factors Other Than Whether the Nature of the Work for Which Plaintiffs Sought Seating Could Reasonably Be Performed While Seated.

The *CVS* trial court denied summary judgment and class certification, and the *Chase* trial court denied class certification, based on: 1) the nature of *other* work that plaintiff employees sometimes perform when not assigned to the cash register or teller counter; 2) defendants' *preference* that their employees stand at all times while working; and 3) plaintiffs' failure to demonstrate that the same type of seating would be "suitable" for all employer branches.

As will be demonstrated further below, the first two factors are irrelevant to whether the nature of the work performed *at* the CVS cash register or Chase teller counter reasonably permits the use of seats, while the third is not plaintiffs' burden to prove as part of their prima facie case under §14(A).

A. The *CVS* Trial Court's Rulings

The *CVS* trial court acknowledged that, "generally speaking, an individual can operate a cash register from a seated position." ER 20.

Nevertheless, in granting summary judgment to CVS, the court concluded that the "'nature of the work' performed by an employee" for purposes of §14(A) "must be considered in light of that individual's entire range of assigned duties in order to determine whether the work permits the use of a seat or requires standing." ER 9. The court agreed with CVS that an employer's "business expectations for a job are relevant" in determining whether the nature of the work reasonably permits the use of seats, "such that if CVS hires employees to stand while working a cash register because CVS wants to project a certain image, then those employees would not be performing their job if they were seated." ER 9.

Applying this construction of §14(A), the court looked to CVS's written job description for the Clerk/Cashier position, which lists 26 job "functions," and concluded that because CVS "expects Clerk/Cashiers to perform the majority of their job duties [(including operating a cash register)] while standing," a Clerk/Cashier's "job as a whole" requires standing, and therefore §14(A) affords such workers no protection. ER 10. The court gave no consideration to the undisputed evidence that Ms. Kilby spent approximately 90% of her time operating a cash register at a fixed location, or to the physical requirements of that work. ER 697, 847-60. Instead, the court merely counted up the number of tasks listed in the job description without giving any weight to factors such as duration, frequency, or core importance, and largely deferred to CVS's *preference* that its Clerk/Cashiers stand throughout the entirety of their up-to-nine-hour shifts, regardless of the physical demands of the tasks performed.

The court in *CVS* had previously applied this same impermissible construction of §14(A) as the basis for denying Ms. Kilby's earlier motion for class certification, holding that any inquiry into whether the nature of a CVS Clerk/Cashier's work reasonably permits the use of seats would

require "an individualized, fact-intensive analysis to determine how each Clerk/Cashier spends his or her time." ER 20. The trial court also denied class certification based on its conclusion that whether the nature of the work "reasonably permits" the use of seats turns in part on what modifications an employer must make to its workstations to come into compliance with §14(A), and that what constitutes a "suitable seat" may vary from store to store. ER 20.

B. The *Chase* Trial Court's Ruling

The district court in *Chase* also denied class certification, despite finding that Chase's tellers spend the majority of their time working at the teller counter (*Chase*-ER 13), based on its express adoption of the *CVS* trial court's conclusion that §14(A) requires seating only if the "job[]" as a whole (comprised of the entire range of an employee's assigned duties) "can be performed while seated." *Chase*-ER 10. In denying class certification, the court in *Chase* relied on evidence that, when *not* working at the teller counter, Chase's tellers spend varying amounts of time performing *other* various tasks away from their teller stations. *Chase*-ER 12-15. Because some of those other tasks require movement, the court concluded that it would have to conduct "individualized inquir[ies] of how each teller spends his or her time" throughout each workday to determine whether each employee's "job [as a whole]" reasonably permits the use of seats. *Chase*-ER 13.

As a second basis for denying class certification, the court cited its conclusion that "[t]he question of what type of seat is suitable for tellers also does not produce a common answer." *Chase*-ER 14. Noting differences in workplace configurations and "incidental differences" among Chase's branches ("such as the location of printers"), the court concluded that it "would be required to conduct an individualized analysis to

determine whether seats are suitable at teller stations, what kind of seats would be suitable, and whether accommodations would be necessary to permit seating." *Chase*-ER 15.

IV. Proceedings in the Ninth Circuit

Ms. Kilby appealed the *CVS* trial court's grant of summary judgment and denial of class certification, and Ms. Henderson and her co-plaintiffs appealed the *Chase* trial court's denial of class certification. The Ninth Circuit set argument for both appeals on the same day, along with a third case also involving PAGA claims for violation of §14(A), in which the trial court had *granted* certification of a class of Wal-mart retail cashiers who alleged they had been unlawfully denied seats. *See Brown v. Wal-Mart Stores, Inc.* (9th Cir. 12-17623). On December 31, 2013, the Ninth Circuit issued an order pursuant to Rule of Court 8.548, asking this Court to decide the proper interpretation of §14(A) in Wage Orders 4-2001 and 7-2001. To aid in this statutory construction, the Ninth Circuit posed to this Court the three specific questions (the first of which contains a subpart) listed above. This Court granted the Ninth Circuit's certification request on March 14, 2014.

LEGAL STANDARD

"The IWC's wage orders are to be accorded the same dignity as statutes." *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1027. "'As quasi-legislative regulations, the wage orders are to be construed in accordance with the ordinary principles of statutory interpretation.'" *Bright*, 189 Cal.App.4th at 1480 (citation omitted). The fundamental goal of statutory interpretation is "to determine and give effect to the intent of the enacting legislative body." *People v. Braxton* (2004) 34 Cal.4th 798, 810; *accord Home Depot*, 191 Cal.App.4th at 216. To accomplish this goal, courts "first examine the words themselves because

the statutory language is generally the most reliable indicator of legislative intent. . . . The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490 (internal quotation marks and citation omitted). "'[P]lain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent.'" *Bright*, 189 Cal.App.4th at 1477 (citing *Green v. California* (2007) 42 Cal.4th 254, 260).

If the statutory language is ambiguous, the Court "may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute." *Holland*, 58 Cal.4th at 490 (internal quotation marks and citations omitted). A "statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." *Elk Hills Power, LLC v. Bd. of Equalization* (2013) 57 Cal.4th 593, 610 (internal quotation marks and citation omitted). The Court "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." *Frog Creek Partners, LLC v. Vance Brown, Inc.* (2012) 206 Cal.App.4th 515, 524 (internal quotation marks and citation omitted).

ARGUMENT

Section 14(A) provides: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." As reflected in this simple and straightforward language, the IWC sought to accomplish its worker protection goals by requiring

employers to provide seats to "all" covered employees, during the periods of time ("when") those employees are engaged in job tasks whose inherent physical characteristics ("nature of the work") are such that the employees objectively could perform those tasks while seated ("reasonably permits the use of seats").

