Supreme Court Case No. S224611

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CHRISTOPHER MENDOZA, an individual, on behalf of himself and all other persons similarly situated,
Plaintiff-Appellant-Petitioner,

MEAGAN GORDON,
Plaintiff-Intervenor-Petitioner,

v.

NORDSTROM, INC., a Washington Corporation authorized to do business in the State of California,
Defendant-Appellee-Respondent.

After a Request by the United States Court of Appeals for the Ninth Circuit
Consolidated Case Nos. 12-57130 and 12-57144

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF NORDSTROM, INC.

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APPLICATION TO FILE BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF NORDSTROM, INC.

The National Retail Federation ("NRF") is the world's largest retail trade association. It represents discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs — 42 million working Americans. Contributing $2.5 trillion to annual gross domestic product, retail is a daily barometer for the nation's economy.

As the retail industry umbrella group, the NRF periodically submits amicus curiae briefs in cases raising significant legal issues, including employment law issues, that are important to the retail industry. Pursuant to rule 8.520(f) of the California Rules of Court, the NRF respectfully applies for leave to file the accompanying amicus curiae brief in support of Respondent Nordstrom, Inc., which application is hereby joined by the National Association of Manufacturers. The NRF is familiar with the contents of the parties' briefs.

The NRF has an interest in this action because it concerns issues of great significance to its members and the retail industry as a whole, particularly with respect to how employees are scheduled for work, when they may be scheduled, the degree of autonomy an employee may have in taking advantage of flexible scheduling options, and whether and to what extent an employer must police its employees in their attempts to exercise that autonomy. Additionally, until the statutory ambiguities identified by

the Ninth Circuit are resolved, the NRF's members will continue to operate under a cloud of uncertainty and the threat of class action litigation.

The same is true of the National Association of Manufacturers with respect to its members and industry as a whole. The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.09 trillion to the U.S. economy annually, and has the largest economic impact of any major sector. The NAM is the voice of the manufacturing community and the leading advocate for helping manufacturers compete in the global economy and create jobs across the United States.

Assisting with the interpretation and development of a statutory framework that is clear, that aids the NRF's members in complying with their obligations, and that operates for the benefit of both NRF members and their employees is a central component of the NRF's mission. The NRF, joined by the NAM, therefore respectfully requests that it be permitted to file the following brief for the Court's review and consideration.

Dated: November 20, 2015

Respectfully submitted,

SCHIFF HARDIN LLP

By: _____

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208(e)(3) of the California Rules of Court, there are no interested entities or persons to list in this certificate.

Dated: November 20, 2015

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BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF NORDSTROM, INC.

I. INTRODUCTION

This case is one of statutory interpretation. Neither Respondent, nor the NRF, seeks to deny "one day's rest in seven" for all eligible California employees. Rather, Respondent and the NRF contend that the statute must be interpreted in a way that is reasonable, practical, and that confers the most benefit on both employees and employers in this State. Indeed, an employee's right to take a day's rest is not the issue in dispute; it is whether employees should have a say in the exercise of that right. The NRF believes they should.

The NRF submits that the positions advanced by Petitioners here do their fellow California employees a disservice. Most California employees will be harmed—not helped—if Petitioners' arguments are adopted. Employers will no longer be able to provide the degree of flexibility and autonomy that employees deserve in managing their work schedules; even less so if an employer must police its own employees and "protect" them from the exercise of their own free will. The NRF therefore respectfully urges this Court to adopt the arguments advanced by Respondent.

II. ARGUMENT

A. The Workweek Is the Proper and Most Reasonable Framework for Calculating the Required Day of Rest Under Labor Code Section 551.

Section 551 should be interpreted to provide for a day of rest on a fixed, weekly basis. It should not be interpreted, as Petitioners urge, to impose unmanageable policing and monitoring requirements on employers that will only operate to the detriment of their employees. Respondent's

brief catalogs the broad array of reasons why, under the traditional canons of statutory interpretation, the defined, weekly measuring period best effectuates the Legislature's intent and purpose. The NRF does not seek to duplicate those efforts here. Rather, the NRF, on behalf of retailers at every level of the economy throughout the United States, seeks to identify the important policies that will be advanced by this proper interpretation.

