S215614

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

NYKEYA KILBY,
Plaintiff/Petitioner,

v.

CVS PHARMACY, INC.,
Defendant/Respondent.

KEMAH HENDERSON, et al.
Plaintiffs/Petitioners,

v.

JP MORGAN CHASE BANK, N.A.
Defendants/Respondents.

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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

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APPLICATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

INTRODUCTION

Pursuant to the California Rules of Court, rule 8.520(f), the undersigned respectfully request leave to file the attached brief on behalf of the Chamber of Commerce of the United States of America and the California Chamber of Commerce as *amici curiae* in support of Respondents CVS Pharmacy, Inc., and JP Morgan Chase Bank, N.A.[1]

THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matter before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The California Chamber of Commerce ("CalChamber") is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of

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[1] *Amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

California. For over one hundred years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have one hundred or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory and legal issues. CalChamber often advocates before federal and state courts by filing *amicus curiae* briefs in cases, like this one, involving issues of paramount concern to the business community.

Amici are referred to collectively herein as the "Chambers."

INTEREST OF *AMICI CURIAE*

The Chambers seek permission to file this brief to assist this Court in understanding the perspective of the business community on the so-called "suitable seating" regulation at issue in this matter. The outcome of this proceeding has the potential for widespread and significant impact on many different businesses that operate in this state. *Amici*, as organizations devoted to advancing the interests of commerce, are well positioned to address the significant, real-world business ramifications of departing from longstanding industry norms and California's historical enforcement positions, and in the process, giving insufficient consideration to the business judgment of the employers who created the affected job positions in the first place.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court accept the accompanying brief for filing in this case.

Dated: August 29, 2014

Respectfully submitted,

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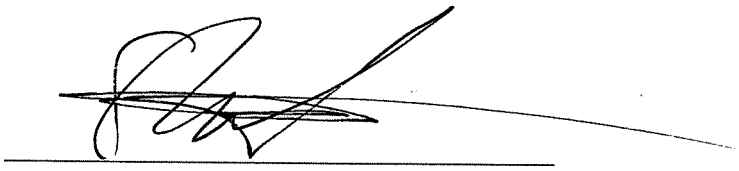

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CALIFORNIA CHAMBER OF COMMERCE

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CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND CALIFORNIA CHAMBER OF COMMERCE

BRIEF AS *AMICI CURIAE*

SUMMARY OF ARGUMENT

Many businesses with operations in California are subject to the "suitable seating" regulation at issue here because it appears in nearly all of the Industrial Welfare Commission ("IWC") Wage Orders. This terse regulation has been in place for decades, and no government agency or union has ever made any concerted effort to challenge the open and ubiquitous practice whereby retail cashiers (or bank tellers) perform their duties while standing. Indeed, the administrative guidance that has been issued by the Division of Labor Standards Enforcement ("DLSE") demonstrates that the regulation was not intended to have any wide-ranging impact on existing business practices.

Employers and industry groups have understandably and reasonably relied on this long history of acquiescence to their well-established practices—not only when designing their business practices and workplaces, but also when deciding whether and to what extent to participate in the regulatory rulemaking process. After all, if it was understood that the IWC had been adopting a regulation that would require retailers, banks and many other industries to abandon nationwide industry practices in California and make massive changes to job functions and

design layouts, there surely would have been (and definitely should have been) a robust rulemaking process with meaningful input from these businesses. There was not, and the novel interpretation urged by Petitioners in this proceeding would run contrary to this historical record, resulting in unfair surprise and exposing California employers to staggering potential liability for unjust civil penalties.

Furthermore, allowing such a legislation-through-litigation result would not only impose an unexpected hardship on California businesses, but it would simply not work in the real world, as applied to real jobs. Petitioners urge an interpretation that would artificially examine discrete job tasks as opposed to evaluating the realistic and overall nature of the work. Petitioners' urged approach ignores and, indeed, declines to consider relevant information such as the purposes of the job as a whole and the myriad reasons (e.g., ergonomics, customer service, loss prevention) why an employer might determine as a matter of business judgment that work should be performed while standing. The approach urged by Petitioners here is unworkable in practice and would do little more than create an uncertain and under-informed standard that would generate untold amounts of lawyer-driven litigation.

By contrast, the holistic approach advocated by Respondents, and urged by the DLSE, takes into account all available information about the work at issue—including vital factors such as the employer's business

judgment as to whether the work can be performed effectively while standing, the layout of the workspace, and the physical characteristics of the employees carrying out the work. In doing so, this approach considers the judgment of the employer, i.e., the entity that created and designed the job in question in the first place and thus has the best insight into the nature of the work and how it can be best performed. Significant if not paramount consideration of the employer's judgment is particularly appropriate here where the practice at issue has been open and ubiquitous, there has been a consistent historical enforcement approach, and there has been no notice of the need for extensive engagement by industry in the rulemaking process.

