IN THE SUPREME COURT OF CALIFORNIA

Case No. S215614

NYKEYA KILBY,
Plaintiff and Petitioner,
v.
CVS PHARMACY, INC.,
Defendant and Respondent,

KEMAH HENDERSON, TAQUONNA LAMPKINS, CAROLYN SALAZAR, and TAMANA DALTON,
Plaintiffs and Petitioners,
v.
JPMORGAN CHASE BANK, N.A.
Defendant and Respondent.

ON REQUEST TO DECIDE CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
DOCKET NOS. 12-56130/13-56095

ANSWER BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A.

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I. INTRODUCTION

The Ninth Circuit has certified to this Court three questions of California law concerning the meaning of Section 14 of California Industrial Welfare Commission ("IWC") Wage Order 4-2001 ("Wage Order"), which provides:

> 14. Seats
>
> (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.

(Cal. Code Regs., tit. 8, § 11040, subd. 14 (emphasis added).)

Response to Certified Question 1: Using established rules of statutory construction, "nature of the work" must be defined holistically, taking into account not only the entire range of an employee's duties, but "all available facts and conditions" regarding the employee's job. This interpretation follows the plain meaning of the words used. Section 14 assigns different meanings to "duties" and "nature of the work," which means that the two are not synonymous. Indeed, job "duties" are a subset of the broader, holistic inquiry necessary to identify the "nature of the work." This holistic interpretation is also supported by customary and usual definitions of the words "nature" ("the inherent character or basic constitution of a person or thing: essence") and "work" ("the labor, task, or duty

that is one's accustomed means of livelihood"), as well as the regulatory history of Section 14, which shows that the terms "reasonably permits" and "suitable seats" were added to Section 14 in furtherance of a declared regulatory intent that Section 14 be "more flexible and more subject to administrative judgment as to what is reasonable."[1]

Response to Certified Question 1(a): Petitioners and Chase agree that Section 14 does not require a quantitative analysis to determine whether the nature of the work reasonably permits the use of suitable seats. Other sections of the Wage Order expressly require courts to quantify the amount of time spent on particular duties, but Section 14 noticeably does not.

Response to Certified Question 2: The "nature of the work" requires that a court consider "all available facts and conditions" regarding the employee's work, including the employer's business judgment, the physical layout of the workspace, worker safety, and other relevant constraints on the actual deployment of seats in the workplace. As the Labor Commissioner has explained, the Division of Labor Standards Enforcement ("DLSE"), which is primarily responsible for enforcing the Wage Order, assesses the "nature of the work" by applying "a reasonableness

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[1] Statement of Findings by the Industrial Welfare Commission of the State of California, In Connection with the Revision in 1976 of Its Orders Regulating Wages, Hours and Working Conditions (Aug. 13, 1976) ("1976 Statement of Findings"), at p. 15, Plaintiff-Appellant's Request for Judicial Notice, Ex. 2, *Kilby* 9th Cir. Dkt. No. 10-1 ("Kilby RJN").

standard" and considers "all available facts and conditions" regarding each employee's job, including: (1) the physical layout of the workplace; (2) the employee's job functions; (3) the expected job duties as defined by the employer; (4) the views of the employer as to the nature of the work; (5) the employer's business judgment; and (6) existing or historical industry or business practices.[2] This long-standing, multi-factor test properly defines "nature of the work."

Response to Certified Question 3: Plaintiff must prove that a "suitable seat" is available to be provided before the employer can be found to violate Section 14(A) – even if an employer has not provided any seats to employees. Under established California law, plaintiff must prove all elements of each asserted claim. The existence of a "suitable" seat is one of the essential elements necessary to establish a Wage Order violation.

In answering the Ninth Circuit's questions, this Court should make clear that the nature of an employee's work is interpreted holistically, in keeping with how Section 14 has long been administered by the DLSE and interpreted by the courts.

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[2] Amicus Brief of the California Labor Commissioner, on Behalf of the Division of Labor Standards Enforcement and the California Labor and Workforce Development Agency ("Labor Commissioner Amicus Brief"), Chase's Ninth Circuit Supplemental Excerpts of Record ("SER") at 28-33.

Hereafter, "ER" and "Kilby ER" shall refer to the Excerpts of Record filed by Petitioners with the Ninth Circuit in *Henderson* and *Kilby,* respectively. "CVS SER" shall refer to the Supplemental Excerpts of Record filed by CVS with the Ninth Circuit.

This interpretation properly applies Section 14's requirements, yet is flexible enough to allow courts to apply a requirement originally conceived nearly a century ago to the thousands of different jobs in California's ever-changing economy.

II. REGULATORY FRAMEWORK AND HISTORY

Section 14 applies to employees in "Professional, Technical, Clerical, Mechanical and Similar Occupations," including "tellers." (Wage Order, § 2(O).) The current version of Section 14 was adopted in 1979. (*Bright v. 99c Only Stores* (2010) 189 Cal.App.4th 1472, 1478.)

Seating requirements were first adopted in the early 20th century, and were originally applicable to women and children. (*Kilby v. CVS Pharmacy, Inc.* (S.D. Cal. May 31, 2012, No. 09-cv-02051-MMA-KSC) 2012 WL 1969284, *4.) The IWC's seating requirements have been amended over the years. As Petitioners note, early enactments were very specific, including requirements for "at least one seat for every two women"; seats provided had to be adjustable so that the position of workers and their work tables or machines would be "substantially the same"; and the work tables had to be designed such that "there are no physical impediments to efficient work in either a sitting or standing position." (AOB-25, Kilby ER79.) Even when Section 14 contained greater specificity, whether a seat was required turned on "the judgment of the [IWC]." (*Ibid.*)

These specific requirements were amended in the 1947 Wage Order, which broadly declared, "Suitable seats shall be provided for all female employees. When the nature of the work requires standing, an adequate number of said seats shall be placed adjacent to the work area and employees shall be permitted to use such seats when not engaged in the active duties of employment." (Kilby ER84.) Qualifying language was added to the seating requirements in the 1968 Wage Order, which added the clause "when the nature of the work permits." (Kilby ER104 ["All working female employees shall be provided with suitable seats when the nature of the work permits."].) The 1976 Wage Order added another modifier – "reasonably" – to Section 14(A), thereby causing Section 14(a) to read as it does now. (Kilby ER107 ["All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats."]).[3]

This history of revision shows that the IWC made seating requirements more flexible by adding language linking seating requirements to reasonableness and to the availability of suitable seats. This flexibility allowed Section 14 to be intelligently applied in a modern economy, where job positions and job requirements vary and evolve. As the IWC declared in its 1976 Statement of Findings, "the Commission has made its requirement more flexible and more

[3] Section 14(B) was further modified in the 1980 Wage Order to include the addition of the clause "when it does not interfere with the performance of their duties" at the end of subdivision (B). (Kilby ER111.)

subject to administrative judgment as to what is reasonable." (1976 Statement of Findings, at p. 15, Kilby RJN Ex. 2.)

In an opinion letter[4] dated December 28, 1979, Margaret T. Miller, Secretary-Consultant to the DLSE, explained that compliance with Section 14 could only be determined by "[a]n investigator from the Division of Fair Labor Standards Enforcement [who] would have to make the judgments involved."[5] The IWC later explained, "the Commission's intent in Section 14" was "to minimize the need to apply for special exemption. With this provision, it is up to the Division of Labor Standards Enforcement (DLSE) to inspect a facility and consider its particular situation."[6]

A common theme emerges: repeated recognition that determinations about enforcement of the seating provisions of the Wage Order should turn on

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[4] As this Court has recognized, the DLSE's opinions and advice letters, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029 fn.11; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 584 [relying on DLSE opinion letters to inform its interpretation of the IWCs wage orders]; *Harris v. Superior Court* (2011) 53 Cal.4th 170, 190 ["Although we generally give DLSE opinion letters 'consideration and respect,' it is ultimately the judiciary's role to construe the language [of the wage orders].]").

[5] Dec. 28, 1979 Letter from Margaret T. Miller, Secretary-Consultant of the Division of Labor Standards Enforcement, Kilby ER174-75.

[6] May 4, 1982 Letter from Margaret T. Miller, Executive Officer of the Industrial Welfare Commission, Kilby ER181.

administrative judgment by those with special expertise to address California's changing and diverse California workforce.