1. Section 551, when read in harmony with the statutory scheme, requires a workweek-based interpretation.

In order for applicable statutory provisions of the Labor Code to be read in harmony, the required day of rest must be calculated on a defined, weekly basis, and not for any undefined, consecutive-day period. Section 551 cannot be analyzed in a vacuum; the statute and the statutory scheme must be construed as a whole. *See, e.g., Lakin v. Watkins Assoc. Indus.* (1993) 6 Cal.4th 644, 659 ("The meaning of a statute may not be determined from a single word or sentence . . . ."). Indeed, "the words of a statute [must be construed] in context, . . . harmoniz[ing] the various parts of an enactment by considering the provision at issue in the context of the statutory framework as a whole." *Cummins, Inc. v. Sup. Ct. (Cox)* (2005) 36 Cal.4th 478, 487. In performing this analysis, two examples of the Labor Code's embrace of a week-based measuring period are particularly striking: (1) the explicit reference in Section 556—titled "Application of §§ 551 and 552"—to a "week[ly]" measuring period; and (2) the Legislature's adoption of a fixed, weekly measuring period for calculating overtime pay. *See* Cal. Lab. Code § 510 (granting overtime pay for "any work in excess of 40 hours in any one **workweek** and the first eight hours worked on the seventh day of work in any one **workweek**") (emphasis supplied).

From the standpoint of an employer seeking to comply with its various legal obligations while scheduling employees for work, it would be unreasonable to be forced to calculate overtime using one measuring framework, and rest days using an entirely different framework, *particularly when the two statutes overlap as they do in the context of seventh day overtime premium pay.* As the Labor Code and the DLSE's interpretive guidance make clear, the seventh day overtime premium pay is designed to compensate employees who, for whatever reason, are denied the opportunity for a day off "*during the workweek.*" It does not compensate employees for work on a seventh *consecutive* day. In order for these various provisions of the same labor code to be read in harmony, as they must, the required day of rest must be calculated on a defined, weekly basis, and not for any undefined, consecutive-day period.

2. Comparable statutes in other states are illustrative and further demonstrate that the workweek is the appropriate measuring period for calculating the required day of rest.

In certifying the questions to this Court, the Ninth Circuit noted that the statute was unclear, and that there was no legislative or judicial guidance in California to assist in the interpretation. "Where, as here, there is no California case directly on point, foreign decisions involving similar statutes . . . are of great value to the California courts." *RSL Funding, LLC v. Alford* (2015) 239 Cal.App.4th 741, 746 (quoting *Martinez v. Enterprise Rent-A-Car Co.* (2004) 119 Cal.App.4th 46, 55)). Such authorities are of course persuasive rather than precedential. Nevertheless, they provide a useful context, and illustrate the ways in which other states have sought to protect employees under similar circumstances. While the number of states

that have enacted rest day legislation is limited, New York and Illinois, the fourth and fifth-most populous states in the country respectively, have enacted comparable legislation that explicitly provides for a workweek-based calculation.

New York's applicable rest day law provides: "Every employer operating a . . . mercantile establishment . . . shall, except as herein otherwise provided, allow every person employed in such establishment . . . at least twenty-four consecutive hours of rest **in any calendar week**." N.Y. Lab. Law § 161(1) (2015) (emphasis supplied).

Illinois' rest day law similarly states: "Every employer shall allow every employee except those specified in this Section at least twenty-four consecutive hours of rest **in every calendar week**." 820 Ill. Comp. Stat. Ann. 140/2 (2015) (emphasis supplied). Under both the New York and Illinois statutes, the calendar week refers to a fixed, defined workweek, beginning with the same calendar day each week, analogous to the "workweek" at issue here as defined under section 500 of the California Labor Code. *See* N.Y. Lab. Law § 161(3); 820 Ill. Comp. Stat. Ann. 140/4; Cal. Lab. Code § 500(b).