I. **QUESTION 1: Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe "nature of the work" holistically and evaluate the entire range of an employee's duties?**

QUESTION 1a: If the courts should construe "nature of the work" holistically, should the courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat?

Simply stated, the first question and sub-part asks whether: 1) covered employees must be able to perform *all* or *a majority* of their assigned "work" (whether measured in work time or number of tasks) while seated in order to be entitled to any seating under §14(A); or instead whether: 2) covered employees are entitled to seating when the nature of the "work" being performed at a particular time reasonably permits the use of seats, without having to satisfy a specific threshold percentage of time spent on such tasks.

Chase and CVS advocate the former construction, which requires courts to examine the entire range of assigned duties that may arise in the course of employment to determine whether some percentage of those duties (100%, 50%, or somewhere in between – neither defendants nor the district courts have been clear) requires standing or can be performed while seated; and then to classify the entire "job as a whole" as one that either categorically "reasonably permits the use of seats" (in which case defendants contend the entire job would be subject to the labor protections

of §14(A), but not those of §14(B)) or categorically "requires standing" (in which case defendants contend the entire job would be subject to the labor protections of §14(B), but not §14(A)), *see supra* at 5.

Neither the plain text nor the regulatory history and purpose of the Wage Orders supports defendants' construction, which, when applied to real-world work scenarios, inevitably yields inconsistent and, we submit, absurd outcomes. In the context of §14(A), the phrase "nature of the work" cannot logically refer to the entire aggregation of assigned duties that may arise in the course of employment. Instead, it must refer to the discrete task or set of tasks that an employee performs at any given time during the work day. Further, while an employee who spends more than half his or her time performing tasks that reasonably allow the use of a seat certainly is entitled to a seat for use while performing those tasks, nothing in the text or history of the Wage Order warrants withholding the protection of the law from those employees who happen to spend 49% or less of their total employment time on such seating-permitted tasks.

A. The Text of §14 Supports Construing "Nature of the Work" as the Job Task or Tasks Being Performed, Not an Unweighted Aggregation of an Employee's Every Assignment.

The most common plain meaning dictionary definition of "work" is "task" or "duty." The *Merriam-Webster Collegiate Dictionary* (11th ed. 2003) defines "work" as an "activity in which one exerts strength or faculties to do or perform something" or "a specific task, duty, function, or assignment often being a part or phase of some larger activity." Other dictionaries define "work" in similarly functional, task-oriented terms. *See, e.g., Black's Law Dictionary* (4th ed. 1951) ("To exert one's self for a purpose, to put forth effort for the attainment of an object, to be engaged in the performance of a task, duty, or the like"). In plain, simple terms,

§14(A) requires employers to provide covered employees a suitable seat during those times when the nature (i.e., the objective characteristics) of the specific task, duty, function, or assignment they are performing reasonably permits the use of seats.

Plaintiffs' common sense construction of the phrase "nature of the work" as focused on the particular task or set of tasks at hand, rather than the "entire range" of an employee's conceivable assignments, is further supported by the IWC's use of the temporal modifier "when." The IWC undoubtedly understood that nearly all jobs comprise a variety of tasks, some which require standing and some which may be successfully accomplished while seated; and that few, if any, of the occupations described in the Wage Orders never involve standing or movement. For example, "teacher" is one of the covered occupations under Wage Order 4-2001. *See* 8 CCR §11040(2)(O). While actively teaching a classroom of students, a teacher's job duties may require some standing (for example, while writing on the blackboard) and some walking around the classroom. But teachers also perform many other tasks (such as grading papers, preparing lesson plans, and attending faculty meetings) that can reasonably be accomplished while seated. The IWC's use of the temporal word "when" allows §14 to apply in a sensible and logical way to protect workers in occupations comprising a mix of tasks, some of which require standing, others of which permit sitting.[6/] The plain meaning dictionary definition of

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[6/] Wage Order 4-2001 also covers many occupations typically considered "desk jobs," such as copy readers; copy writers; editors; proof readers; accountants; computer programmers; typists; librarians; laboratory workers; and secretaries. 8 CCR §11040(2)(O). Even these jobs also entail some duties requiring mobility. A copy reader, copy writer, editor, proof reader, accountant, computer programmer, or typist may spend most of the time typing at a desk, but may occasionally have to retrieve documents from

(continued...)

"when" is "at or during the time that," or "at any or every time that." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Thus, by requiring employers to "provide[]" employees with suitable seats "when" the nature of the work reasonably permits the use of seats (§14(A)), the IWC made clear that employers must provide workstation seating only "during the time that" employees perform tasks that can be performed while seated. As applied to our teacher example, §14(A) provides a clear directive requiring seating "when" grading exams or preparing lesson plans, even if no workstation seating is required "when" writing on the chalkboard.[7/]

In contrast, the construction adopted by the trial courts provides *no* guidance as to "when" an employer has an obligation to provide seating. To construe §14(A) as requiring employers to provide seats only if an employees' "entire range of assigned duties" reasonably permits the use of

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[6/] (...continued)
the printer or deliver documents to a supervisor. A librarian may spend most of the time answering questions at the reference desk, but may occasionally have to shelve books. A laboratory worker may spend most of the time looking at sample specimen through a microscope, but may occasionally have to put chemicals away for storage or clean large pieces of equipment. A secretary may spend most of the time answering phones and typing e-mails, but may occasionally have to walk to the photocopy machine or the filing room.

[7/] During the times that employees are assigned to tasks that require standing, §14(B) requires employers to "place[]" suitable seating nearby for employees to use "[w]hen" not actively engaged in those duties. As the IWC made clear in its 1976 Summary of Basic Provisions, §14(B) is not meant to apply during break times, but rather during "lulls in operation." Request for Judicial Notice, *Kilby v. CVS Pharmacy, Inc.* (9th Cir. Case No. 12-56130), Dkt. No. 10-1 ("RJN"), Ex. 1 at 3 ("Seats are required where the job permits the use of seats, and employees who have to stand at work are to have a place nearby where they can sit when there are lulls in operation.").

seats would divest the word "when" of all meaning, and would ultimately render §14(A) nonsensical. Again, taking the example of a teacher, a court would have to look at the teacher's "entire range of assigned duties" and determine whether, "as a whole," they either "reasonably permit[] the use of seats" or "require[] standing."[8/] If the court determined that a teacher's duties "as a whole" permitted the use of seats, the "nature of the work" would at all times "reasonably permit the use of seats." The only way to give effect to the word "when" in the phrase "when the nature of the work reasonably permits the use of seats," then, would be to require the employer to provide seats *at all times*, including when those employees are engaged in tasks requiring movement. The IWC could not have intended such an illogical application of the simple word "when."

Other sections of the IWC Wage Orders fully support the plain-meaning conclusion that the IWC intended the phrase "nature of the work" to refer to the character of the task or tasks at hand, not an aggregated, unweighted assessment of whether the employee's job "as a whole" should be characterized as always permitting seats or always requiring standing. *See People v. Dillon* (1983) 34 Cal.3d 441, 468 ("[I]t is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute."), *superseded by statute on other grounds*.