The DLSE has applied such judgment in specific cases. For example, the DLSE recognized in 1986 that Section 14 "was not intended to cover those positions where the duties require employees to be on their feet, such as salespersons in the mercantile industry."[7]

Until recently, the DLSE had exclusive jurisdiction to enforce the Wage Order. That changed in 2003, when the Legislature enacted the Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code. sections 2698, *et seq.*, which created a private right of action allowing aggrieved employees to sue and recover civil penalties. A plaintiff bringing suit under PAGA "does so as the proxy or agent of the state's labor law enforcement agencies," and "represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 986.)

[7] December 5, 1986 letter from Albert J. Reyff, Chief Deputy Labor Commissioner, SER35.

In enforcing Section 14, the DLSE has utilized a multi-factor analysis to determine if "the nature of the work" reasonably permits the use of a seat. As explained in the Labor Commissioner's Amicus Curiae Brief in *Garvey v. Kmart*:

> If called upon to enforce Section 14, DLSE would apply a reasonableness standard that would fully consider all existing conditions regarding the nature of the work performed by employees. Upon an examination of the nature of the work, DLSE would determine whether the work *reasonably* permits the use of seats for working employees under subsection (A) of Section 14...
>
> ...DLSE would consider all available facts and conditions, including but not limited to the physical layout of the workplace and the employee's job functions, to determine compliance with Section 14 requirements. In this regard, DLSE recognizes the IWC's expressed intent that the regulatory standard to be applied is a reasonableness standard, and that the IWC left application of that objective standard in any given situation to DLSE's expertise as an enforcement agency to determine compliance based on the facts of each case.

Labor Commissioner Amicus Brief at 3-4, SER31-32 (italics in original).[8] The required exploration of "all available facts and conditions" regarding each employee's job means consideration of: (1) the physical layout of the workplace; (2) the employee's job functions; (3) the expected job duties as defined by the employer; (4) the views of the employer as to the nature of the work, (5) the

[8] An administrative agency's interpretation of law in a legal brief may be given deference "when it reflects the agency's fair and considered judgment on the matter in question." (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 957 (*citing, and quoting in part, Auer v. Robbins* (1997) 519 U.S. 452, 462).)

employer's business judgment; and (6) existing or historical industry or business practices. (*Id.* at 3-5, SER 31-33.) The DLSE's multi-factor test reflects the holistic interpretation of the "nature of the work," using a discerning assessment of the entire situation, rather than a simple identification of job duties that could be done while seated, as Petitioners urge.

Consistent with DLSE standards and enforcement policies, in other suitable seating cases that have gone to judgment on PAGA claims, the courts applied this same holistic approach and concluded that the nature of the work of Kmart cashiers and hotel desk clerks required standing. Thus, there was no violation of Section 14 in either case.[9]

III. PROCEDURAL AND FACTUAL BACKGROUND

This case, and the companion case of *Kilby v. CVS*, are before this Court on certification from the Ninth Circuit, which certified the following questions of California law:

> (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?

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[9] *See Garvey v. Kmart Corp.* (N.D. Cal. Dec. 18, 2012, No. C 11-02575 WHA) 2012 WL 6599534, *9 (trial verdict in favor of employer because nature of cashier work at Kmart required standing and plaintiffs failed to show that any seat would be suitable), appeal dismissed (Feb. 24, 2014); *Hamilton v. San Francisco Hilton, Inc.*, Superior Court of California, County of San Francisco, Case No. 04–431310 (June 29, 2005) (hotel desk clerk job required standing), CVS SER237-48.

(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 could constitute "suitable seats" to show the employer has violated Section 14(A)?

This case and *Kilby* have different procedural postures: the district court in *Henderson* denied class certification, while the district court in *Kilby* entered summary judgment for defendant and denied class certification.

A. Procedural History

On February 17, 2011, Carolyn Salazar filed a putative class action complaint in federal court alleging wage and hour claims against Chase, including a claim that Chase failed to provide her with "suitable seats" while she worked as a bank teller. Thereafter, Kemah Henderson and Taquonna Lampkins, and, later, Tamana Dalton, filed their own suitable seating putative class action complaints in California state court. Chase removed these actions to federal court, where the suitable seating claims were eventually consolidated with *Henderson* as the lead case. (ER 401-424.)

B. Layout and Design of Different Chase Branches and Teller Areas Prevent And Limit The Use of Seats in Multiple Ways.

The record evidence developed in federal court shows that California Chase branches vary widely, ranging from traditional, stand-alone buildings to space allocated within grocery stores and other retail establishments. (Meyer Dep. 67:4-24 [describing "extreme variations" between Chase branches]; Rosh Decl. ¶ 3, ER 197 ["The Saratoga Branch and the Los Gatos Branch are very different."].) These differences directly influence whether the nature of a Chase teller's work reasonably permits the use of a seat and, if so, whether a suitable seat exists to accommodate that work.

For example, some Chase branches have bulletproof glass protecting the teller area. (Dyse Decl. ¶¶ 3, 4, ER 171; Henderson Dep. 188:16-22, SER 72; Lampkins Dep. 28:23-29:2, SER 97-98.) The evidence shows that seats are usually impractical in at least some of these branches, where the teller and customer exchange currency and documents through a small pass-through window. One Chase teller at such a branch encountered this problem when she sprained her ankle while trying to perform her duties from a chair. "[D]uring almost every transaction throughout the day, I had to scoot out of my chair in order to reach far enough forward to reach the opening. I found it inefficient and awkward." (Dyse Decl. ¶ 4, ER 171.)

The setup of teller stations also varies. Commonly-used equipment – what Petitioners call "office tools" (AOB-11) – is not always within arm's reach at every teller station. Some teller stations have cash drawers where tellers make change for customers, but cash drawer locations vary widely. In some cases, adding a seat to the teller station would impair access to the drawer. (Salazar Dep. 135:7-18, SER 155 [side]; ER 159-160, ¶ 14 [below the teller window]; ER 171, ¶ 5 [on the side]; ER 184, ¶ 4 [cash drawer was placed low, to prevent customers from seeing the money in the drawer]; ER 204, ¶ 10 [two cash drawers, one on the side and one low].) By contrast, some branches do not have cash drawers at all. Tellers at these locations use a "Teller Cash Dispenser" or "TCD," an ATM-like device that provides cash for tellers. (Andrews Dep. 90:14-17, SER 40.) Some teller stations have these TCD machines within arm's reach of each teller station but others do not, meaning tellers must regularly walk to a shared TCD machine to obtain cash for customers. (Davis Decl. ¶ 4, ER 167; Lampkins Dep. 33:23-34:2, SER 99-100; Salazar Dep. 31:23-32:5, SER 126-127.) In addition to shared TCD machines, in many branches, tellers share check printers and cash counters, meaning tellers must leave their teller stations to use these devices. (Andrews Dep. 54:14-25, 55:5-12, 66:2-16, 90:14-17, SER 37-40; Salazar Dep. 145:19-146:2, SER 159-160; Lampkins Dep. 52:12-16, 90:11-13, SER 103, 108; Anthony Decl. ¶ 3, ER 141; Davis Decl. ¶ 4, ER 167; Dyse Decl. ¶ 6, ER 171-172; Ildefonso Decl. ¶ 6, ER

180; Khodanian Decl. ¶ 3, ER 184; Vega Decl. ¶ 3, ER 210; Vu Decl. ¶ 5, ER 214-215.)[10]

C. Chase Tellers Perform A Wide Variety of Job Functions that Require Standing.

Chase tellers do not perform any one particular job function continuously. The functions performed vary widely, depending on the person, branch, or shift worked.[11] The many different functions tellers perform – including how they do so, for how long, and where – prevent and limit their ability to work while seated. Chase tellers can be found performing one job function one minute, and other job functions the next. Henderson, for example, was a "lead teller" expected to oversee the teller area, assist other tellers with overrides, work at a teller station when customer needs required, act as vault custodian, and assist with back office duties as needed, which required her to walk "all day long back and forth to the tellers, back and forth." (Henderson Dep. 183:23-184:6, SER 70-71.)