As indicated, the legislatures in New York and Illinois have unambiguously selected a week-based approach as the appropriate method for determining an employee's entitlement to a day of rest. The approaches taken by the policymakers in those states to protect their workers are instructive and should further guide the Court's analysis here. Using a weekly measuring period strikes the proper balance between protecting the health, safety, and welfare of employees and aiding employers in securing those protections through flexible, reliable, and practical scheduling practices.

3. The policy of promoting flexibility in workplace scheduling is advanced by a workweek-based construction.

As a practical matter, a workweek-based construction offers substantial benefits to both employees and employers that a rolling seven-day standard would deny. Calculating rest days based on consecutive days worked would create rigid scheduling requirements for employees, effectively mandating that an employee take the same day off each week. (*See* Resp. Ans. Br. ("RAB"), pp. 35-37.) Additionally, it would impose unmanageable policing requirements on employers in scheduling their employees. In order to comply, employers would no longer be able to permit employees to freely exchange shifts with one another for fear of unwittingly scheduling an employee to work on a seventh consecutive day. As a result, California employees who seek flexibility in workplace scheduling would not be afforded that benefit.

If the already complex web of interests that must be navigated when scheduling employees is further complicated with a rest day requirement based on a rolling seven-day period, the scheme quickly becomes unworkable. And in that case, as employers retreat from providing flexible scheduling options, it will be the employee who bears the brunt of the burden. For example, where an employee might have simply traded a shift so as to accomplish a personal objective without losing worktime, such as taking a day to deal with an unexpected emergency, the employee will instead have to choose between the two. Flexibility, reliability, and greater work-life balance are achieved for both employers and employees when a workweek-based measuring period is utilized. For each of the foregoing

reasons, the NRF urges this Court to adopt the construction of Section 551 advanced by Respondent.

B. The Policies of Encouraging Employee Flexibility and Autonomy in Scheduling Support Respondent's Interpretation of the Plain Language of Labor Code Section 556.

Labor Code section 556 provides: "Sections 551 and 552 shall not apply to any employer or employee when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Cal. Lab. Code § 556. As the text plainly states, the 30-hour weekly limitation and the 6-hour daily limitation—separated by the word "or"—are disjunctive clauses and therefore operate as two independent and alternate inquiries for application of the rest day laws. (*See* RAB, pp. 39-41.) If either threshold condition is met, *i.e.*, if an employee does not work more than 30 hours in one week, or if an employee does not work more than six hours in any one day of the week, Sections 551 and 552 do not apply. (*Id.*)

There does not appear to be any dispute as to the application of the exemption for employees who do not exceed 30 hours per week. Rather, the parties dispute how "six hours in any one day thereof" should be interpreted. The NRF supports the interpretation of Respondent because giving credit to Petitioners' argument would deprive employees of any reasonable control. To illustrate, in a situation where the 30-hour exemption does not apply (*i.e.*, an employee works more than 30 hours in one week), there are two possible scenarios: (1) an employee works ***not more than*** 6 hours on each day of the week; and (2) an employee works ***more than*** 6 hours on at least one day of the week, but 6 hours or less on each of the remaining days.

Scenario 1:

Sun	M	T	W	Th	F	Sat	Total
6	6	6	6	6	6	Per Petitioner's argument, **NO REST**	36

Scenario 2:

Sun	M	T	W	Th	F	Sat	Total
6.5	6	6	6	6	5.5	Per Petitioner's argument, **MUST REST**	36

In each of the above scenarios, for the sake of comparison, the employee has worked 36 total hours through Friday. In the first, the employee works no more than six hours on *each* day. In the second, the employee works more than six hours on just one day. Under Petitioners' interpretation, as noted in the Saturday column above, an employee would not be entitled to a day of rest in the first scenario. In the second, however, despite working the same number of hours in the week and a nearly identical schedule, an employee would be prohibited from working on a seventh day merely because he or she worked for 6.5 hours on one day.