For all of these reasons, and as explained in greater detail herein, the Chambers respectfully urge this Court to respond to Question 1 by adopting a holistic approach in evaluating the "nature of the work." As to Question 2, which asks whether factors such as the employer's business judgment and the physical layout of the workplace should be considered in determining whether work reasonably permits the use of a seat, the Chambers respectfully urge this Court to answer in the affirmative.[2] Indeed, because Petitioners are attempting to use litigation to circumvent past enforcement positions (not to mention established national industry

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[2] The Chambers also support Respondents' position as to Questions 1(a) and (3), though this brief does not directly address those questions.

standards), the consideration given to such factors should be substantial if not paramount.

ARGUMENT

As this Court is well aware, the actions pending before it on certification from the United States Court of Appeals for the Ninth Circuit are just two in a series of nearly simultaneously filed suits by a few groups of lawyers asserting that the decades-old practice whereby retail cashiers stand behind checkout counters violates California law and thus (a) entitles plaintiffs to recover potentially massive class-wide civil penalties and attorneys' fees; and (b) requires national retailers and others (including for example the bank defendant sued here) to create unique and all-new business practices in California. Of course, there has in the past been no overt legislative or regulatory effort to effectuate such a monumental change and mandate that these jobs be performed by seated employees, nor has there been any concerted union effort to that effect. Instead of seeking to effectuate such change through regulation or collective bargaining, Petitioners here seek to reverse a decades-old and industry standard practice through litigation.[3]

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[3] Petitioners openly reveal their intent: "A construction ... that requires individual adjudication of every employee's seating situation and great deference to industry custom and employer preference would eliminate the only effective remedies available to redress this kind of workplace grievance, *i.e.*, class and representative actions." (Reply Brief at p. 3.) Of course, the proper way to address any grievance is not to alter the

Because Petitioners are seeking to engage in policy-making through litigation, and because of the potential for staggering liability, the Chambers submit that if such litigation is allowed to proceed at all, it is critical that the seating provision be interpreted in a way that makes sense in the real world, as applied to real jobs. Such an approach should give significant consideration to the judgment of the employers who designed those jobs (and the associated workspaces) to best meet the specific needs of their customers and their employees.

Although the Chambers support Respondents' position as to all of the Questions Presented in this proceeding, this brief focuses in particular on the first two Questions:

1. Does the phrase "nature of 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?

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

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law to facilitate class actions after the fact but rather to pursue a meaningful, regulatory rule-making process whereby regulators can balance competing interests and (1) determine if they wish to reverse decades of industry custom; and (2) if so, adopt understandable and prospective rules on the subject.

employee should stand, the physical layout of the workplace, or the physical characteristics of the employee?

Question 1: The Chambers strongly urge a holistic approach that looks to the entire range of an employee's duties. As explained below, focusing on individual tasks is unworkable in practice and, among other things, does not adequately account for the employer's purposes in creating a particular job or the many reasons an employer may deem standing required.

Question 2: The Chambers submit that not only should courts consider these real world factors (the employer's business judgment, the physical layout of the workplace, and the physical characteristics of the employee) when determining whether the nature of the work reasonably permits the use of a seat, but that the consideration given to the judgment of the employer who created and maintains the specific position in question should be paramount. This is particularly warranted here because retailers and other employers were not on notice that the Wage Order provision at issue might be construed to require seats where not traditionally provided. Had employers been on such notice, they would have surely participated in the rulemaking process with the same vigor with which they are contesting these unprecedented lawsuits, and their judgments would have been considered as part of a clear and deliberate legislative and regulatory process. Accordingly, to the extent private plaintiffs are allowed at all to

seek to impose such a rule through litigation,[4] the employers' judgment must be given paramount consideration to avoid unfair surprise.

I. BACKGROUND

The underlying lawsuits at issue in this proceeding are two of many admittedly lawyer-contrived cases asserting that the "suitable seating" provision somehow bars certain decades-old industry practices, such as the practice of having retail cashiers perform their duties while standing.[5]

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[4] In one of the first of the now many suits on this issue, the California Superior Court for the County of Los Angeles sustained a demurrer to the action on the ground that the plaintiff could not state a cause of action because the Labor Code (when read with the pertinent regulations) does not provide for penalties under the "suitable seating" and other workplace regulations if the employee suffers no actual loss of wages. The Court of Appeal reversed this decision. (See *Bright v. 99 Cents Only Stores* (2010) 189 Cal.App.4th 1472. This Court denied a petition for review, but Justice Baxter stated that the petition for review should have been granted. (See *Bright v. 99 Cents Only Stores*, review denied Feb. 16, 2011, S189216.)

[5] Specifically, there is one cashiering case (*Kilby*) and another case involving bank tellers (*Henderson*). Because the issues have been framed by the parties in those factual contexts, this brief focuses in many respects on those same contexts. It is important to recognize, however, that the identical regulation applies in many industries in California. In addition to the sixteen industry-specific wage orders, (see Cal. Code Regs., tit. 8, §§ 11010-11160 [Wage Orders 1-16]), Wage Order 17 covers all other industries (see Cal. Code Regs., tit. 8, § 11170 [applying to "Miscellaneous Employees"]). The same suitable seating language appears in all of these wage orders except Nos. 14 ("Agricultural Occupations") and 16 ("Certain On-Site Occupations in the Construction, Drilling, Logging and Mining Industries"), which have different, industry-specific language. (Cal. Code Regs., tit. 8, §§ 11140, 11160.) Thus, it remains to be seen which other heretofore standard industry practices will come under fire and generate future waves of litigation if the approach urged by Petitioners is adopted by this Court.