---

[10] This evidence refutes Petitioners' erroneous generalization that "[p]erforming . . . basic teller functions does not regularly require tellers to walk about, as the office tools and material used most frequently by Chase tellers...are physically located on the teller counter within arm's reach." (AOB-11.)

[11] As one teller testified, "[I] performed different duties in each of the Teller positions I've held at Chase." (Ruiz Decl. ¶ 3, ER 202.) Another teller stated that she "performed several responsibilities that other Tellers at [her] branch do not perform." (Cervantes Decl. ¶ 3, ER 157; Ildefonso Decl. ¶ 3, ER 179 ["I have a variety of responsibilities that other Tellers in my branch do not have"]; Murrillo Decl. ¶ 5, ER 194 [duties performed at Oxnard branch were different that those performed at Ventura branch].)

Some Chase tellers have "ATM Custodian" responsibilities that take the teller away from a teller station altogether. ATM responsibilities include checking to make sure the machines are not jammed or out of cash or paper, carrying cash from the vault to the ATM room to replenish the ATM machine, pulling out deposits, and taking cash deposits from the machine back to the vault. (Anthony Decl. ¶ 9, ER 143; Cervantes Decl. ¶ 4, ER 157; Dyse Decl. ¶ 8, ER 172; Ruiz Decl. ¶ 5, 7, ER 202-203; Vega Decl. ¶ 5, ER 211; Salazar Dep. 127:25-128:8, SER 149-150.)

Other Chase tellers serve as "TCD Custodians" who are responsible for maintaining the TCD machines. These duties involve counting cash in the machine, carrying the machines and/or their cash cassettes to the back room or vault, replenishing the TCD, and returning the TCD and/or cash cassette to the teller area. (Ildefonso Decl. ¶ 5, ER 179-180; Anthony Decl. ¶ 7, ER 142; Tsuei Decl. ¶ 5, ER 207-208; Henderson Dep. 206:8-14, SER 82.)

Still other Chase tellers serve as "Vault Custodians," meaning they must order cash and coins for the branch, handle cash shipments from the armored car service, take cash from the teller line to the vault when a teller's cash drawer exceeds the teller's drawer limits, and bring cash from the vault to tellers on the teller line when needed to replenish cash drawers. (Anthony Decl. ¶ 4, ER 141-42; Cervantes Decl. ¶ 7, ER 157-158; Cho Decl. ¶ 7, ER 163, SER 196; Davis Decl. ¶

5, ER 167-68; Ruiz Decl. ¶¶ 5-6, ER 202-203; Vega Decl. ¶ 4, ER 210-211; Vu Decl. ¶ 4, ER 214; Henderson Dep. 206:17-19, 220:2-11, SER 82, 87; Ildefonso Decl. ¶ 4, ER 179.)

Some Chase tellers greet customers in the lobby when no one is in the teller line. (Lampkins Dep. 53:23-54:10; 111:12-13, SER 104-105, 113 ["If it's slow, then I would go work the lobby"]; Dyse Decl. ¶ 7, ER 172; Khodanian Decl. ¶ 5, ER 184-185; Ruiz Decl. ¶ 4, ER 202.) Other branches, like Henderson's, had designated greeters in their branches, and tellers did not work the lobby. (Henderson Dep. 225:25-226:16, SER 89-90.) Others tellers were responsible for cleaning, restocking supplies, and vacuuming. (Vega Decl. ¶ 6, ER 211.)

Depending on the shift worked, tellers may perform "opening" duties to make the branch ready for business. (Ildefonso Decl. ¶ 9, ER 181, SER 211; Anthony Decl. ¶ 11, ER 143, SER 176-177; Cervantes Decl. ¶ 10, ER 158, SER 191-92; Dyse Decl. ¶ 9, ER 172, SER 205-206; Khodanian Decl. ¶ 6, ER 185, SER 215; Ruiz Decl. ¶ 8, ER 203, SER 231; Tsuei Decl. ¶ 6, ER 208, SER 240; Henderson Dep. 190:4-191:4, 192:22-25, SER 248-250; Salazar Dep. 133:18-134:19, 147:23-148:24, SER 161-162, 260-261; Lampkins Dep. 81:7-19, 82:15-19, SER 255-256.) Other tellers perform "closing" duties, which include cleaning, checking the printers for sensitive materials, shredding documents, emptying trash, locking cabinets, restocking supplies, locking the vault, and setting the alarm.

(Ildefonso Decl. ¶ 9, ER 181, SER 211; Vega Decl. ¶ 7, ER 211, SER 243; Anthony Decl. ¶ 11, ER 143, SER 176-177; Cervantes Decl. ¶ 10, ER 158, SER 191-192; Dyse Decl. ¶ 9, ER 172, SER 205-206; Khodanian Decl. ¶ 6, ER 185, SER 215; Ruiz Decl. ¶ 8, ER 203, SER 231; Henderson Dep. 200:10-202:3, 204:18-205:15, SER 78-81, 251; Salazar Dep. 133:4-17, 149:10-150:12, 153:20-154:11, SER 163-166, 260; Lampkins Dep. 85:16-25, SER 106.)

D. Time Spent at the Teller Station Varies Widely and This Phenomenon Prevents and Limits The Use of Seats.

Just as teller functions vary, so too does teller time spent *away* from teller stations. The record contains estimates of 70% of the work day spent away from a teller station (Vu Decl. ¶ 4, ER 214) to 10% spent away (Henderson Decl. ¶ 3, ER 380). But even Petitioner Henderson, who gave this low number, gave varying estimates: while her declaration says she spent 90% of her time at her station, she testified during deposition that, as a lead teller, "I walked all day long. I walked all day long back and forth to the tellers, back and forth – overrides, back and forth." (Henderson Dep. 101:16-102:5, 183:23-184:6, SER 58-59, 70-71.) Ms. Henderson also testified that regular, non-lead tellers at her branch spent 50% of their time away from their teller stations. (*Id.* 236:3-6, SER 94.)

Contrary to Petitioners' assertion, there was no "finding" by the federal district court 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." (AOB–10.) What the district court found was that common evidence could not determine the amount of time tellers spent at their teller stations: "tellers provide different estimates for how much time they spend at their teller stations compared to the amount of time they spend performing tasks that require them to leave their stations." (ER 13.)

E. The Work of a Chase Teller Requires Standing.

The record shows Chase tellers could not perform a variety of teller functions while seated. (Ildefonso Decl. ¶ 3, ER 179 ["The duties I perform in these roles can only be performed while walking or standing."]; Davis Decl. ¶ 4, ER 167 ["It would be difficult for me to perform these tasks while seated...."]; Khodanian Decl. ¶ 4, ER 184 ["I don't think I could perform these transactions as efficiently if I were seated....A seat would get in the way."]; Ruiz Decl. ¶ 10, ER 204 ["[A] seat would just get in the way."]; Tsuei Decl. ¶ 3, ER 207 ["I do not believe I could perform my job duties while seated."]; Carrillo Decl. ¶ 3, ER 152 [not possible to use a seat at the drive-up teller window]; Murrillo Decl. ¶ 7, ER 194; Vu Decl. ¶ 12, ER 216; Guy Decl. ¶ 9, ER 176; Sanchez Decl. ¶¶ 10-11, SER 236-37.)