For example, the phrase "when the nature of the work" also appears in Wage Order 7-2001 §11, which governs the circumstances when employers can require their employees to take "on-duty" meals periods (an exception to the usual rule requiring 30-minute meal periods in which the employee is relieved of all duty and must be entirely free from employer

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[8/] The trial courts provided no guidance as to *how* to make such a determination.

control, *Brinker*, 53 Cal.4th at 1035). In relevant part, this section of the Wage Order provides:

> 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 is agreed to.

8 CCR §11070(11)(C) (emphasis added). Presumably, the IWC intended this exception to be limited to shifts during which the nature of the employees' assigned tasks would prevent them from leaving the workplace to take a traditional off-duty meal period. Applying the *CVS* and *Chase* district courts' work-duties-as-a-whole construction of the phrase "nature of the work," however, would result in this narrow exception applying to all employees who *sometimes* perform work that could require them to remain on call, whether or not they actually perform those tasks during meal periods. The IWC would not likely have intended to leave employees unprotected in that manner.

The Section 1 exceptions in each IWC Wage Order further demonstrate that when the IWC intended to require an assessment of the employee's job "as a whole," it knew how to make that intent clear. Section 1 creates exemptions for several categories of high-level employees, including executives, professionals, and administrators, and it defines those categories of employees as either categorically exempt or categorically non-exempt based on a time- and task-based assessment of their job responsibilities as a whole. An exempt executive, for example, is defined in these Wage Orders as a person "[w]ho *customarily* and *regularly* directs the work of two or more other employees therein," "[w]ho *customarily* and *regularly* exercises discretion and independent judgment,"

and "[w]ho is *primarily* engaged in duties which meet the test of the exemption." Wage Order 7-2001 §1(A)(1)(b), (d), (e) (emphases added); *see also id.* §1(A)(2)(b), (c), (f); *id.* §1(A)(3)(b), (c), (g), (h). Section 2 of the Wage Order, in turn, defines "[p]rimarily" as "more than one-half the employee's work time." *Id.* §2(K) By using the adverbs "customarily," "regularly," and "primarily," the IWC made clear that the applicability of each of these exemptions must be determined by assessing an employee's entire range of assigned duties, or job as a whole.

Had the IWC intended an employee's right to seating to depend on a comparative assessment of an employee's entire range of duties, it could have written §14(A) to read, "All working employees shall be provided with suitable seats if they *primarily* perform work whose nature reasonably permits the use of seats." No such weighing requirement appears in Section 14, however. "When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning." *Cornette v. Dep't of Transp.* (2001) 26 Cal.4th 63, 73.

Finally, §1(A)(1)(e) of the Wage Orders requires courts to compare the time an employee devotes to "exempt work" versus "non-exempt work" in determining whether the employee is "primarily engaged in duties which meet the test of the exemption." This comparison would make sense only if "work" referred to the particular duties performed at any given time, rather than to the employee's "job as a whole." Presumably, the IWC intended "work" to have the same meaning in §1 as in §14(A). *See Dillon,* 34 Cal.3d at 468. Consequently, just as §1 contemplates a single employee having both non-exempt work and exempt work, §14 contemplates a single employee having both sitting-permitting work and standing-requiring work. Unlike §1, however, §14 does *not* include any requirement that an employee

be "primarily," "customarily," or "regularly" engaged in sitting-permitting work for the mandatory seating provision to apply.

B. The Regulatory History and Purpose of §14 Supports Construing "Nature of the Work" as the Job Task or Tasks Being Performed, Not the Aggregate of an Employee's Every Assignment.

When the plain language of a statutory provision is clear, resort to extrinsic evidence is not necessary. *See Elk Hills Power*, 57 Cal.4th at 609-10. Nonetheless, the available extrinsic evidence – in particular, the regulatory history and the overarching purpose of the Wage Orders – lends strong support to plaintiffs' construction of §14(A).

Prior versions of the IWC's suitable seating provision establish a consistent administrative intent to ensure the availability of suitable seating to employees to the maximum extent possible. The IWC was created in 1913 by the California Legislature and charged with "establish[ing] ... '[t]he standard conditions of labor demanded by the health and welfare of [such employees].'" *Indus. Welfare Comm'n*, 27 Cal.3d at 700-01. One of the IWC's earliest concerns (expressed as a mandate in the original 1919 version of what is now §14) was to ensure that employers provide suitable workstation seating to female employees employed in the mercantile industry. The earliest version of a Wage Order seating provision (which reversed the order of the current §14(A) and (B)) stated in broad language:

> (a) Seats of the proper height shall be provided in all rooms to the number of at least one seat for every two women employed and evenly distributed in that proportion. Women shall be permitted to use the seats at all times when not engaged in the active duties of their occupation. No order or instruction shall be issued by any employer or his representative which shall conflict with this provision.
>
> In any room where manufacturing, altering, repairing, finishing, cleaning or laundering is carried on, the following provision shall also apply:

(b) As far as, and to whatever extent, in the judgment of the Commission, the nature of the work permits, the following provision shall be effective: Seats shall be provided at work tables or machines for each and every woman or minor employed, and such seats shall be capable of such adjustment and shall be kept so adjusted to the work tables or machines that the position of the worker relative to the work shall be substantially the same, whether seated or standing. Work tables, including sorting belts, shall be of such dimensions and design that there are no physical impediments to efficient work in either a sitting or standing position, and individually adjusted foot rests shall be provided.

ER 52, 75.

This first iteration of the suitable seating provision informs the meaning of the current §14(A) in at least three ways.

First, the phrase "[a]s far as, and to whatever extent," supports the conclusion that the IWC meant the term "when" in the current Wage Order to mean that a seat must be provided whenever the employee is performing a task or tasks that reasonably permit seating. By requiring seats for employees "[a]s far as, and to whatever extent, ... the nature of the work permits," the IWC recognized that most jobs are not comprised of a single task, but instead involve a combination of duties, some of which can reasonably be performed while seated, others not. The IWC made clear that "[a]s far as, and to whatever extent" possible an employee's work can be performed while seated, suitable seating must be provided. The current version of §14(A), requiring suitable seating "when the nature of the work reasonably permits the use of seats," incorporates that same concept.

Second, the IWC's directive in the 1919 Wage Order that seats be provided "at work tables or machines" also supports plaintiffs' construction that the IWC intended a task-specific assessment of when seating is required. This early language required employers to provide seats at a work table, machine, sorting belt, or other similar fixed location, if the "nature of

the work" performed at that workstation could reasonably be accomplished while seated, even if employees *could* stand while performing those duties, and even if their job duties as a whole included other tasks requiring them to move about the workplace. When the work tasks performed at a particular workstation (such as a cash register or a teller counter) reasonably permit the use of seats, the IWC's intent was clearly to ensure that workstation seating be provided for all employees to use when assigned to that particular workstation.