These lawsuits were not the result of a groundswell of employee dissatisfaction with longstanding national practices, but rather the contrivance of lawyers attempting to exploit this regulation to pursue large penalty and attorney fee awards. Of course, as compared to agency enforcement proceedings, private litigants and their counsel simply do not have the same incentives to harmonize remedial purpose with the avoidance of unfair surprise nor do they have the same incentive to advance workable interpretations that serve the interests of businesses and employees alike. It is therefore vital that agency interpretation and enforcement history, and the resulting expectations on which industry has relied for decades, inform this Court's decision here.

A. Pertinent History Of The Seating Provision

The history of the suitable seating provision indicates that it was first intended to apply to seamstresses[6] and other machine operators who could perform their work while sitting with no effect on productivity or quality. (See ER75 [original 1919 Wage Order requiring (a) a certain number of seats for use by employees when not engaged in active duties, and (b) to the extent "the nature of the work permits," in "any room where

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6 As the parties have noted, the Wage Orders originally regulated only work by women and children. (E.g., AOB at p. 24; JPMorgan Chase Answer Brief at p. 4; ER 75.)

manufacturing, altering, repairing, finishing, cleaning, or laundering is carried on," adjustable seats at "work tables or machines"].)

The language of the regulation has subsequently evolved in two significant ways. First, the provision now, through either section 14(A) or 14(B), covers "all working employees." Second, it has moved from a conjunctive to a disjunctive structure. In its current form, section 14(A) provides that "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Section 14(B), on the other hand, applies when the nature of the work requires standing: "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." In other words, if the nature of the work requires standing, then the employer can satisfy the regulation by, for example, providing seats near the work area for use during down time such as mandated rest or meal breaks.

When promulgating this present language in 1976, the IWC explained that the extension of the suitable seating requirement to more industries meant the need for a "more flexible" requirement that was "more subject to administrative judgment as to what is reasonable." (Appellant's

RJN, Ex. 2 [1976 Statement of Findings] at p. 16 (Statement of Findings).)[7] At that time, the IWC also explained its continuing view that seating should be provided to employees *either* while working "*or*" during lulls in operations, "*when it is feasible.*" (*Ibid.*, italics added.) This underscores an important point: *Both* sections of this disjunctive seating provision serve its remedial purpose. Nothing in the provision suggests that employers are required to structure jobs so as to permit the use of a seat if at all possible. Instead, the regulation recognizes that not all jobs can be performed while seated (except perhaps during lulls in operations, if any); contemplates consideration of the "nature of the work" (not isolated tasks); and dictates that if the job does require standing, then providing seating in nearby rest areas is sufficient to satisfy the regulation.

B. Pertinent Enforcement History

As explained in Respondent CVS's brief, historical enforcement practices have informed employers' understanding as to what the suitable seating provision means. (See generally CVS Answer Brief at pp. 19-23, 35-36.) For example, and pertinent to the sorts of jobs at issue in this proceeding, in a 1986 opinion letter, the DLSE explicitly rejected the idea that the suitable seating provision required seats for retail salespeople:

> This section of the Order was originally established to cover situations where the work is usually performed in a sitting

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[7] The RJN cited here was filed in the Ninth Circuit proceeding.

> position with machinery, tools or other equipment. It was not intended to cover those positions where the duties require employees to be on their feet, such as salespersons in the mercantile industry.

(SER 252 [1986 DLSE opinion letter].)

More broadly, the DLSE made the observation that, in accordance with industry practice, such employees customarily performed their duties while standing:

> 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.

(*Ibid.*)

The DLSE went on to issue a second letter on January 13, 1987, further expounding on its interpretation of the suitable seating provision as applied to retail salespeople, reiterating that "this section was originally intended for work usually performed in a sitting position, e.g., typing" and observing that the "nature of the work for salespersons is such that it requires them to be mobile . . . ." (SER 254 [1987 DLSE opinion letter])[8] In making this observation, it is clear that the DLSE was considering the job of a retail salesperson as a whole, not any single particular duty

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[8] The DLSE further concluded that compliance with the provision, as to retail salespeople, required only that the employer provide adequate seating for use "during their rest periods." (*Ibid.*)

associated with the job. Indeed, the discussion centers around whether seats are required for a certain *type* of employee (there, salespersons) and not whether a seat is required for any particular job duty.