In addition, in branches where seats were available, tellers often chose not to use them. One teller had an available chair, but she chose not to sit because she did not like doing so. (Cho Decl. ¶ 9, ER 164 ["[M]y manager and assistant

manager would frequently tell me that I could sit down, but I told them that I prefer to stand."].) Other tellers who obtained seats for medical reasons ultimately realized it was necessary to stand. For example, one teller who received a stool while pregnant explained, "[w]hen I was pregnant and used a stool, I had to get up and down from the stool throughout the day and it would become tiring....If I was sitting on a stool at my workstation, it would not be long before some task would require me to get up and walk to another part of the branch." (Vega Decl. ¶ 8, ER 211-212.) The only work this teller could perform seated was "not work that I normally perform as a Teller, but it was the only work I could do while sitting at the desk." (*Ibid.*)

Other tellers who received seats as a form of disability accommodation had job duties reassigned to other, non-seated tellers, because those duties could not be performed while seated. (Cervantes Decl. ¶ 13, ER 159 [teller with medical accommodation had a seat but "[o]ther Tellers and I had to help her get cashier's checks and other supplies that weren't immediately at hand, and we also had to take care of her closing duties"]; Khodanian Decl. ¶ 9, ER 186 [teller with an ankle injury only used her chair "when there were no customers in the branch and she was not actually performing her duties"]; Burns Dep. 79:7-80:1, 80:10-20, 81:24-82:13, SER 49-50 [other tellers covered duties such as responding to the drive-up

teller]; Carrillo Decl. ¶ 11, ER 155 [helped sick teller who couldn't get cashier's checks and other supplies when seated].)[12]

Other Chase tellers prefer to stand for customer service reasons. As one explained, "Part of good customer service is greeting customers when they walk in the branch and being interested when serving them. To me, this means I should be standing to assist customers." (Rosh Decl. ¶ 9, ER 198; Murillo Decl. ¶ 7, ER 194 ["I would also feel awkward and that it was inappropriate for me to assist a standing customer while I am seated."]; Tsuei Decl. ¶ 4, ER 207 ["[C]ustomers are standing too, and I want to stand and look at customers at eye level."].)[13]

F. The District Court Denied Class Certification.

Petitioners moved under Federal Rule of Civil Procedure 23 to certify a class of more than 5,000 tellers and lead tellers at over 900 Chase branches in

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[12] Petitioners' claim that teller work could be performed while seated because Chase provided seats to tellers with medical needs (AOB-11) fails to disclose these job duty modifications and the fact that tellers who received seats did not find them helpful to their work.

[13] Petitioners also recount certain "facts" that were not pertinent to the federal district court's determination of class certification, and are not only disputed but were not developed in the record. These include: other banks providing seats to their tellers; some branches had seats in the teller area when those branches were operated by a predecessor; one furniture manufacturer produces a stool for tellers; and Chase did not include evidence of studies comparing or analyzing customer perceptions of standing versus seated tellers. (AOB-11-12.) None of these points bore on whether common evidence could have shown that the nature of Chase tellers' work reasonably permits the use of a suitable seat. That was the issue the federal district court confronted.

California. (ER238-243.) Class certification was denied based on an extensive factual record. (ER1-17.) The court found that Petitioners had not met their burden to establish commonality under Rule 23(a)(2). (ER9-15.) Class issues did not predominate given extensive differences in teller duties, experiences, and the physical layout of Chase branches and teller workstations. (*Ibid.*) In particular, the court found that common evidence could not establish the "nature of the work" for the thousands of tellers in the proposed class because "tellers have different duties based on their status as lead teller or teller; the branch at which they work; the shift to which they are [as]signed; whether they have been assigned to an additional task such as ATM, vault, or TCD [Teller Cash Dispenser] custodian; and various other factors that affect tellers' daily tasks." (ER13.) The court also found that common evidence could not be used to determine whether a seat would be either suitable or possible for tellers, given the "evidence on the record that the specific layout of the Chase branches and individual teller stations varies greatly," and evidence from Chase tellers who testified that they could not perform their jobs while seated. (ER14.)

Contrary to Petitioners' current characterization of the order denying class certification, the court did not make any merits-based determinations concerning Section 14. Indeed, Petitioners did not even take a consistent stance concerning how Section 14(A), or its "nature of the work" requirement, should be interpreted,

and they certainly did not advance the interpretation of the "nature of the work" that they now urge this Court to adopt. Rather, in seeking class certification, Petitioners argued that "nature of the work" means the "most common duties" or tasks that take up "the majority of teller time." (Motion for Class Certification, C.D. Cal. Dkt. No. 90-1, at 12:20-21; Reply to Motion for Class Certification, C.D. Cal. Dkt. No. 114, at 10-11.) Petitioners have since abandoned any such quantitative analysis of how tellers spend time. (AOB-30 [conceding "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."].)

Furthermore, the court did not deny class certification based on "the nature of *other* work that plaintiff employees sometimes perform when not assigned to the....teller counter" or "defendant's *preference* that their employees stand at all times while working." (AOB-12.) Rather, the district court found that determining the nature of a Chase teller's work for purposes of applying Section 14 was individualized and could not be done using class-wide evidence. (ER9-15.)[14]

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[14] The federal district court did not find that "Chase has a nationwide policy, applicable to 900-plus California branches, not to provide any seating to its tellers." (AOB-10.) For purposes of class certification, the court treated Chase as having an "established policy of not providing seats to tellers," even though the issue of whether such a policy existed was a "close call" given "evidence on the record that some number of employees had access to seats without making a medical request for one." (ER8-9.) This comports with evidence that some Chase branches had seats at teller stations, but "no written policy" on teller seating. Other evidence shows newly-built Chase branches did not automatically receive

IV. CERTIFIED QUESTION 1: THE "NATURE OF THE WORK" UNDER SECTION 14(A) REQUIRES A HOLISTIC ASSESSMENT OF THE JOB.

The "nature of the work" means a holistic, job-as-a-whole assessment: one that considers all facts and circumstances. Such an interpretation is required by statutory construction rules, the usual and ordinary meanings of words, and Section 14's regulatory history. Such an interpretation comports with the multi-factor test that has long been used by California's enforcement agency, the DLSE, and has been adopted by courts adjudicating claims based on Section 14. This Court should adhere to the long-standing, holistic interpretation that correctly implements Section 14's language and history.

The Wage Order is a quasi-legislative regulation, subject to ordinary principles of statutory interpretation. (*Cash v. Winn* (2012) 205 Cal. App. 4th 1285, 1297 (2012).) Interpretation must begin with the statutory language, "giving the words their usual and ordinary meaning." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) Petitioners' suggested interpretation, that "nature of the work" means specific duties or tasks that could conceivably be done while seated, would contravene these statutory construction rules and lead to absurd results.

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seats, but actual practice was "different from place to place." (SER41-42.)

A. Section 14 Requires a Holistic Approach Because It Assigns Different Meanings to "Nature of the Work" and "Duties."

In drafting the current version of Section 14, the IWC drew a deliberate distinction between "nature of the work" and "duties." "Nature of the work" is used in Section 14(A), while both "nature of the of work" and "duties" are used in Section 14(B). When read as a whole, as required by statutory construction rules, "duties" must be interpreted to be mean a subset of the broader phrase "nature of the work." Under that interpretation, Section 14(A) applies when the job-as-a-whole "reasonably permits" the use of a seat, while Section 14(B) applies when the job-as-a-whole "requires standing," and the two provisions are dichotomous.

"When the Legislature uses different words as part of the same statutory scheme, those words are presumed to have different meanings." (*Romano v. Mercury Ins. Co.* (2005) 128 Cal.App.4th 1333, 134.) The Court must give effect "to the statute as a whole, and to every word and clause thereof, leaving no part of the provision useless or deprived of meaning." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18.) When two statutory provisions touch upon a common subject, "they are to be construed in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage." (*DeVita v. Cnty. of Napa* (1995) 9 Cal.4th 763, 778 (internal quotations omitted); *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 ["[A] construction making some words surplusage is to be avoided"].) When two

different words are used, "the construction employing that different meaning is to be favored." (*People v. Stewart* (2004) 119 Cal.App.4th 163, 171.)

In *Echavez v. Abercrombie and Fitch Co. Inc.* (C.D.Cal. Aug. 13, 2013, No. 11-cv-9754-GAF) 2013 WL 7162011, *5, plaintiffs argued – as Petitioners do here – that the "nature of the work" is synonymous with "duties," but the federal district court rejected this interpretation. The court considered the interplay between the "nature of the work" and "duties" in Section 14, and concluded that the meaning of the "nature of the work" "suggests the entirety of duties and responsibilities of a particular job. The job - 'the nature of the work' - either 'permits the use of seats' or 'requires standing,' but it cannot do both." (*Ibid.*) In rejecting the same "duty or task" interpretation that Petitioners propose here, the *Echavez* court held, "[t]here is nothing to suggest that the Wage Order was intended to create such an unworkable rule for employers. Had such an approach been intended, it is reasonable to assume that the IWC would have chosen the phrase 'job duties' to the phrase 'nature of the work.'" (*Ibid.*)

Given the distinction between the "nature of the work" and "duties," it follows that Sections 14(A) and 14(B) are dichotomous and apply to different scenarios. If the "nature of the work reasonably permits the use of seats," then subsection (A) applies. If the "nature of the work" does not reasonably permit the

use of seats – that is, if standing is required for the job – then subsection (B) applies.