Third, the original suitable seating provision makes clear that the IWC intended the protections of what is now §14(A) and §14(B) to be cumulative rather than mutually exclusive, affording workers complementary protections during a single shift. The 1919 version started with the general principle that "[s]eats...shall be provided in all rooms...[and w]omen shall be permitted to use the seats at all times when not engaged in the active duties of their occupation." This first provision, now codified in §14(B), required employers to provide seats in reasonable proximity to the work area for employees to use during lulls in operation when they were otherwise required by the nature of their duties to stand. The seating law then included the following transitional language (before what is now subsection §14(A)):

> In any room where manufacturing, altering, repairing, finishing, cleaning or laundering is carried on, the following provision *shall also apply*:

ER 52, 75 (emphasis added). By this language, the IWC sought to ensure that seats would be provided for all employees to use "at all times when not engaged in the active duties of their occupation," and *in addition*, that seats would be provided *at the employees' work tables or machines* for those employees when engaged in tasks at those workstations that permit seating.

This intent remains manifest in the current structure of §14(A) and (B). The two subsections of §14, read together, reflect the IWC's understanding that an employee's duties likely may include some that require standing (when §14(B) applies) and others that reasonably permit the use of seats (when §14(A) applies). Nothing about the structure of §14 indicates that §14(A) requires workplace seating only for the rare employee whose "entire range of assigned duties" can all be performed while seated – a construction that would enable employers to avoid providing any workstation seating simply by adding one or more standing-only tasks to every employee's job description. Even the factory seamstress whose job functions the IWC might have been considering when it initially adopted the suitable seating provision in 1919 performs some duties that require standing or movement.[9/]

As the scope of the IWC's jurisdiction has broadened, so too has the language of this seating law, which (like all Wage Order provisions) now extends to all workers in covered industries, male and female. But despite minor revisions to the language of §14(A) over the years, the central purpose of the seating law has remained unchanged: to promote worker health, welfare, and comfort, and to prevent employers from forcing employees to stand when, from an objective perspective, those employees

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[9/] For example, an employer could define a seamstress's job as involving four discrete tasks: 1) bringing materials from the stockroom to her workstation; 2) sewing; 3) periodically restocking her workstation with thread; and 4) delivering the finished garment to the sorting room. A seamstress could spend the first five minutes of her shift performing the first task, the last five of her shift performing the final task, and all the remaining time sewing at her work table, with occasional breaks to replenish thread. Under the interpretation of §14(A) adopted by the district courts, that employee would not be entitled to a seat even while sewing for almost her entire shift, because three of the four employer-defined tasks required standing or movement.

reasonably could perform their work while seated. As the IWC explained in its 1976 Statement of Findings:

> The requirement for "suitable" seats "whe[n] the nature of the work permits" has long been a provision of I.W.C. orders and has proved to be useful and workable as the Division has reasonably enforced it. Testimony in public hearing made it clear that some kinds of work places would be covered by the new orders that were not covered by previous orders, and the Commission has made its requirement more flexible and more subject to administrative judgment as to what is reasonable. *It continues to find that humane consideration for the welfare of employees requires that they be allowed to sit at their work or between operations when it is feasible for them to do so.*

RJN Ex. 2 at 16 (emphasis added); *cf.* ER 104, 107.[10/]

Even if there were ambiguities in the text or regulatory history, the clear worker protection purposes of §14 would require a construction that extends its protective ambit to more employees, not fewer. To further the

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[10/] The IWC's concern with ensuring suitable workstation seating is well supported by medical and public health literature, which demonstrate that prolonged and uninterrupted hours spent in a standing position can cause significant health issues (including musculoskeletal disorders, chronic venous insufficiency, preterm birth and spontaneous abortion, and carotid atherosclerosis), as well as foot and lower leg pain and discomfort. *See, e.g.*, Halim & Omar, *A Review of Health Effects Associated With Prolonged Standing in the Industrial Workplaces*, 8 Int'l J. Res. & Revs. Applied Sci. 14, 15 (2011); Zander et al., *Influence of Flooring Conditions on Lower Leg Volume Following Prolonged Standing*, 34 Int'l J. Indus. Ergonomics 279, 279-80 (2004). It is well documented that allowing workers to alternate between sitting and standing promotes worker health. *See, e.g.*, Tuchsen, et al., *Prolonged Standing at Work and Hospitalisation Due to Varicose Veins: A 12 Year Prospective Study of the Danish Population*, 62 Occupational Envtl. Med. 847, 849 (2005), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/ PMC1740939/ ("standing or walking at work should be limited and alternate[d] with other positions such as sitting"); Halim, 8 Int'l J. Res. & Revs. Applied Sci. at p. 18 (suggesting the use of a sit-stand stool to alternate between standing and sitting positions).

State's important health and welfare goals, this Court has repeatedly instructed courts to construe the Wage Orders broadly "with an eye to promoting [employee] protection." *Indus. Welfare Comm'n*, 27 Cal.3d at 702; *see also Martinez v. Combs* (2010) 49 Cal.4th 35, 61-62; *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103. The proper construction of §14(A) must "'promot[e] rather than defeat[]'" the Wage Order's general purpose of promoting employee health and welfare. *Frog Creek Partners*, 206 Cal.App.4th at 524 (citation omitted); *cf.* Wage Order 7-2001 §17 (permitting employers to seek exemptions from the IWC for certain Wage Order requirements that would work "undue hardship," but only if the requested exemption "would not materially affect the welfare or comfort of employees"). Plaintiffs' proposed construction furthers the remedial, worker-protection purposes of §14(A) far better than the district courts' and defendants' alternative.

In short, there is no reason to abandon the plain meaning of the term "work" in favor of a contrary meaning supported neither by the context, regulatory history, nor purpose of §14. Had the IWC intended the meaning urged by defendants, it could easily have made that intent clear, for example, by drafting §14(A) to provide: "All working employees shall be provided with suitable seats when the nature of the job as a whole reasonably permits the use of seats" or "when the entire range of assigned duties of employment considered as a whole reasonably permits the use of seats." The IWC instead used the simple term "work," whose plain meaning is synonymous with the terms "task," "duty," [job] function," and "assignment." Because defendants' proposed interpretation "lacks any textual basis in the [W]age [O]rder," it must be rejected." *Brinker*, 53 Cal.4th at 1038.

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C. Imposing an Arbitrary "Percentage of Tasks" Condition on Employees' Rights to §14(A) Seating Would Yield Absurd Results When Applied to Real-World Scenarios.