The DLSE has never initiated any enforcement action challenging the longstanding, ubiquitous practice whereby retail cashiers perform their jobs while standing, and this privately initiated set of suits appears to be the first challenge of any sort to this practice. Although Petitioners point to the fact that PAGA was enacted in part because existing enforcement resources were inadequate (AOB at p. 6), it strains credulity to think that there would have been no action whatsoever by the Labor Commissioner, over the course of several *decades*, against such a ubiquitous practice—one readily observable by anyone who has ever been shopping—if in fact the DLSE shared Petitioners' view that this practice violated the minimum standards of labor set forth in the Wage Orders. No matter how Petitioners attempt to reconcile their claims with the fact that no government entity or union ever sought to challenge this ubiquitous practice, they cannot erase the fact that employers understandably relied on these decades of acquiescence when creating job positions and physical designs in accordance with this longstanding, nationwide industry practice.

II. QUESTION NO. 1: THE ONLY WAY TO CONDUCT A REAL-WORLD ANALYSIS OF THE "NATURE OF THE WORK" IS THROUGH A HOLISTIC APPROACH.

As the DLSE did when evaluating whether seats were required for retail salespeople, courts should assess a given job holistically in evaluating the "nature of the work"—i.e., whether, as an overall matter, the job requires standing.[9] The employer's point of view is a key consideration in this evaluation, since it is the employer that creates the job in the first instance. An employer may create a job that requires the employee to stand for a variety of reasons. In the case of a retail cashier, for example, an employer may conclude that standing allows the cashier to present him or herself as attentive and respectful to customers, be seen more easily by the customers, safely move (often heavy) items through the check out process, minimize injuries and associated staffing disruptions and Workers Compensation costs, effectively monitor customers for theft, speak and exchange currency with the customer at eye level, and efficiently complete the check out and bagging process. Because the employer creates the job to meet its business needs, and because it is the employer who is best suited to

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[9] The DLSE's amicus brief in the recent *Garvey v. Kmart Corp.* case reaffirmed its position that the "nature of the work" should be interpreted holistically, considering "all existing conditions." (See Brief for the California Labor Commissioner as Amici Curiae, *Garvey v. Kmart Corp.*, (N.D.Cal. Dec. 7, 2012, No. C 11-02575) 2012 WL 10691472, at pp. 4-5 (hereafter DLSE *Garvey* Brief).)

judge the requirements of its business, the employer's judgment deserves paramount consideration.

A. Employers Create Jobs To Further Particular Business Purposes, And All Of Those Purposes Must Be Considered In Evaluating The Nature Of The Work.

Employers create jobs to further specific business purposes. The purposes of the job in turn inform how the work is most effectively performed. It is therefore critical to consider the reasons why a job exists—all of the business purposes that the employer sought to fulfill in creating that job—in determining whether the nature of the work requires standing. In this context, it would be absurd to suggest that the business needs that both create and sustain a job are irrelevant to this determination. Yet that is exactly what Petitioners advocate. (AOB at pp. 34-37.)

As applied in the *Kilby* case here, consider the cashiering role in terms of how it fits into the overall business of a retail enterprise. Petitioners appear to contend that cashiers add nothing to their stores beyond processing sales, i.e., mechanically ringing up customers. But the businesses that run the operations and employ the cashiers in question take a broader view of the job.

In reality, the key metrics typically used to measure performance in retail enterprises are, among other things, sales performance, labor usage, shrink (i.e., effective loss prevention), customer service, and store

cleanliness and appearance. Businesses hire and retain store employees including cashiers to further these goals, by, for example:

> - Contributing to sales performance by providing a respectful, efficient checkout experience that encourages customers to return;
>
> - Contributing to the minimization of labor usage by working as efficiently as possible and using all available time to the employer's benefit; if there are no customers who need to be checked out, cashiers are often expected to engage in other duties and not simply wait around for more customers to come up to the register;
>
> - Contributing to loss prevention and minimizing shrink by watching the store for suspicious activity, monitoring for potential theft, and ensuring that no one leaves the store without paying for their merchandise;
>
> - Contributing to customer service by projecting an image of readiness to assist and actively engaging in customer assistance tasks; and
>
> - Contributing to store cleanliness and appearance by maintaining the area around the register and, when there is a longer lull, by stocking items on shelves or retrieving carts from the shopping lot.

At many or perhaps most retailers, cashiers are generally expected to further most if not all of these purposes *at all times* while they are working. Viewed from the perspective of furthering these multiple business purposes, it is readily apparent why employers understandably and legitimately want their cashiers to stand, and it is no accident that the retail

industry has followed this practice across the entire nation for decades.[10] Nevertheless, Petitioners not only seek to reverse this practice and create a special standard for California, but they ask this Court to adopt a rule that effectively ignores the employer's many legitimate reasons for requiring standing when creating and maintaining the position.[11]

B. Employers Have A Right To Ensure That All Working Time Is Used Productively To The Employer's Benefit.

Closely related to the above point is the fact that employers have a right to expect that all working time is used productively to the employer's benefit. Obviously, some types of jobs do have lulls. A parking garage attendant, for example, may have nothing to do but wait for some portion of his or her shift, such as during an event when few customers need to park or

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[10] As one example, it is telling that Petitioners do not address the point raised by Respondent CVS about the loss prevention purpose of having retail cashiers work in a standing position. (CVS Answer Brief at p. 7.) It is beyond question that an employee who is standing up will have a much better sightline with which to monitor for theft and the ability to respond more quickly in the event of suspicious activity.