Petitioners' proposed interpretation, focusing on whether particular job duties could be performed while seated (AOB-17), would render Section 14(B) surplusage, because nearly every job includes at least *some* duties that could conceivably be performed while seated. The IWC's use of the job-as-a-whole, "nature of the work" terminology, instead of the term "duties," prevents absurd results whereby a worker is made simultaneously subject to Section 14(A) and (B), i.e., like when a chef chops vegetables, which might be done while seated (conceivably implicating Section 14 (A)) and then puts the vegetables in the oven, which requires standing (bringing Section 14(B) into play). Courts construing Section 14 reject such unwieldy constructions, and have used instead the prevailing, holistic interpretation of Section 14 as a means to properly assess the nature of the work. (*See, e.g., Echavez,* 2013 WL 7162011 at p. *5 ["Subsection (B) provides for those employees who do not get the benefit of Subsection (A) . . . [and t]he argument that both sections apply to all employees . . . would render limitations in subsection (B) meaningless"]; *Kilby*, 2012 WL 1969284 at p. *4 [finding that Sections 14(A) and 14(B) are mutually exclusive, because "[w]hen both subsections are given full and independent effect, Section 14 establishes a dichotomous approach for employers to follow, based on the 'nature of the work'

involved"]; *Aguirre v. DSW, Inc.* (C.D. Cal. Jan. 19, 2012) 2012 U.S. Dist. LEXIS 62984, at *34 ["[Section 14(A)] should not be interpreted to require an employer to provide an employee engaged in a "standing" job a seat whether engaged in active duties or not[; o]therwise, the limitation in [Section B] . . . would be meaningless"].)

B. The Established Definition of "Nature of the Work" In Other Parts of the Same Wage Order Calls for a Holistic Analysis When Interpreting Section 14.

A holistic interpretation of the "nature of the work" is also supported by how that phrase is used elsewhere in the very same Wage Order that contains Section 14's seating requirements. Section 11 of the Wage Order addresses on-duty meal periods, and also uses the phrase "nature of the work." In the on-duty meal period setting, "nature of the work" is defined holistically, without a limited linkage to specific job duties or tasks.

Section 11 requires that employees receive a mandatory 30-minute meal break and that employees be "relieved of all duty" unless an exception applies that would allow an "on-duty" meal period. (Wage Order, § 11(C).) Meal periods may not be "on-duty" unless the employer shows, *inter alia*, that "the *nature of the work* prevents an employee from being relieved of *all duty*." (*Ibid.* (emphasis added); *Abdullah v. U.S. Sec. Associates, Inc.* (9th Cir. 2013) 731 F.3d 952, 958.)

For purposes of on-duty meal periods, the "nature of the work" is determined by applying a multi-factor test requiring an assessment of: (1) the "type of work"; (2) the "availability of other employees to provide relief to an employee during a meal period"; (3) the "potential consequences to the employer if the employee is relieved of all duty"; (4) the "ability of the employer to anticipate and mitigate these consequences such as by scheduling the work in a manner that would allow the employee to take an off-duty meal break"; and (5) "whether the work product or process will be destroyed or damaged by relieving the employee of all duty." (*See Abdullah, supra,* 731 F.3d at p. 959 fn.12; *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l. Union, AFL–CIO, CLC v. ConocoPhillips Co.* (C.D. Cal. Mar. 16, 2009, No. 08-CV-2068-PSG-FFMx) 2009 WL 734028, *6 n.4 [citing DLSE Opinion Letter 2002.09.04 with approval as furnishing "factors [that] should be considered when determining whether the nature of the work permits an on-duty meal period"].) These multiple factors must be "taken as a whole." (*Ibid.*)

Notably absent from this "nature of work" assessment is any singular focus on particular job duties or tasks. A similar, holistic approach is needed when assessing "nature of the work" in Section 14 of the same Wage Order, for to do otherwise would leave in the very same Wage Order dramatically different meanings for the same phrase. (*Sorenson v. Sec'y of Treasury of U.S.* (1986) 475

U.S. 851, 860 ["identical words used in different parts of the same act are intended to have the same meaning"].)

C. Dictionary Definitions of "Work" and "Nature" Support a Holistic Approach

A holistic approach is also supported by the most common dictionary definitions of the words "work" and "nature." These definitions refer to "work" as "one's accustomed means of livelihood" and a collection of tasks that are "a part or phase of some larger activity." When read in connection with the definition of "nature," which means "the inherent character or basic constitution of a person or thing: essence," job "duties" are nothing more than a subset of the broader inquiry that is the "nature of the work."

Merriam-Webster's first three primary definitions of "work" support a holistic interpretation of the "nature of the work." They are: (1) "activity in which one exerts strength or faculties to do or perform something"; (2) "sustained physical or mental effort to overcome obstacles and achieve an objective or result"; and (3) "the labor, task, or duty that is one's accustomed means of livelihood."[15] Even Merriam-Webster's fourth definition – "a specific task, duty, function, or assignment often being a part or phase of some larger activity" – recognizes that,

[15] *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003), *available at* http://www.merriam-webster.com/dictionary/work (accessed June 11, 2014)

when "work" is involved, tasks or duties are often "a part or phase of some larger activity."

Black's Law Dictionary defines "work" this way: "for purposes of determining employee's rights to compensation means *physical and mental exertion controlled or required by employer* and pursued necessarily and primarily *for benefit of employer and business.*"[16] This definition broadly defines "work" to include anything an employee does, mentally or physically, for the employer's benefit. Subsequent editions of *Black's* have similarly defined "work" to mean "[p]hysical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor."[17]

The *Oxford Dictionary* definition is similar, defining "work" as "mental or physical activity as a means of earning income; employment; . . . the place where one works; . . . the period of time spent during the day engaged in such activity."[18] These examples are all consistent with defining "work" to mean the job as a whole, encompassing, but not limited to, all of the tasks or duties performed.

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[16] *Black's Law Dictionary* (6th Ed. 1990) (emphasis added).

[17] *Black's Law Dictionary* (9th ed. 2009).

[18] *Oxford Dictionaries Online*, available at http://oxforddictionaries.com/definition/american_english/work?q=work (accessed on June 11, 2014).

Petitioners' contention that the "most common plain meaning dictionary definition of 'work' is 'task' or 'duty'" (AOB-18) is simply wrong. When read in conjunction with the word "nature" and its definition – "the inherent character or basic constitution of a person or thing: essence"[19] – the "nature" of "work" means "the entirety of the duties and responsibilities of a particular job." (*Echavez*, 2013 WL 7162011 at p. *5.) Petitioners' proposed construction would render the words "nature" and "work" meaningless because they would mean the same thing as the word "duty." Had the IWC intended that seats be required whenever a particular employee duty could be performed while seated, the IWC could have easily written Section 14 to achieve this end. (*Echavez*, 2013 WL 7162011 at p. *5). It did not. Instead, the IWC modified its original enactment to make seating requirements "more flexible." (1976 Statement of Basis, Kilby RJN Ex. 2, p. 15.) Moreover, the IWC or the Legislature could have voted to repudiate or change the prevailing administrative interpretation of Section 14 if it were inaccurate or in need of change. Neither did so.

D. The Regulatory History Supports A Holistic Interpretation of Section 14's Seating Requirements.

The IWC has revised Section 14 and its predecessors over the years since they were first promulgated in the early 20th century. This history of revision, and

[19] *Merriam-Webster Collegiate Dictionary, supra.*

the IWC's statements of intent in support of those revisions, strongly confirm that the current version of Section 14, like its predecessors, requires a holistic analysis. (*See* Section II, *supra.*)

As this Court has acknowledged, when the words of a statute or regulation are altered, it is presumed that the Legislature intended to change the meaning. (*Brinker, supra,* 53 Cal.4th at p. 1041-49 & fn.28 [holding that when a Wage Order originally contained a requirement that was dropped, that omission in the subsequent Wage Order evidences the IWC's intention to no longer impose that requirement].)