Despite the Ninth Circuit's suggestion in formulating its questions to this Court, nothing in the text or history of the Wage Order supports an arbitrary "percentage-of-tasks" or "percentage-of-time" condition on employees' right to suitable seating. By its plain text, §14(A) requires employers to provide seats when it is *reasonable* to permit employees to sit while working, without regard to any particular percentage of time spent on seating-permitted tasks. Thus, even if this Court were to determine that the "nature of the work" standard requires consideration of an employee's entire range of assigned tasks (which it should not, for the reasons stated above), the Wage Order still requires an employer to provide seating if the *nature* of the employee's range of work is such that the job *reasonably permits* the use of seats while performing a regular job task at a fixed location at some point during a PAGA-covered pay period. For example, it may not be reasonable to provide workstation seating to an employee whose work requires her to alternate rapidly among a series of brief, discrete tasks, only some of which could be performed while seated, if allowing her to sit during those fleeting or ephemeral seating-permitted tasks would yield constant workflow disruptions or physically prevent her from performing her other assigned tasks. But an employee (like plaintiffs here) who could perform most tasks while seated, and could easily just stand up to perform an intermittent standing-required task, would still be entitled to workstation seating under §14(A) under this "reasonabl[eness]" standard.

The IWC could not have intended to limit application of the suitable seating law only to those employees whose majority of assigned tasks reasonably permits the use of seats. Not only is such a construction unsupported by the text, history, or purpose of the Wage Order, but as

illustrated by the following series of examples, it is also entirely illogical in the real world. The Court must avoid any statutory interpretation that would "'produce absurd consequences,'" and therefore defendants' proposed construction cannot prevail. *Bright*, 189 Cal.App.4th at 1478 (quoting *Flannery v. Prentice* (2001) 26 Cal.4th 572, 578).

Example 1: Jake is a security guard who works in a commercial building for a private security guard company subject to Wage Order 4-2001. *See* 8 CCR §11040(2)(O). During each nine-hour shift, he is assigned to spend the first four hours watching security video monitors in a secure room, and the next five hours patrolling the building. If §14(A) were construed to protect only employees whose majority of work time is spent on stationary tasks, Jake would not be entitled to a seat while watching video monitors for four hours – a task that can indisputably be performed while seated. The IWC could not have intended such a result.

Example 2: Sandy works at an amusement park, which is governed by Wage Order 10-2001. *See* 8 CCR §§11100(2)(A), 11100(14)(A). Her weeks alternate between staffing the ticket booth, where her sole responsibility is to sell tickets for 40 hours a week; and staffing the ring toss booth, where her duties are to collect tickets from customers, hand customers a set of rings, retrieve the tossed rings, and give customers prizes if they win. The ticket booth window is designed so that an average adult can purchase tickets while standing. Although Sandy can generally perform her ticket booth duties while seated on a high stool, she occasionally must lean over the booth window to collect money from and hand tickets to younger children customers.

If §14(A) were construed to protect only employees whose majority of assigned tasks permit the use of seats, Sandy's employer would not be required to provide her a seat in the ticket booth, and she would be forced to

stand for 40 hours a week in a small, confined space. Likewise, Sandy would be forced to stand for all 40 hours of her workweek if §14(A) were construed to protect only employees whose duties *never* require them to stand intermittently. Again, the IWC could not have intended such a result.

Example 3: Two employees work at a bookstore subject to Wage Order 7-2001. *See* 8 CCR §11070(2)(H). Anna works at the bookstore two days a week and is always assigned to the customer information counter, where her sole responsibilities are to smile and wait for customers to approach with questions, assist customers in locating books by looking up their queries on the computer database, and page a sales representative if a customer needs assistance physically retrieving a book. None of these tasks requires standing or movement. Jorge works at the same bookstore five days a week. On Mondays and Tuesdays, he is assigned to that same customer information counter and performs the same tasks as Anna. On Wednesdays, Thursdays, and Fridays, he is assigned a series of ambulatory tasks, such as re-shelving books, pulling mail-ordered books from the shelves and delivering them to the shipping department, and patrolling the store to assist customers and watch for shoplifters.

Even if the phrase "nature of the work" were construed to require a numeric counting of an employee's "entire range of assigned duties," Anna would be entitled to a seat at the customer information counter under §14(A). Jorge, however, would not – even though he and Anna are similarly situated and perform the *identical* work for *identical* amounts of time each pay period – simply because his "entire range of assigned duties" happens *also* to include a majority of ambulatory tasks. This unfair and discriminatory application of §14(A) is the inevitable result of the *CVS* and *Chase* courts' – and defendants' – proposed construction, and cannot be right. Anna and Jorge are similarly situated for purposes of the seating

provision. Consistent with the worker-protection purposes of §14(a), they should be entitled to the same protections. The IWC could not have intended that one be fully protected and the other be completely unprotected, based on what they do when *not* stationed at the same customer information counter.

As the above examples illustrate, the IWC could not have intended to require some kind of time- or task-based assessment of an employee's "entire range of assigned duties" in determining whether the "nature of the work" reasonably permits the use of seats. Rather, the IWC clearly communicated a requirement that employers and courts must consider the objective characteristics of the task or tasks being performed to determine whether or not they reasonably permit the use of a seat.

Plaintiffs' construction is the only reasonable construction of §14, and is the only construction consistent with the Wage Order's plain text, regulatory history, and overarching worker-protection purpose. The "nature of the work" under §14(A) must refer to the discrete task or set of tasks being performed at any given time, not an abstract assessment of an employee's "entire range of assigned duties" or "job as a whole."

II. QUESTION 2: When determining whether the nature of the work "reasonably permits" the use of a seat, should courts consider any or all of the following: the employer's business judgment as to whether the employee should stand, the physical layout of the workplace, or the physical characteristics of the employee?

Neither employer preference nor industry custom and practice – the very things the labor standards set forth in the Wage Orders were designed to supersede – should be allowed to defeat the remedial, worker-protection purpose of the seating law. Entitlement to a seat under §14(A) must be based on an objective standard of reasonableness, focused on the physical demands, frequency, and duration of an employee's tasks or duties, viewed

in light of the underlying remedial purpose of the seating requirement. Conditioning entitlement to seating on factors such as an employer's subjective preference (or unsupported "business judgment") that its employees stand while working, an employer's voluntary decision to design a noncompliant workstation, or each individual employee's unique physical characteristics, would be inconsistent with the text, history, and purpose of the Wage Order, which call for an objective analysis of the "nature" of the employee's "work," not the nature of the employee or the nature of the workstation.

A. Section 14(A) Guarantees Workers a Suitable Seat Based on an Objective Assessment of the "Nature" of The Work, Not on an Employer's Subjective Preference.

Any deference to an employer's unsupported "business judgment" is contrary to the plain meaning and purpose of the Wage Order, which dictate that employers "shall" provide employees with suitable seats when the "nature" of the work permits, based on an objective standard of reasonableness, not on the subjective preferences of the employer.