It is easy to see how the second scenario could be revised to further reduce the hours worked on any day (excepting Sunday) such that the total hours worked in Scenario 2 is less than the total hours in Scenario 1. For example, as illustrated in Scenario 3 below, the employee in Scenario 2 could work five hours per day, Monday through Friday, for a weekly total of 31.5 hours. Yet under Petitioner's interpretation, the employee would

still be prohibited from working on the seventh day, which further demonstrates the inherent inconsistency in Petitioners' proposed construction.

Scenario 3:

Sun	M	T	W	Th	F	Sat	Total
6.5	5	5	5	5	5	Per Petitioner's argument, **MUST REST**	31.5

It is clear from the above that the interpretation urged by Respondent most closely conforms to the language of the statute, maintains flexibility in scheduling, and most strongly protects an employee's right to work, *or at least have a say in the matter*. Indeed, where the employee in Scenarios 2 or 3 would otherwise prefer to work that seventh day, whether for increased wages, benefits, or to take a longer vacation in the future, Petitioners' interpretation would deprive the employee of that choice. Respondent's approach protects an employee's freedom of choice, and the NRF therefore urges this Court to adopt the interpretation advanced by Respondent.

C. "Cause," as Used in Labor Code Section 552, Must Be Interpreted to Mean "Require" in Order to Remain Consistent with the Plain Meaning of the Statute and the Policies Supporting Employee Flexibility in Scheduling.

Petitioners err in contending that "cause" should be stripped of its forceful, active definition and instead be read to mean something as meek and passive as "to permit." Petitioners offer no support for their efforts to give "cause" a meaning that the word has never known. Respondent's brief thoroughly addresses the statutory and linguistic bases for why "cause," as used in the statute, maintains its traditional, "compulsory" definition. (*See*

RAB, pp. 50-58.) For these and each of the following reasons, this Court should adopt the interpretation urged by Respondent.

1. The reasoning of this Court in *Brinker Restaurant Corp.* with respect to an employer's meal period obligations should be applied to an employer's duties under the rest day laws.

As the Ninth Circuit recognized in certifying the question to this Court, the parallels between an employer's obligation to provide a day of rest and to provide meal and rest breaks to its employees are substantial. In *Brinker Restaurant Corp. v. Superior Court (Hohnbaum)* (2012) 53 Cal.4th 1004, this Court held that an employer must relieve an employee of all duty during the requisite break, but that the employer has no duty to ensure that the employee does not in fact choose to continue working during that time. *Id.* at 537-38. The Court reached this conclusion by reasoning, among others, that: (1) nowhere does the relevant statute provide that an employer must actively prohibit employees from working during their meal period; and (2) ensuring an employee does no work is inconsistent with an employer's obligation to relinquish any control over the employee during that period. Those same principles apply here.

Like an employer's duty to provide a day of rest, an employer's obligation to provide a meal period is stated in two separate statutes. Section 512(a) sets forth an employee's entitlement to a meal break, stating the employer's obligation to "provid[e] the employee with a meal period," while Section 226.7(b) states that an employer "shall not require" an employee to work during a meal period. Cal. Lab. Code §§ 226.7(b), 512(a). The day of rest statutes follow the same scheme: one states the employee's entitlement to a day of rest (Section 551), while the other states

that the employer may not actively interfere with that right (Section 552). These similarities in the statutory structure and in the nature of the rights to be protected should guide this Court's analysis of the meaning of "cause" in Section 552. Just as this Court reasoned in *Brinker* with respect to Section 226.7, nowhere does Section 552 provide that an employer must prohibit an employee from working on his or her day of rest.

Furthermore, if an employer's obligation toward an employee on his or her day of rest is to "relinquish any employer control over the employee," then an employer can only fulfill this duty by exercising no control over "*how he or she spends the time.*" *See Brinker Rest. Corp.*, 53 Cal.4th at 1038-39 (emphasis supplied). If the time is truly free and belongs to the employee, then the employee should not be prevented from electing to, for example, take another employee's shift on what would otherwise be a day of rest. Indeed, if an employee chooses to give up his or her right to a rest day, the employer should not be required to prevent the employee from doing so.[1] To hold otherwise would deny the employee the exercise of his or her own free will and would substitute the judgment of this Court for what the employee considers to be in his or her own best interest. And in such a situation, it is unlikely that an employer's effective statement of, "Don't worry, it's for your own good," would be of much comfort or benefit to the very employees the statute is designed to protect.