If the IWC had intended to require seats whenever an employee is performing a task that could be performed while seated, the IWC would have written Section 14 to accomplish that result. It never did so. (*See* Section II, *supra.*) Nothing in Section 14's language requires that employers provide a seat whenever an employee is performing a task that could be performed while seated. Even the early Wage Order iterations recognized that the "nature of the work" was to be evaluated based on "the judgment of the [IWC]." (*See* Section II, *supra.*) This is consistent with the DLSE's interpretation for nearly 100 years: all facts and circumstances regarding the nature of the work are to be considered.

As Petitioners note, Section 14(A)'s predecessors originally contained language such as "as far as, and to whatever extent," and requirements that seats be

provided "at work tables or machines." (AOB-24-25.) The IWC, however, deliberately removed such language in subsequent versions of Section 14, demonstrating that the IWC intended a holistic view of the "nature of the work." In fact, the IWC declared in its 1976 Statement of Findings that the amended seating provisions were "more flexible and more subject to administrative judgment as to what is reasonable" than prior iterations. (*Kilby* RJN, Ex. 2, p. 15.) Accordingly, Petitioners are plainly incorrect when they assert that "[p]rior 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" and that prior language requiring seats "at work tables or machines" demonstrates that the IWC "intended a task-specific assessment of when seating is required" in the *current* Wage Order. (AOB-24-26.)

The DLSE's administrative interpretation and enforcement history are consistent with a holistic interpretation. For example, salespersons could conceivably complete certain tasks while seated (such as signing contracts, completing forms, etc.), but the DLSE concluded that the nature of sales work requires standing, even though some specific tasks could conceivably be performed while seated. (SER35 [opining that Section 14(A) does not apply to salespersons because "historically and traditionally, salespersons have been expected to be in a position to greet customers, move freely throughout the store to answer questions

and assist customers in their purchases"].) The DLSE's interpretation reflects the importance of the "job-as-a-whole" interpretation, and demonstrates that Petitioners' proposed duty-by-duty analysis is unsound.

All facts and circumstances regarding the employee's work should be considered when determining whether the nature of that work reasonably permits the use of seats, just as has been the case for decades.[20]

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[20] Petitioners' health benefit argument (AOB 28 & n.10) is unconvincing and contradicted by substantial, reputable experts. Numerous studies show prolonged sitting is a significant occupational health concern leading to coronary heart disease, diabetes, breast cancer, and musculoskeletal disorders. (*See, e.g., Hu, et al.*, The joint associations of occupational, commuting, and leisure-time physical activity, and the Framingham risk score on the 10-year risk of coronary heart disease, Eur Heart J 2007, 28:492-498; *Hu, et al*, Occupational, commuting, and leisure-time physical activity in relation to risk for Type 2 diabetes in middle-aged Finnish men and women, Diabetologia 2003, 46:322–329; *Thune, et al.*, Physical activity and the risk of breast cancer, N Engl J Med 1997, 336:1269-1275; *Griffiths, et al.*, Prevalence and risk factors for musculoskeletal symptoms with computer based work across occupations, Work 2012, 42:533–54.)

As a 2010 *Science Daily* article states, "More time spent sitting linked to higher risk of death." (Science Daily, July 10, 2010, available at http://www.sciencedaily.com/releases/2010/07/100722102039.htm. And, as *Forbes* reported, "sitting at work all day is bad for you," while standing at work "may extend your life up to three years." Get Up, Stand Up, For Your Life, *Forbes*, August 3, 2012, available at http://www.forbes.com/sites/katetaylor/2012/08/02/can-standing-desks-fight-sitting-disease/.)

In any event, Petitioners' purported policy argument based on alleged benefits of sitting would contradict Section 14's text, regulatory intent, and its interpretation by the DLSE and the courts. To the extent Petitioners seek a requirement that seats be provided if any particular duty could be performed while seated, they should petition the Legislature to change the law.

V. CERTIFIED QUESTION 1(A): SECTION 14 DOES NOT REQUIRE A TIME QUANTIFICATION ANALYSIS.

A holistic analysis of the "nature of the work" does not require suitable seats when "more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat." (Certified Question 1(a).) Such an interpretation finds no support in Section 14. It is also incompatible with the long-used, multi-factor test for assessing the "nature of the work" and the history of DLSE administrative interpretation and enforcement.

Petitioners originally lobbied the district court to interpret "nature of the work" as the "most common duties" performed by tellers. (Motion for Class Certification, C.D. Cal. Dkt. No. 90-1, at 12:20-21.) Petitioners then advocated that "nature of the work" should be defined as tasks that take up "the majority of teller time." (Reply to Motion for Class Certification, C.D. Cal. Dkt. No. 114, at 10-11.) In federal appellate proceedings, Petitioners pressed many different interpretations of the "nature of the work," including: duties that take an "appreciable amount of work time" (9th Cir. Dkt. No. 1-2, at p. 9); a teller's "significant" job duties (9th Cir. Opening Brief at 5); a tellers' "core job functions" (*ibid.*); and the "essential elements of a covered employee's particular job duties" (*id.* at p. 18).

Now, before this Court, Petitioners finally agree with Chase that Section 14 has no language suggesting that the "nature of the work" has any kind of quantitative element. Section 14 does not specify that suitable seats are required if more than 50% of work time is spent on duties that could conceivably be performed while seated. (AOB-30-33.) If Section 14(A) required a "quantitative" analysis, counting time spent on particular duties, then Section 14 would contain such language. It does not. Terms like "primarily engaged" or "customarily and regularly" engaged are used in the same Wage Order when a quantitative analysis is contemplated – *i.e.*, a determination of the amount or percentage of time spent on given job duties or functions. (*See, e.g.*, Wage Order §§ 1(A)(1) [executive exemption requires employee to be "primarily engaged" in exempt managerial duties and "customarily and regularly" direct the work of two or more other employees]; 1(A)(2) [administrative exemption requires employee to be "primarily engaged" in exempt administrative duties and "customarily and regularly" exercise discretion and independent judgment].)[21]

[21] The Wage Order expressly defines "primarily" to mean "more than one-half the employee's work time." (Wage Order § 2(N).) In the exemption context, this means that "exempt" duties must be identified, the time spent on those duties tallied and quantified, and if the total time spent on exempt duties exceeds 50% of the employee's total work time, then the employee can meet this part of the exemption test. (*Campbell v. PriceWaterhouseCoopers, LLP* (9th Cir. 2011) 642 F.3d 820, 831 n.11 [under California law, "[t]o 'primarily engage' in exempt work, an employee must spend at least 50% of his or her time on exempt work"].)

Similarly, the IWC and DLSE have defined the phrase "customarily and regularly" to mean "a frequency which must be greater than occasional but which may be less than constant." (DLSE Enforcement Policies and Interpretations Manual § 52.3.8.4; 29 C.F.R. § 541.207(g) (2000).) If a quantitative approach had been envisioned for Section 14 – *i.e.*, whether work tasks could be performed while seated "more than one-half the employee's work time" or "greater than occasional but . . . less than constant" – the IWC would have used the same terminology it used in other sections of the Wage Order to denote a quantitative approach.

As the IWC made clear in its 1976 Statement of Findings, the modern seating provisions are "more flexible and more subject to administrative judgment as to what is reasonable." (Kilby RJN, Ex. 2, p. 15.) If the task were simply to tabulate time spent on seated versus non-seated duties, meaningful "judgment" wouldn't be needed. The fact that judgment and administrative expertise have always been contemplated underscores that the phrase "nature of the work" does not require a quantitative analysis of the time spent performing particular tasks.

Petitioners describe hypothetical security guards, amusement park workers, and bookstore workers (AOB-31-33), but their examples are of little assistance here. Petitioners' hypothetical security guard watches security monitors for four hours straight and then spends five hours patrolling the building; Petitioners'

amusement park worker is a ticket taker on certain days and runs the ring toss booth on others; and Petitioners' bookstore worker staffs the customer service desk on certain days and stocks books on others. (AOB-31-32.) Petitioners' hypothetical employees perform distinct job duties continuously and at separate times.