[11] To the extent Petitioners suggest that the employer's judgment is entitled to no consideration because it would not consider the well-being of the employees that the Wage Orders seek to protect (AOB at pp. 33-34), that suggestion is not only cynical; it is also manifestly wrong. Employees who become injured in the workplace (something that is exacerbated by allowing employees to perform duties while seated that are more safely performed while standing) cost their employers in terms of both Workers Compensation and lost productivity. As such, employers have ample incentive to create ergonomically responsible work environments. These same considerations illustrate why it makes sense to consider the physical characteristics of employees when evaluating the nature of the work.

retrieve their cars. If there were other things that the attendant could do during this down time to benefit the employer, of course, the employer would be free to define the job to require that attendant to fill his or her time with such duties.[12] But assuming there is truly nothing else to do but wait, this is the classic case of a "lull in operations" during which an employee might wish to sit down. This is the sort of situation anticipated by Section 14(B), which provides that when the nature of the work (in this example, parking cars) requires standing, seats must be provided in reasonable proximity for use during lulls in operations when it does not interfere with the performance of employees' duties.

But unlike the position of a parking lot attendant, which may have an inherent lull in job activity, many positions are designed so that there are no such lulls, other than required rest and meal breaks. To provide one example, when checkout lines are very short, a retail business may instruct one or more cashiers to help customers elsewhere in the store or help stock items. This is entirely legitimate, and a business should not be required to provide a seat and then pay employees for non-productive time simply because the job could hypothetically be restructured that way. Such an analysis would turn the regulation on its head, focusing on the hypothetical nature of the work, and not the actual nature of the work.

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[12] For instance, the employer may prefer to instruct parking attendants to patrol the lot to guard against vehicle theft or vandalism.

Furthermore, as the example above illustrates, even if a job that requires standing has lulls, the provision of seats in reasonable proximity to the work area is sufficient to satisfy the disjunctive suitable seating requirement.

C. A Holistic View Is The Only Way To Account For The Nuances And Complexities Inherent In Many Real-World Jobs.

The language of the regulation contemplates a holistic review to determine whether the "nature of the work requires standing". If it does, then the requirement can be satisfied by placing seats in reasonable proximity to the work area for use during lulls and other periods when sitting will not interfere with the work. In this fashion, the regulation contemplates that there will be times when an employee who is sometimes required to stand may encounter other periods (or even tasks) that he or she can perform while sitting. But, the regulation inherently focuses on whether the overall "nature of the work" requires standing.

Reality compels the same conclusion. Many jobs in the real world involve a frequently shifting mix of duties and do not involve just one or two tasks that are performed one at a time for long stretches. The hypotheticals discussed by Petitioners (see AOB at pp. 30-33) fail to address this reality. Although their tidy examples seem somewhat appealing at first blush, upon closer examination, all Petitioners have done is assumed away the many nuances that exist in most jobs in the real

world.[13] And in any event, neither Respondents nor the Chambers advocate the sort of count-the-duties approach that these simplistic hypotheticals are designed to undermine.

Nothing in the holistic approach, for example, precludes a finding that a classroom schoolteacher job as a whole reasonably permits the use of a seat (even though, as Petitioners note, some of a teacher's duties may involve standing). Then again, the same may not hold true of a gym coach or an outdoor education teacher where standing is actually required. Nor does anything in the holistic approach prevent an employer from providing a chair to a security employee who works in an enclosed room and exclusively monitors closed-circuit security footage in passive fashion.[14]

To take another of Petitioners' examples, it may or may not be reasonable to provide seats to those staffing a customer information counter

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[13] Of course, some jobs of that sort do exist—e.g., data entry operator. But such jobs are just as easily evaluated using a holistic approach as by looking only at specific duties in isolation. It does not make sense to adopt a rule that is workable *only* in the context of simple jobs with clearly defined discrete duties and not the more complex jobs prevalent in the modern economy.

[14] As Respondent CVS suggests, whether the job of a security guard reasonably permits the use of a seat depends on "whether there are disruptive standing-required tasks mixed in while Jake watches the monitors and whether the employer has a legitimate business reason for requiring the guard to stand, along with any other relevant circumstances." (CVS Answer Brief at p. 30.) Surely, there must be at least some measure of deference to security professionals in determining when it is reasonable to require a security guard to remain better situated to perform his or her duties by standing.

at a bookstore (AOB at p. 32), depending on the purposes animating the job and the full range of expected job duties. But Petitioners simply assume away the more likely real-world scenario in which the employer expects such employees to project a ready-to-assist attitude, actively approach and greet customers to see if they need assistance, promote sales, and/or constantly monitor the store for loss prevention purposes. Similarly, in a real job, it may be that time spent answering customer questions is interspersed with other activities—rather than being wholly segregated, as in Petitioners' artificial example. The point is that many modern-day employees have much broader job duties than the seamstresses and table machine operators that this regulation was first adopted to cover. After all, the question before this Court is whether an employer has *violated the law* by not providing a seat to an employee during the performance of the job that the employer created and is sustaining. Without a holistic approach that considers all facets of the job, including substantial consideration of the employer's business judgment, one cannot determine the overall nature of the work and whether the job reasonably permits the use of a seat.