The Legislature has specifically stated that the word "shall" must be construed as mandatory for purposes of Labor Code enforcement. *See* Labor Code §15 ("'Shall' is mandatory and 'may' is permissive."). Thus, an employer's subjective "business judgment" cannot override a standard condition of labor mandated by the seating law. To allow an employer's subjective business judgment to define the "nature of the work" and whether such work "reasonably permits the use of seats" would be to make each employer its own legislature, empowered to determine whether to be bound by §14(A) or not. Section 14(A) would lose all force, for every employer could evade the mandatory seating requirement by asserting its "business judgment" that its employees' jobs require them to stand at all times, as CVS and Chase have done here. *See* ER 9 (trial court accepting

CVS's rationale that "if CVS hires employees to stand while working a cash register ... those employees would not be performing their job if they were seated"). Even an office receptionist would obtain no protection from §14(A) if her employer chose to define her tasks as "answering the telephone while standing," "greeting visitors while standing," and "using a computer while standing." The Court cannot adopt a construction that would legitimize such brazen circumvention of the law.

The plain meaning of the terms "nature of the work" and "reasonably permit" also preclude consideration of an employer's business judgment in determining whether the nature of an employee's work reasonably permits the use of seats. The *Merriam-Webster Collegiate Dictionary* (11th ed. 2003) defines "nature" as "the inherent character or basic constitution of a . . . thing: essence." An employer's "business judgment" does not inform the "inherent character" of a cashier's or teller's work; and nowhere in the seating provision is there any specific mention of an employer's "business judgment." While companies like CVS and Chase may believe that their customers prefer a standing cashier or teller, nothing about the "nature" of cashier or teller work requires standing. Cashiers and tellers can greet customers with the same friendly smile and warm welcome whether seated or standing.[11/] Likewise, the term "reasonably permits" underscores the objective nature of the required inquiry, as "reasonableness" is inherently an objective standard. *Cf. People v. Conway* (1994) 25 Cal.App.4th 385, 388 ("reasonable suspicion" standard for investigative stops "is measured by an objective standard"); *Rossi v. Motion Picture Ass'n* (9th Cir. 2004) 391 F.3d 1000, 1004 (noting well-established distinction between "objective

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[11/] Tellingly, neither defendant was able to cite any evidentiary basis for its "belief" that standing cashiers or tellers provide better customer service than do seated employees.

reasonableness standard" and "subjective good faith standard"); *Brooks v. Vill. of Ridgefield Park* (3d Cir. 1999) 185 F.3d 130, 137 (reasonableness requirement "imposes an objective standard by which to judge the employer's conduct"). Deferring to an employer's subjective preference for standing employees is fundamentally incompatible with the objective inquiry required under §14(A).

It has been clear from the earliest version of the suitable seats provision that whether the nature of an employee's work reasonably permits the use of seats is a judgment to be made by the IWC (or the courts), not by the self-interested employer. After all, in *every* case that alleges a violation of §14(A), the employee is challenging an employer's judgment *not* to provide seating to its employees. If deference to that judgment were required, no violation of §14(A) could ever be found.

In its earliest versions, the suitable seating requirement explicitly stated that the relevant judgment was that of the IWC, not the employer. The 1919 Wage Order language stated that seats shall be provided "[a]s far as, and to whatever extent, *in the judgment of the Commission*, the nature of the work permits." ER 52, 75 (emphasis added). Even after the explicit phrase "in the judgment of the Commission" was removed in 1947 (presumably as unnecessary), the IWC stated clearly in its 1976 Statement of Findings:

> [T]he Commission has made its requirement more flexible and *more subject to administrative judgment as to what is reasonable.* It continues to find that humane consideration for the welfare of employees requires that they be allowed to sit at their work or between operations when it is feasible for them to do so.

RJN Ex.2 at 16 (emphasis added). That Statement confirms that the IWC did not intend to transfer ultimate authority from the Commission (or the DLSE or the courts) to the employer to determine whether the nature of an employee's work permits seating or not.

Several decisions of this Court highlight the adverse impact on workplace rights that would result from relying on an employer's own job descriptions to determine the applicability of Labor Code protections. For example, this Court has made clear that courts should not defer to an employer's decision to classify an employee as exempt from overtime protection as an outside salesperson or as an exempt manager. Instead, courts must independently evaluate the actual job duties performed by those employees to determine how they spend their work days. *See, e.g., Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801-02. After all, "if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality." *Id.* at 802. Likewise here, under the district courts' approach, an employer could exempt itself from the requirements of §14(A) by simply redefining the scope of an employee's official job description to include tasks that, in the employer's "business judgment," require standing. That cannot be what the IWC intended when it drafted the mandatory suitable seating provision.

An employer's subjective preference for having its employees stand merits no weight in determining whether the nature of an employee's work reasonably permits the use of seats. Instead, this determination must be made based on the objective physical requirements of the task or set of tasks for which seating is sought, viewed in light of the underlying remedial purpose of the IWC's mandatory seating law.

B. Section 14(A) Establishes a Mandatory Condition of Labor With Which Employers Must Comply, Even if Doing So Requires Modification of Existing Workstations.

The same textual and historical reasons why an employer's business judgment cannot dictate when workstation seating is required apply with

equal force with respect to an employer's choice of workstation. Just as an employer cannot evade the requirements of the mandatory seating law simply by asserting its "business judgment" that the work requires employees to stand, nor can an employer evade §14(A) simply by pointing to an existing workstation design that will not accommodate a seat absent modifications to the workstation. An employer's choice of a workstation design that does not accommodate a seat may be as arbitrary as an employer's choice to have its employees stand while performing tasks that reasonably *could* be performed successfully while seated. To condition employees' entitlement to a suitable seat on the employer's decision to design a noncompliant workstation would, again, turn the worker-protection purpose of the Wage Order on its head.

That an employer would incur economic hardship if required to modify an existing workstation in order to accommodate a seat is no excuse for failing to provide the required seating. An employer will likely incur compliance costs any time it violates a standard condition of labor set forth in the Labor Code or Wage Orders. For example, §3(A) of Wage Order 4-2001 requires employers to pay employees overtime premiums for all hours worked over eight or twelve hours in a single day. If an employer refused to pay its workers these premiums, it would be no excuse that compliance with the overtime law would cost the employer money. Section 9 of Wage Order 4-2001 requires employers to provide and maintain uniforms whenever such uniforms are required to be worn as a condition of employment. If an employer refused to pay for such required uniforms and instead forced employees to pay out of their own pockets, it would be no excuse that providing the uniforms would cost the employer money. Section 15(C) of Wage Order 4-2001 requires employers to maintain a temperature of not less than 68 degrees in employees' restrooms and

changing rooms during hours of use. If an employer installed a heating system that only warmed up to 60 degrees, again, it would be no excuse that upgrading the heating system to comply with the temperature law would cost the employer money.