---

[1] This approach especially benefits those employees who, desiring to earn more money, would find other employment during a forced day off from one employer. While the employee would have been able to earn overtime wages by continuing to work for his or her regular employer, the employee would be denied the benefit of premium pay at the second place of employment.

2. Comparable statutes and judicial decisions in other states should further guide this Court in properly determining that "cause," as used in Section 556, means "to require."

As discussed above, the practices of other states are instructive and should aid this Court in determining that "cause," as used in Section 556, maintains its literal definition of "to require." *See, e.g., RSL Funding, LLC v. Alford* (2015) 239 Cal.App.4th 741, 746.

The applicable rest day statute in Texas—the second-most populous state in the U.S. behind California—provides that an employer "may not **require**" an employee to work on his or her day of rest. Tex. Labor Code Ann. § 52.001(a) (2015) (emphasis supplied). Furthermore, an employee is free to volunteer for work on the seventh day, and in such case, a Texas employer is not held liable for that employee's exercise of his or her right. *Id.* § 52.003(c).

The comparable statute in Illinois similarly states that "no employee shall be **required** to work on the day of rest so designated for him." 820 Ill. Comp. Stat. Ann. 140/4 (2015) (emphasis supplied). Just as Texas permits employees to voluntarily work on a day of rest, Illinois defines "required" under its rest day statute to mean "that all such work on the seventh day of the week must be voluntary on the part of the employee involved." Ill. Admin. Code tit. 56, § 220.125 (2015).

In interpreting the comparable New York rest day statute, which provides that an employer must "allow" one day of rest in any calendar week (N.Y. Lab. Law § 161), the case of *Tanner v. Imperial Recreation Parlors* (N.Y. App. 1943) 265 A.D. 371, 39 N.Y.S.2d 99, is instructive. There, the plaintiff, who had not designated a day of rest, brought suit seeking additional wages for all instances in which he had worked seven

days in a week. *Id.* In noting that the employer "could not *compel* the plaintiff to work more than six days per week," the court also stated that "[t]he employee was not forbidden to work on his day of rest," and that he might, "under the statute, make any contract he saw fit as to hours and wages." *Id.* at 373, 375 (emphasis supplied).

Here, so long as an employer does not "cause" an employee to work on his or her statutorily-entitled day of rest (whether through forced scheduling, incentives, or some other form of undue influence designed to impede or discourage rest days), an employee should be free to work if he or she so chooses. This approach is consistent not only with the text of the statute, but also with the aims of the policy goals to be achieved. Accordingly, the NRF urges this Court to include California among those states that protect the free choice of their employees.

III. CONCLUSION

For each of the foregoing reasons, and for the additional reasons articulated in Respondent's Answering Brief, the NRF, on behalf of retail employers large and small throughout California, urges this Court to adopt the positions advanced by Respondent.

Dated: November 20, 2015

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rule of Court, I certify that this brief is proportionally spaced in Times New Roman, has a typeface of 13 point, and contains 3,237 words as counted by Microsoft Word 2010, the word-processing program used to generate this brief.

Dated: November 20, 2015 SCHIFF HARDIN LLP

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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare as follows:

I am over the age of eighteen years and not a party to this action. My business address is One Market, Spear Street Tower, 32nd Floor, San Francisco, California. On the date stated below, at San Francisco, California, I served the attached document on the parties in this action as follows:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF NORDSTROM, INC.

☒ BY OVERNIGHT DELIVERY: By placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery addressed as set forth below (pursuant to C.C.P. §1013).

(SEE ATTACHED SERVICE LIST)

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

Executed this 20th day of November 2015, at San Francisco, California.

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