Chase tellers are different. They do not cash checks on certain days and walk customers to the safe deposit boxes on other days. Chase tellers cash checks one minute (a task which may or may not involve helping a customer at a teller station), get cash from the vault or TCD the next minute, and thereafter walk to a supervisor (i.e., for approval of a transaction), walk to a check printer the next, or escort a customer to her safe deposit box. These functions are not neatly segregated like those in Petitioners' hypotheticals. Rather, Chase tellers and their duties resemble those of retail salespersons, who need not be furnished with seats per the DLSE's December 1985 DLSE opinion letter. Such employees with overlapping duties show why attempts at dividing all jobs into seated and standing duties yields an inappropriate and inadequate test, and why the black-and-white seating rule Petitioners advance cannot be correct.[22]

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[22] This is not to say that all tellers in the banking industry have the same multi-tasking responsibilities as Chase tellers. It is conceivable that some other banks could hire tellers only to cash or deposit checks and to perform no other duties – like replenishing ATMs, servicing customers at drive-through teller windows, walking customers to safe deposit boxes, or replenishing cash from the vault –

A holistic, multi-factor test, which gives weight to all facts and circumstances, is necessary to account for multi-tasking workers, like Chase tellers. The proper definition of "nature of the work" must be flexible enough to allow its intelligent and reasonable application to all of the many different types of jobs present in our modern society.

VI. QUESTION 2: THE COURT MUST CONSIDER BUSINESS JUDGMENT AND PHYSICAL LAYOUT OF THE WORKPLACE.

The fact that Section 14 includes qualifying language that "suitable seats" are available and that the employee's work "reasonably permits the use of seats" further supports the holistic interpretation of "nature of the work." This language means that assessing whether seats are "suitable" and "reasonable" requires more than simply determining whether any particular job duty can conceivably be performed while seated. Just as the DLSE has done for years, whether the nature of the work "reasonably permits" the use of seats requires that "all existing conditions" be taken into account, including the employer's business judgment, expectations of the job, the physical layout of the workplace, worker safety, and other factors.

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duties that are undisputedly performed by some Chase tellers. (*See* Section II.C.) Any interpretation of "nature of the work" must be flexible enough to account for the differences in duties performed by various Chase tellers, as well as tellers at other banks.

A. Employer Business Judgment and Expectations Are Important Factors Relevant to Whether the Nature of the Work Reasonably Permits the Use of Suitable Seats.

Business judgment and the employer's job expectations are now, and always have been, relevant inquiries when determining whether the nature of an employee's work reasonably permits the use of suitable seats. As the Labor Commissioner explained in *Garvey,* "business judgments are relevant in determining the overall appropriateness of providing seating." (Labor Commissioner Amicus Brief at p. 4, SER32.) The DLSE "would also consider existing or historical industry or business practices along with all available information regarding the nature of the work, but would not treat any individual factor as dispositive." (*Id.* at 4-5, SER32-33.) To date, trial courts adjudicating Section 14 claims have considered employer business judgment when determining the nature of the work. (*See, e.g., Garvey v. Kmart Corp.* (N.D. Cal. Dec. 18, 2012, C 11-02575 WHA) 2012 WL 6599534, *9; *Hamilton v. San Francisco Hilton, supra,* CVS SER237-48.)

Petitioners' proposed interpretation, that employer business judgment and other factors should be excluded from the Section 14 analysis (AOB-34), is irreconcilable with the IWC's modern modifications to the Wage Order. These changes conditioned Section 14(A)'s seating requirements on whether the nature of

the work "reasonably permits" the use of seats. Petitioners' paraphrase of Section 14(A) notably omits the term "reasonably."[23]

As discussed in Section II, *supra*, prior versions of Section 14 did not contain the modifier "reasonably." That word was added to the 1976 version of Section 14 in order to make seating requirements "more flexible and more subject to administrative judgment as to what is reasonable." (1976 Statement of Findings, Kilby RJN Ex. 2, p. 15.) The addition of the modifier "reasonably" certainly means that the analysis is not limited to whether it is physically possible to provide a seat. The use of the word "reasonably" connotes a need to look at all circumstances and fairness in particular. In an employment setting, jobs are created and offered by employers based on the employer's assessment of what business needs require. It blinks reality to suggest that employer-defined job requirements are not among the factors that bear on whether the "nature of the work" reasonably permits the use of a seat.

Petitioners pursue another gambit as well. Turning to their dictionaries again, they argue that the use of the word "nature" in "nature of the work" precludes judicial consideration of employer business judgment, including in

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[23] AOB-34 ["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."].

defining jobs and job requirements. (AOB-35.) This contention, however, is directly at odds with how Petitioners have elsewhere defined "nature of the work" as "a specific task, duty, function, **or assignment** often being a part or phase of some larger activity." (AOB-18 (emphasis added).) If the "nature of the work" includes the "assignment" given by the employer, then employer expectations and business judgments must come into play, because work "assignments" do not materialize out of thin air. California courts have recognized in many contexts the importance of giving consideration to the requirements of each employer's business. Courts are not intended or suited to substitute their judgment for that of employers about what the needs of particular businesses require. (*See, e.g., Lee v. Interinsurance Exch.* (1996) 50 Cal.App.4th 694, 713-14 [business judgment rule].)

Petitioners make the exaggerated charge that consideration of employer business judgment will cause Section 14(A) to "lose all force." (AOB-34.) Chase has never contended that employer business judgment is a sole or dispositive factor that trumps all others. Rather, as the Labor Commissioner has confirmed, "DLSE would consider the views of the employer as to the nature of the work but these views would not be controlling." (Labor Commissioner Amicus Brief at p. 4, SER32.) Indeed, "the IWC left application of that objective standard in any given

situation to DLSE's expertise as an enforcement agency to determine compliance based on the facts of each case." (*Ibid.*)

Employer business judgment is one of several factors that has long been – and should continue to be – considered when interpreting and applying the Wage Order.[24]

B. The Physical Layout of the Workplace Is Relevant to Whether the Nature of the Work Reasonably Permits the Use of Suitable Seats

Proper interpretation of the "nature of the work" requires consideration of the physical layout of the workspace, worker safety, and other relevant constraints on the actual deployment of seats in the workplace.[25] Under Section 14(A), seats

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[24] Petitioners misstate the record when they assert that "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." (AOB-35 fn.11.) Numerous Chase tellers testified that they believe they provide better customer service when standing. (*See* Section II.E., *supra*). Expert testimony showed that tellers do, in fact, provide better customer service experiences when standing. (Expert Decl. of Dr. C. Dev., at p. 4 ["[H]aving Tellers and Lead Tellers that stand rather than sit would have a positive impact on the effectiveness and efficiency of customer service, brand standards of Chase, customer issue resolution, and competitive advantage of Chase versus its competition."].) Petitioners never refuted this evidence.

[25] Petitioners' suggestion that Chase should apply for the "safety valve" of an administrative exemption unjustifiably presumes that seating is required in the first place. As the DLSE has explained, "[t]he Commission added the word 'feasible' [in a prior iteration of the Wage Order] at the request of employers **so as to minimize the need to apply for special exemptions**." (Kilby ER181 (emphasis added).)

Indeed, Petitioners' suggestion that Chase seek an exemption impliedly

are not required unless the nature of the work reasonably permits the use of suitable seats. This standard looks at the existing job and workplace situation, not how the workplace might be modified to trigger the applicability of Section 14(A).

The record evidence shows numerous physical variations across the hundreds of California Chase bank branches. For example, some Chase branches have bulletproof glass for the safety and protection of tellers. (*See* Section II.B, *supra*.) The record shows tellers in these branches cannot perform their jobs from a seated position due to the setup of the bulletproof glass. (*Ibid.*) As earlier noted, a majority of Chase branches do not have "office tools," like check printers and TCDs, within each teller's reach. (*Ibid.*) Most often, Chase tellers shared these items and had to leave their teller stations to access them. (*Ibid.*)

Given these constraints necessary to serve other business and employee needs, common sense dictates that the physical layout of the existing workspace must be considered under Section 14, just as the *Garvey* court did when it entered judgment against plaintiffs because, among other things, they failed to prove that seats could be provided without imposing a safety hazard. (*Garvey*, 2012 WL 6599534 at p. *9.)

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acknowledges that a holistic, multi-factor assessment should ultimately be performed. If Chase had applied for an exemption, the DLSE would have used its multi-factor test to assess whether the nature of the work reasonably permits the use of seats, not the "specific duties" test advanced by Petitioners.