Compliance with the mandatory seating provisions of Section 14 should be no different. Whatever modifications to existing workstations might be required for an employer to comply with its legal obligations is irrelevant to whether the "nature of the work reasonably permits the use of seats." An employer's costs of compliance have no place in construing §14(A).

This is particularly so given that the mandatory workstation seating requirement has been the law in California law for *more than 90 years*. The original 1919 wage order provision stated that "[w]ork tables, including sorting belts, shall be of such dimensions and design that there are no physical impediments to efficient work in either a sitting or standing position." ER 52, 75. Although that specific provision no longer exists, at no point did the IWC replace it with language authorizing employers to design noncompliant workstations or to justify noncompliance based on ignorance of the law. Employers today cannot claim that they were without notice of this mandatory seating requirement when they designed or purchased their stores or employee workstations. Whatever might be the financial costs of complying with these requirements, those concerns are properly addressed to the California Legislature, not the courts.[12/]

[12/] At most, the issues raised by defendants about workplace reconfiguration bear on the potential amount of PAGA penalties, not on whether plaintiffs can establish an underlying violation of the mandatory seating law. PAGA includes a "safety valve" provision, Labor Code §2699(e)(2), that allows the trial court to reduce a defendant's PAGA penalties from "the maximum civil penalty amount" if "based on the facts (continued...)

Moreover, the Wage Orders already provide a safety valve for employers who claim that compliance with particular provisions, such as the seating law, "would work an undue hardship on the employer," allowing them to seek an administrative exemption. *See, e.g.*, Wage Order 7-2001 §17 (establishing a multi-part administrative procedure for employers seeking an exemption from the seating law). As further testament to the strong worker comfort and welfare purposes of the Wage Orders, however, an exemption may be granted only upon an employer's showing (and the Division's finding, "after due investigation") *both* that compliance with the seating law "would work an undue hardship on the employer" *and* that the requested exemption "would not materially affect the welfare or comfort of employees." Wage Order 7-2001 §17.[13] This administrative exemption standard would be rendered superfluous if an employer could bypass the procedure and escape liability simply by asserting economic hardship.

In short, the existing physical configuration of an employee's workspace should have no bearing on whether the nature of the employee's work reasonably permits the use of seats.

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[12] (...continued)
and circumstances of the particular case, to do otherwise would result in an award that is unjust, arbitrary and oppressive, or confiscatory." This is a heavy burden, but if an employer could establish that the costs of reconfiguration were so high as to be "confiscatory," having to pay full PAGA penalties *on top of* those costs of reconfiguration might be a sufficient basis for seeking a discretionary reduction of the applicable PAGA penalty.

[13] In the cases pending before the Ninth Circuit, neither CVS nor Chase sought an exemption from the DLSE.

C. Section 14(A) Establishes a Standard Condition of Labor For *All* Employees, Regardless of Their Physical Characteristics.

There is no rational basis for conditioning an employee's entitlement to a seat under §14(A) on that employee's height, weight, or other physical characteristics. The Wage Orders establish mandatory, standard conditions of labor for all covered employees working in the regulated industries. Section 14(A) makes the universal scope of its mandate clear in plain, unmistakable terms, providing that "*All* working employees *shall* be provided with suitable seats when the nature of the work reasonably permits the use of seats." (Emphases added). Moreover, the Wage Order entitles workers to the use of a suitable seat when the "nature of the work" reasonably permits such use. Whether the "nature of the work" "reasonably permits" the use of seats does not vary with the height or weight of the individual employee performing the work. The IWC could not have intended its mandatory seating, whose purpose is to establish a minimum standard condition of labor for the comfort and welfare of *all* employees, to apply to different employees in a discriminatory fashion based on their physiological traits.

For all of the above reasons, §14(A) cannot, consistent with its text, history, or purpose, be construed as permitting consideration of an employer's "business judgment," the design of an existing noncompliant workstation, or an employee's individual physiological characteristics, in determining whether or not the nature of an employee's work reasonably permits the use of seats. Instead, the text, history, and purpose of the Wage Orders instruct that determining whether the "nature" of an employee's work "reasonably" permits the use of seats must be guided by an objective inquiry into the inherent physical requirements of the employee's task or set

of tasks for which seating is sought, viewed in light of the underlying remedial purpose of the IWC's mandatory seating law.

III. QUESTION 3: If an employer has not provided any seat, does a plaintiff need to prove what would constitute "suitable seats" to show the employer has violated §14(A)?

An employer's failure to provide *any* seating to an employee whose work reasonably permits the use of seats establishes an employer's prima facie liability under §14(A). Thus, once employees establish that 1) the nature of the work reasonably permits the use of seats, and 2) the employer failed to provide them *any* seating to use while performing such work, the employer's prima facie liability is established, without any further showing required of what might constitute a "suitable" seat under the particular circumstances.

Defendants, and the district courts in these two cases, would place the burden on *employees* to identify and prove what constitutes a "suitable seat" before imposing liability on an employer who failed to provide *any* seat. In effect, defendants seek to condition an employer's obligation to provide suitable seating on an employee's request not only for a seat, but for a *particular* seat that qualifies as "suitable." Assigning such burden to the employees is not only logically unsound, but contrary to the plain text and purpose of the Wage Order.

As an initial matter of common sense and logic, it would be impracticable to impose on *employees* the burden of identifying a "suitable seat." The employer, not the employee, has the information and resources to identify a seat that qualifies as "suitable" for the nature of the work being performed.

This common sense allocation of burdens is reflected in the plain text of the Wage Orders, which regulate employers and establish standard conditions of labor that employers must provide to protect their employees'

health, comfort, and welfare. The seating law provision, for example, instructs in unmistakably mandatory terms that "[a]ll working employees *shall be provided* with suitable seats . . . ." (Emphasis added). By its plain terms, the seating law imposes a burden on employers to make suitable seats available to employees, not on employees to request a seat.[14/] To hold otherwise would inject into the unqualified mandatory language of the Wage Order a condition the IWC never included and never gave any indication of intending, either in the current version of §14 or any of its previous, equally mandatory versions, dating back to 1919. *See Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 381 ("In construing the statutory provisions a court is not authorized to insert qualifying provisions not included") (quoting *People v. One 1940 Ford V-8 Coupe* (1950) 36 Cal.2d 471, 475), *superseded by statute on other grounds*; *accord Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 ("[I]n construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does."); *In re Hoddinott* (1996) 12 Cal.4th 992, 1002 (same). Nowhere does the Wage Order state that "provide" means "make available only upon request." Nor would such a construction be consistent with the plain language of §14(A).