III. QUESTION NO. 2: CONSIDERATION OF THE EMPLOYER'S BUSINESS JUDGMENT AND INDUSTRY NORMS IS IMPORTANT IN ORDER TO AVOID UNFAIR SURPRISE.

The Chambers respectfully submit that in determining whether the "nature of the work" reasonably permits the use of a seat, the employer's

business judgment should receive paramount consideration (or at least very substantial weight) because employers were not on notice that the suitable seating provision would be used to reverse a long-standing industry practice—one of which the IWC was obviously aware. As such, the business community effectively was deprived of the opportunity to present its views in the rulemaking process. Not only have businesses chosen to define jobs in reliance on historical experience, but they have also made substantial investments in designing and building workplaces based on industry norms and the DLSE's enforcement history. Giving substantial consideration to their business judgment here is consistent with principles of statutory construction and administrative law and would avoid manifestly unfair surprise.

A. It Is Appropriate To Consider Employers' Business Judgment Because The IWC Is Presumed To Understand The Customs And Usages Of The Industries It Regulates.

It is appropriate for courts, in interpreting a wage order, to regard the IWC as "having had in mind . . . the customs and usages of [the regulated] industry or activity." (*Irvine Co. v. Cal. Employment Com.*(1946) 27 Cal.2d 570, 581 [noting that it is a "settled principle" of statutory construction that the Legislature has customs and usages in mind]; *Butts v. Bd. of Trustees of the Cal. State Univ.* (2014) 225 Cal.App.4th 825, 835 [in determining the meaning of a regulation, California courts apply standard

tools of statutory construction] [citing *Hoitt v. Dept. of Rehabilitation* (2012) 207 Cal.App.4th 513, 523].)

In *Irvine Co.*, this Court considered whether the term "agricultural labor" within the meaning of a certain provision of the Unemployment Insurance Act applied to ancillary work such as carpentry or bookkeeping. (27 Cal.2d, *supra*, at pp. 573-574.) This Court reasoned that the Legislature, at the time of statute's enactment, was aware of the existence of large-scale farming operations that required significant ancillary labor. (*Id.* at p. 578.) Thus, this Court concluded that as long as ancillary work is essential to the production of crops, it is properly encompassed within "agricultural labor" because, in part, the industry understood it to include non-farming functions.[15] (*Id.* at pp. 582-583.)

Applying this principle, the IWC is presumed to have understood pertinent industry customs in promulgating the suitable seating provisions

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[15] The Court of Appeal more recently applied the same principle to a statute regulating loan rates in *Wolski v. Fremont Investment & Loan* (2005) 127 Cal.App.4th 347, 353-354. The plaintiff there challenged "yield spread payments," an industry practice in which a bonus payment is made by a lender to a loan broker. (*Id.* at p. 350.) The plaintiff argued that the payment should be considered a fee "payable by the consumer at or before closing" because the bonus was paid when the consumer agreed to an interest rate above the minimum approved by the lender. (*Id.* at p. 351.) The Court of Appeal rejected this argument because, among other reasons, it could safely infer that the Legislature was aware that loan bonus payments result in overall higher interest for the consumer, but failed to include the appropriate language to regulate these payments. (*Id.* at pp. 353-354.)

in each of the Wage Orders. Thus, whether a seat is required for a given job in a given industry depends, at least in substantial part, on industry custom and practice. Had the IWC intended to remove consideration of industry practice from the reasonableness standard, it could have done so by using specific language to cabin the reasonableness inquiry and put pertinent industries on notice of the potential consequences and associated need to participate in the rulemaking process. Because the IWC did not do so, the provision should be interpreted to account for and accept longstanding industry norms, including the long accepted understanding that a retail cashier (or bank teller) position requires standing.

B. There Is Great Potential For Unfair Surprise Where A Regulation Is Interpreted To Contravene Longstanding Agency Interpretation and Enforcement History.

California courts discourage unfair surprise through the principle of deference to agency interpretations. In general, reasonable agency interpretations of law are entitled to deference by reviewing courts. (See, e.g., *Butts v. Bd. of Trustees*, *supra*, 225 Cal.App.4th at p. 840 [citing *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12].) Agency interpretations are more likely to be deemed reasonable (and thus be eligible for deference) where, as here, they are long-standing and have been consistently maintained. (See, e.g., *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1105, fn.7.) At its core, this principle represents skepticism about changing interpretations and protects

regulated entities from unfair surprise by ensuring that they are able to rely on longstanding and reasonable agency interpretations.