Petitioners contend that the "nature of the work" cannot consider the physical layout of the workplace, because employers are obligated to modify work areas to permit the use of seats. (AOB-37-39.) Section 14(A) contains no such requirement, and properly so. If the inquiry is limited to employee duties only, without considering the workspace or the employer's expectations, absurdity will result. For example, if a foreman on a construction site holds a morning meeting with workers, then Petitioners' "specific task" interpretation would require that the employer provide seats for that meeting, since the "task" of meeting could be done while seated. Petitioners' interpretation of Section 14 would exclude from consideration whether physical limitations at the construction site constrain the placement of seats or render the placement of seats dangerous. If a group of nurses rides the hospital elevator to go from one patient's room to another, then Petitioners' interpretation would require seating in the elevator, since the task of riding the elevator could be done while seated. If a salesperson in a large department store folds clothes at various locations on the sales floor while at the same time monitoring the store for customers in need of assistance, Petitioners' interpretation would require the store to find a way to fill the sales floor with seats without inquiring into the store's physical constraints. This cannot be what Section 14 requires. Indeed, the DLSE expressed the view nearly thirty years ago that

retail employers are not required to provide seats to salespersons in their stores. (SER35.)

In interpreting Section 14, this Court must not only consider how its interpretation will impact the thousands of different jobs throughout California today, but how jobs will change in the future. A holistic, multi-factor approach allows a concept that was originally enacted in the early 20th century to be made relevant in a diverse modern economy.

VII. QUESTION 3: PLAINTIFFS BEAR THE BURDEN OF PROOF AS TO WHETHER A SEAT IS "SUITABLE."

The plain language of Section 14(A) makes clear that the existence of a suitable seat is an element of a plaintiff's *prima facie* case for a Wage Order violation. Thus, plaintiff bears the burden to prove that a "suitable" seat exists that should have been provided by the employer. (*Garvey,* 2012 WL 6599534 at p. *9 ["plaintiff has the burden to prove that 'suitable seating' exists"].)

"[A] party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." (Evid. Code § 500.) Thus, plaintiff must prove each element of each cause of action pleaded. (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal. App. 4th 1658, 1668; 1 Witkin, Cal. Evid. 5th (2012) Chapter III, Burden of Proof and Presumptions, § 8, p. 178 ["Where, under the substantive law, a fact is

essential to the plaintiff's claim for relief, the burden of pleading and proof of that fact is on the plaintiff"].)

Section 14(A) sets forth the elements that a plaintiff must prove in order to establish a violation, namely: (1) the nature of the work reasonably permits the use of seats; (2) the employer did not provide working employees with a seat; and (3) a "suitable" seat exists. (Section 14(A); *see also Kilby v. CVS Pharmacy, Inc.* (S.D. Cal. Apr. 4, 2012, No. 09CV2051-MMA KSC) 2012 WL 1132854; *Gallardo v. AT&T Mobility, LLC* (N.D. Cal. Mar. 29, 2013) 947 F. Supp. 1128, 1136-37 [at pleading stage, allegation that "[t]here is nothing in the layout and/or design of AT & T Mobility stores that would interfere with the addition of seating for the retail employees" was sufficient to "state a claim for a violation of Wage Order Section 14(A)."].) Even in a case where the plaintiff can establish that the "nature" of her work would reasonably permit the use of a seat, she must still prove that a suitable seat exists but was not provided. The "suitable seat" requirement is an independent element of the regulation.[26] Thus, establishing that a suitable seat exists is an essential element of plaintiff's claim, for which plaintiff bears the burden of proof.

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[26] Nor does Section 14(A) state or suggest that the non-existence or impracticality of a seat is an affirmative defense to a suitable seating claim, such that the employer would bear the burden of proof. Had the IWC intended such an interpretation, it would certainly have drafted Section 14(A) with such language, such as: "unless the employer proves that the nature of the work does not reasonably permit the use of seats...."

Petitioners erroneously argue that "[a]n 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)." (AOB-42.) Petitioners' argument is contrary to the Wage Order and, thus, fails. The Wage Order itself makes no distinction between cases where the employer already provides some seating (which may or may not be "suitable") and where the employer provides no seating. Thus, Petitioners' argument that they should be excused from proving one of the *prima facie* elements of their claim in cases where no seats are provided finds no support whatsoever in Section 14. If there is no suitable seat that could be provided – regardless of whether the nature of the work would reasonably permit the use of a seat – an employer could not violate the Wage Order.

Moreover, Petitioners' tortured construction necessarily requires reading the term "suitable" out of the Wage Order. Liability cannot be imposed simply by failing to provide *any* seat; rather, the Wage Order specifically refers to the employer's provision of a "suitable" seat. As the court in *Garvey* concluded post-trial:

> The Court would be exceedingly reluctant to order Kmart to use a seating system that poses a safety hazard. Put differently, as to the proposed design modification, plaintiff has the burden to prove that "suitable seating' exists. Suitable seating must mean safe seating. Class counsel have failed to prove this aspect of their case.

(*Garvey*, 2012 WL 6599534 at *9.) As an essential element of their claim, Petitioners bear the burden of proving that there is a "suitable" seat Chase failed to provide that reasonably permits employees to carry out the nature of their work.[27]

VIII. CONCLUSION

For the foregoing reasons, the answers to the Ninth Circuit's Certified Questions should be as follows:

1. The phrase "nature of the work" as used in Sections 14(A) and (B) is to be viewed holistically, with courts considering the same factors as the agency tasked with enforcing the Wage Order (the DLSE). Specifically, courts will consider "all available facts and conditions" regarding the employee's job, including: (1) the physical layout of the workplace; (2) the employee's work functions; (3) the expected job duties as defined by the employer; (4) the views of the employer as to the nature of the work; (5) the employer's business judgment; and (6) existing or historical industry or business practices. Courts must consider the entire range of an employee's duties, not just individual tasks or duties.

1(a). Under Sections 14(A) and (B), the particular amount of time an

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[27] Petitioners devote a considerable amount of their Question 3 discussion to the issue of whether employees must request a seat. (AOB-43-44.) This issue never arose in federal court proceedings. Even if it had arisen, the question of whether an employee must request a seat has nothing to do with whether the employee has to prove that there is a suitable seat that could be provided – regardless of whether a request was made.

employee spends on tasks that reasonably allow the use of a seat is not dispositive in determining the "nature of the work."

2. To determine the "nature of the work" for a given employee, courts must consider "all available facts and conditions" regarding the employee's work, including: (1) the physical layout of the workplace; (2) the employee's work functions; (3) the expected job duties as defined by the employer; (4) the views of the employer as to the nature of the work; (5) the employer's business judgment; and (6) existing or historical industry or business practices.

3. In order to establish a violation of Section 14, the plaintiff bears the burden of proving that a "suitable seat" could have been provided by the employer when the nature of an employee's work reasonably permits the use of that suitable seat.

The employers, jobs, and job duties in California have changed enormously since the first versions of the Wage Orders were issued in the early 20th century. More changes in the future are assured. In answering the Ninth Circuit's certified questions, the Court must not only consider the impact of its answers on the thousands of different jobs, employees, and employers present in California today, but also the jobs, employees, and employers California will host in the future. The holistic, multi-factor approach to the Wage Order's seating requirements – an approach that considers all facts and circumstances – has proved for decades to be

a sound way to address California's vibrant and diverse employment and workplace conditions. This Court should not depart from this approach now.

Dated: June 11, 2014

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IX. CERTIFICATION OF COMPLIANCE

Pursuant to Rule 8.204(c)(1), California Rules of Court, the undersigned herby certifies that the Answer Brief of Respondent JPMorgan Chase Bank, N.A. contains 12,194 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce this brief.

Dated: June 11, 2014

MORGAN, LEWIS & BOCKIUS LLP

By _____
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CERTIFICATE OF SERVICE

I, Davace Chin, declare and certify as follows:

I am a resident of the State of California, County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is One Market, Spear Street Tower, San Francisco, California 94105.

On June 11, 2014, I served on the interested parties in this action the within documents entitled:

ANSWER BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A.

BY UNITED STATES POSTAL SERVICE, following ordinary business practices for collection and processing of correspondence with said service, and said envelope will be deposited with said overnight mail service on said date in the ordinary course of business.

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

Executed on June 11, 2014, at San Francisco, California.

Davace Chin