The suitable seating law provides: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits

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[14/] A standard that requires employers to provide employees with suitable seating does not, of course, mean that employees must remain seated at all times, or even that employees must use the available seats at all. Employees who have suitable seating available may *choose* when to sit and when to stand, even if their work could be accomplished while seated. An employee's freedom to decline a workplace accommodation, however, does not obviate the employer's legal duty to provide the accommodation in the first place.

the use of seats." That same language could be inverted, without any change in meaning, to state: "When the nature of the work reasonably permits the use of seats, all working employees shall be provided with suitable seats." That inversion highlights that the *sole* condition an employee must meet to be entitled to a "suitable seat" is a showing that the nature of their work reasonably permits "the use of seats."

The seating law does not impose on employees the burden to request a seat, much less to request a *particular* seat that is suitable. To prevail on a §14(A) seating claim, employees who have been provided no seat whatsoever need only establish that the nature of their work reasonably permits "the use of seats," nothing more. By definition, an employer that has failed to provide *any* seating to its employees has failed to provide suitable seating.

CONCLUSION

For the foregoing reasons, the Court should answer the Ninth Circuit's certified questions as follows:

1. As used in the context of §14, the phrase "nature of the work" refers not to the entire range of assigned duties that may arise in the course of employment, but to the discrete task or set of tasks an employee performs at any given time during the work day.

1a. The phrase "nature of the work" should not be construed to refer to the entire range of assigned duties; but even if it were so construed, §14(A) prescribes no specific threshold amount of time, or percentage of time, that must be spent on tasks that reasonably permit the use of seats. If more than half of an employee's time is spent performing tasks that reasonably permit the use of a seat, §14(A) entitles that employee to a suitable seat whenever engaged in those particular tasks, regardless of whether the remainder of the employee's time is spent on tasks that require

standing; but employees who spend a minority of their work time on such tasks are also entitled to a suitable seat under §14(A), so long as the reasonableness element is satisfied.

2. Entitlement to a seat under §14(A) must be based on an objective standard of reasonableness, focused on the physical demands, frequency, and duration of the task or set of tasks at issue, viewed in light of the underlying remedial purpose of the seating requirement, not on arbitrary factors such as an employer's subjective preference (or unsupported "business judgment") that employees stand while working, the design of a noncompliant workstation, or each individual employee's unique physical characteristics.

3. Once employees establish that 1) the nature of the work reasonably permits the use of seats, and 2) the employer failed to provide them *any* seating to use while performing such work, the employer's prima facie liability is established as a matter of law, without any further showing of what might possibly constitute a "suitable" seat under the particular circumstances.

For the reasons stated, this Court should construe §14(A) of Wage Order 4-2001 and Wage Order 7-2001 as imposing a requirement on employers to provide suitable seating to "all" covered employees, during the periods of time ("when") those employees are engaged in work tasks whose inherent characteristics, such as physical demands, duration, and frequency ("nature of the work"), are such that the employees objectively could perform those tasks while seated ("reasonably permits the use of seats"). The Court should further hold that §14(A) imposes an affirmative obligation on the employer to provide a "suitable" seat, not on the employee to identify and request such a seat.

Dated: April 11, 2014

Respectfully submitted,

Michael Rubin
Connie K. Chan
ALTSHULER BERZON LLP

James F. Clapp
James T. Hannink
Zach P. Dostart
DOSTART CLAPP & COVENEY, LLP

Kevin J. McInerney

Matthew Righetti
RIGHETTI GLUGOSKI, PC

By: Michael Rubin /ckc
Michael Rubin
Attorneys for Petitioners

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I certify that the foregoing **Petitioners' Opening Brief** was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 13,986.

Dated: April 11, 2014

Michael Rubin
Attorneys for Petitioners

PROOF OF SERVICE
Code of Civil Procedure §1013

CASE: *Kilby v. CVS Pharmacy, Inc.*
Henderson, et al. v. JPMorgan Chase Bank, N.A.

CASE NO: California Supreme Court #S215614,
U.S. Court of Appeals, 9th Cir., Nos. 12-56130, 13-56095

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On April 11, 2014, I served the following document(s):

Petitioners' Opening Brief

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

ADDRESSEE	**PARTY**
Timothy Joseph Long Orrick Herrington et al 400 Capitol Mall #3000 Sacramento, CA 95814-4407	Defendant-Appellant CVS Pharmacy
Michael David Weil Orrick Herrington & Sutcliffe LLP 405 Howard Street The Orrick Building San Francisco, CA 94105-2669	Defendant-Appellant CVS Pharmacy

Kevin J. McInerney 18124 Wedge Parkway, Suite 503 Reno, NV 89511	Plaintiff-Appellant Nykeya Kilby; and Plaintiffs-Appellants Henderson and Lampkins in 9th Cir. case no. 13-56095
James F. Clapp James T. Hannink Zach P. Dostart Dostart Clapp & Coveney, LLP 4370 La Jolla Village Drive, Suite 970 San Diego, CA 92122-1253	Plaintiff-Appellant Nykeya Kilby
Matthew Righetti Righetti Glugoski, PC 456 Montgomery Street, Suite 1400 San Francisco, CA 94104	Plaintiff-Appellant Nykeya Kilby
Mark A Ozzello, Esq. Arias Ozzello & Gignac LLP 6701 Center Drive West, Suite 1400 Los Angeles, CA 90045-1558	Plaintiff-Appellant Dalton in 9th Cir. Case #13-56095
Raul Perez, Esq. Capstone Law APC 1840 Century Park East, Suite 450 Los Angeles, CA 90067	Plaintiff-Appellant Salazar in 9th Cir. Case #13-56095
Carrie A. Gonell John A. Hayashi Morgan, Lewis & Bockius LLP 5 Park Plaza, Suite 1750 Irvine, CA 92614	Defendant-Appellee JPMorgan Chase Bank, N.A. in 9th Cir. Case #13-56095
Samuel S. Shaulson 101 Park Avenue New York, NY 10178-0060	Defendant-Appellee JPMorgan Chase Bank, N.A. in 9th Cir. Case #13-56095

Molly Dwyer, Clerk of the Court Office of the Clerk U.S. Court of Appeals for the Ninth Circuit 95 Seventh Street P.O. Box 193939 San Francisco, CA 94119-3939	U.S. Court of Appeals for the Ninth Circuit
Barbara A. Jones AARP Foundation Litigation 200 S. Los Robles, Suite 400 Pasadena, CA 91101	Amicus AARP
Melvin Radowitz AARP 601 E Street, NW Washington, D.C. 20049	Amicus AARP
Robin G. Workman Qualls & Workman 177 Post Street, Suite 900 San Francisco, CA 94108	Amicus class certified in *McCormack v. WinCo Holdings, Inc.*, Riverside Superior Ct. No. RIC1200516
Arif Virji Lynch, Gilardi & Grummer 170 Columbus Ave., 5th Floor San Francisco, CA 94133	Amicus class certified in *Pickett v. 99 Cents Only Stores*, Los Angles Superior Ct. No. BC 473038

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this April 11, 2014, at San Francisco, California.

Jean Perley