In contrast, when a regulation is interpreted in a way that deviates from longstanding industry norms, the danger of unfair surprise is severe. The recent employment misclassification cases involving pharmaceutical representatives are instructive. There, the United States Supreme Court recognized the potential for unfair surprise that may result from a new interpretation of a longstanding regulation—especially one that, like the seating requirement at issue here, does not make clear on its face what is permitted and what is forbidden:

> Until 2009, the pharmaceutical industry had little reason to suspect that its longstanding practice of treating detailers as exempt outside salesmen transgressed the FLSA. The statute and regulations certainly do not provide clear notice of this.
>
> *****
>
> Even more important, despite the industry's decades-long practice of classifying pharmaceutical detailers as exempt employees, the DOL never initiated any enforcement actions with respect to detailers or otherwise suggested that it thought the industry was acting unlawfully. We acknowledge that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred. See, *e.g.*, *Heckler v. Chaney,* 470 U.S. 821, 831, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (noting that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise"). But where, as here, an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute. As the Seventh Circuit has noted, while it may be

> "possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing," the "more plausible hypothesis" is that the Department did not think the industry's practice was unlawful. *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510–511 (2007). There are now approximately 90,000 pharmaceutical sales representatives; the nature of their work has not materially changed for decades and is well known; these employees are well paid; and like quintessential outside salesmen, they do not punch a clock and often work more than 40 hours per week. Other than acquiescence, no explanation for the DOL's inaction is plausible.

(*Christopher v. SmithKline Beecham Corp.* (2012) __ U.S. __ [132 S.Ct. 2156, 2167-2168].)

Here, as explained above and by Respondents in their briefs (JPMorgan Chase Answer Brief at pp. 6-7, 32; CVS Answer Brief at pp. 21-23.), the DLSE's enforcement position over the decades has signaled acceptance of the open and plainly visible practices at issue, and in fact, has expressly confirmed that the duties of retail salespeople are not conducive to the use of a seat. (See SER 252, 254 [December 5, 1986, and January 13, 1987, DLSE opinion letters].) Against this backdrop, it is clear that there is a danger of unfair surprise if courts (as opposed to regulators, after proper notice-and-comment rulemaking) now interpret this provision to require seats for such employees and others whose jobs have historically have been performed while standing—especially if they do so by adopting a standard that gives anything less than paramount consideration of the

judgment and interests of the employers who created these jobs in the first place.

C. Especially Careful Efforts To Avoid Unfair Surprise Are Warranted Where, As Here, Agency Enforcement Has Been Largely Supplanted By Private Plaintiff Enforcement.

Although the principles discussed above involve the avoidance of unfair surprise when departing from longstanding *agency* interpretations, they represent a broader effort by courts to ensure regulatory stability. These principles apply with even greater force where, as here, enforcement efforts now have largely been delegated to private litigants through the Private Attorneys General Act of 2004 ("PAGA"), California Labor Code, sections 2698-2699.5. Private litigants bringing PAGA claims and their counsel have monetary incentives to advocate interpretations that do not reflect balanced public policy and that reach beyond (or even, as here, contradict) prior DLSE positions. This Court should be especially hesitant to depart from previous, longstanding agency interpretations where, as here, there is a particularly acute danger of unfair surprise.

Here, the DLSE has interpreted the suitable seating provisions under California law to employ a broad reasonableness standard in the past and has publicly stated that reasonableness includes the consideration of business judgment. (See DLSE *Garvey* Brief at p. 4.) This interpretation should be afforded significant weight, because any contrary result would

undermine principles of administrative law that seek to discourage unfair surprise. And for the same reasons, Petitioners' novel interpretation, which would disregard business judgment, should be rejected.

IV. Petitioners' Interpretation Would "Cause Undue Hardship And Loss Of Employment Opportunities" In Violation Of The IWC's Mandate.

When the Legislature instructed the IWC to review and, as needed, revise the Wage Orders in 1976, resulting in the suitable seating provision as it is currently worded, it expressly mandated that the IWC do so in a way that would not undermine the development of industry and jobs in this state. Specifically, the Legislature instructed that the IWC must interpret its "duty and authority . . . in a manner which *does not cause undue hardship and loss of employment opportunities* in any segment of industry in California." (Statement of Findings, *supra*, at p. 5, italics added.)

As explained above, the IWC was mindful of this mandate in reviewing the suitable seating regulation. In particular, the IWC noted that the provision "has proved to be useful and workable as the Division has reasonably enforced it" and stated that with coverage extended to more industries came the need for a "more flexible" requirement that was "more subject to administrative judgment as to what is reasonable." (Statement of Findings, *supra*, at p. 16.) In other words, the IWC recognized the potential for unfair surprise and business disruption but confirmed that the current language was not intended to have such consequences. The IWC thus

recognized that some work simply cannot be done effectively while sitting. As Respondents in this matter have urged, in such situations, the employer's obligation is simply to provide a sufficient number of seats in reasonable proximity to the work area for use during lulls, if any, or authorized rest and meal breaks.[16]

Business leaders already rank California's litigation climate as one of the worst in the country—47th out of the 50 States. (See U.S. Chamber Institute for Legal Reform, *2012 State Liability Systems Survey Lawsuit Climate: Ranking the States* (Sept. 2012), at <https://www.uschamber.com/sites/default/ files/documents/files/lr_FinalWeb_PDF.pdf> [as of Aug. 28, 2014] [survey of 1,125 in-house lawyers and other senior executives knowledgeable about litigation matters at large companies]). Moreover, employers in California are already estimated to incur approximately $1,000 per employee in legal liability costs—the highest among western states and higher than most large states. (See California Foundation for Education and Commerce, *The Cost of Doing Business in California* (Aug. 12, 2014), at pp. 27-28 <http://www.calchamber.com/CFCE/Documents/CFCE-Cost-of-Doing-Business-in-California.pdf > [as of Aug. 28, 2014].)

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[16] The IWC also reaffirmed the disjunctive nature of sections 14(A) and 14(B) and the conditional nature of the seating requirement as a whole. (*Ibid.* ["humane consideration for the welfare of employees requires that they be allowed to sit at their work *or* between operations *when it is feasible for them to do so*"].)

As the Ninth Circuit implicitly recognized in certifying questions to this Court, an unanticipated, unworkable interpretation of the suitable seating regulation could have a dramatically adverse business effect. (*Kilby v. CVS Pharmacy, Inc.* (2013) 739 F.3d 1192, 1196 [stating that the interpretation of Section 14 "could have a dramatic impact on public policy in California as well as a direct impact on countless citizens of that state, both as employers and employees"; noting that "[e]ven a conservative estimate would put the potential penalties in these cases in the tens of millions of dollars"; and that "liability could be imposed upon a large number of employers throughout California, depending on the interpretation given to Section 14."].)

Nor is the prospect of substantial job loss merely theoretical. California-based businesses have in fact chosen in recent years to leave the State, or to halt further investment in their California operations, because "[t]he task of unraveling the byzantine layers of regulations seems insurmountable." (Chief Executive magazine, *2014 Best & Worst States for Business* (Aug. 7, 2014) < http://chiefexecutive.net/2014-best-worst-states-for-business> [as of Aug. 28, 2014] [California CKE Restaurants has decided to open 300 new restaurants in Texas but none in California, which is among worst three states for business]; see also Buss, *It Makes Sense for Toyota to Leave California For Texas* (Apr. 27, 2014), at <www.forbes.com/ sites/dalebuss/2014/04/27/it-makes-sense-for-toyota-to-

leave-california-for-texas/ > [as of Aug. 28, 2014] [reporting Toyota's decision to move its national headquarters from California to Texas due to "the outsized penalties of conducting business in the Golden State"].) Indeed, excessive regulation is considered *by far* the biggest challenge to doing business in California. (See California Chamber of Commerce, *California Business Executive Attitudes Survey 2012* (March 2012), at < http:// www.calchamber.com/headlines/ pages/03212012-calchamberreleases2012businessclimatestudy.aspx> [as of Aug. 28, 2014], at p. 7 [64% of executives cite "too much government regulation" as the first or second biggest challenge to doing business in California], 29 [72% cite "Reduce/simplify regulations" as the most requested idea to assist California businesses].)

Add to these concerns the prospect of widespread private plaintiff, lawyer-driven PAGA litigation, and it is clear that an abrupt shift in how the longstanding suitable seating regulation is interpreted—and in particular any departure from historical enforcement positions—has the very real potential to cause a further exodus of businesses and jobs from this state.

CONCLUSION

These lawsuits are an effort to penalize employers for following a long-standing industry practice by circumventing the rulemaking process and turning Superior Courts into after-the-fact regulators. If there is in fact

any need for changes to longstanding industry practices with regard to employee seating in any particular industry, any such changes should be informed by meaningful regulatory review handled by expert regulators with input from pertinent labor and business groups.

In the meantime, this Court should interpret the suitable seating provision, consistent with DLSE enforcement practices, to require a holistic assessment of the "nature of the work." Furthermore, given the regulatory and enforcement history of the suitable seating provision, this Court should adopt an approach that gives paramount consideration to the business judgment of the employer that designed and sustains the job.

DATED: August 29, 2014

Respectfully submitted,

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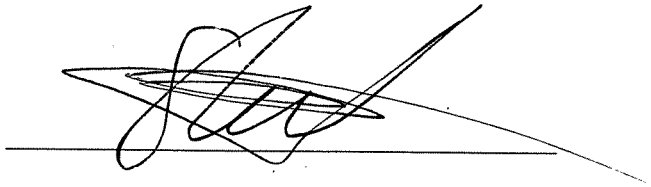

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CASE: *Kilby v. CVS Pharmacy, Inc.*
Henderson, et al. v. JPMorgan Chase Bank, N.A.

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

I am employed in the City and County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action; my business address is 355 South Grand Avenue, 35th Floor, Los Angeles, California 90071. On August 29, 2014, I served the following document(s):

APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORIA CHAMBER OF COMMERCE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 29th day of August, at Los Angeles, California.

Monica J. Walker