No. S224611

IN THE SUPREME COURT OF CALIFORNIA

CHRISTOPHER MENDOZA, an individual, on behalf of himself and all other persons similarly situated,

Plaintiff – Appellant-Petitioner,

MEAGAN GORDON,

Plaintiff – Intervener-Respondent,

v.

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

Defendant – Appellee-Respondent.

AFTER A REQUEST BY THE NINTH CIRCUIT COURT OF APPEALS CONSOLIDATED NOS. 12-57130 AND 12-57144

APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, REASON FOUNDATION, MANUEL COSME, JR., PAUL CRAMER, KIETH STREET, STACY ANTONPOULOS, NATHAN FOLI, STEVE DUVERNAY, AND TIBOR MACHAN IN SUPPORT OF DEFENDANT – APPELLEE-RESPONDENT

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APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, REASON FOUNDATION, MANUEL COSME, JR., PAUL CRAMER, KIETH STREET, STACY ANTONPOULOS, NATHAN FOLI, STEVE DUVERNAY, AND TIBOR MACHAN IN SUPPORT OF DEFENDANT – APPELLEE-RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to California Rule of Court 8.520(f), the National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center"), Cato Institute, Reason Foundation, Manuel Cosme, Jr., Paul Cramer, Keith Street, Stacy Antonpoulos, Nathan Foli, Steve Duvernay, and Tibor Machan (collectively, "Proposed *Amici*") request leave to file the attached brief *amici curiae* in support of Defendant-Appellee-Respondent Nordstrom, Inc. The Proposed *Amici* are familiar with the issues and scope of their presentation, and believe that the attached brief will aid the Court in its consideration of the issues presented in this case.[1]

I. INTEREST OF AMICUS CURIAE

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and to be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 325,000 member businesses nationwide. Its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB member employs 10 people and reports

[1] *Amici* confirm, pursuant to California Rule of Court 8.520(f)(4), that no one and no other party made any contribution of any kind to assist in the preparation of this brief or made any monetary contribution to fund the preparation of this brief.

gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice of small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will affect small businesses. It seeks to file here for two reasons. First, the case raises a question of tremendous practical concern for employers and employees alike because Plaintiff-Appellant's proffered interpretation of California's Labor Code would outright deny employers the flexibility necessary to accommodate reasonable requests from employees to work additional hours, or to allow employees the opportunity to take extra shifts in some cases. It would also greatly complicate the task of scheduling employees, especially for companies with fewer employees. Second, this case raises an important issue because Plaintiff-Appellant is asking this Court to pronounce a new regulatory standard, which contravenes guidance from the Division of Labor Standards Enforcement. NFIB Legal Center files here to voice concern on behalf of small business owners who have reasonably relied on DLSE's longstanding—and commonsense—interpretation of the California Labor Code.

Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Its Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual Cato Supreme Court Review, and files amicus briefs. This case is of concern to Cato because it raises a significant constitutional issue.

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Paul Cramer is the Director of Sales at Star Milling Co. He is currently the Vice Chair of the NFIB California Leadership Council. In his capacity as an employee at Star Milling Co., he manages four sales representatives in California, and wants to maintain flexible working arrangements with his employees. Accordingly, he is concerned by the implications of the arguments advanced by Plaintiff-Appellant in this case, and is especially concerned that Plaintiff-Appellant's interpretation would require him to adopt a policy categorically prohibiting his employees from working on days that they may otherwise wish to work, or from even asking them if they want the opportunity to work an occasional weekend tradeshow. Even if his company should adopt a policy prohibiting employees from working on the seventh day of a workweek, he believes it would be difficult or impossible to police and enforce that policy in practice. Additionally, he believes it would be impractical and burdensome to require his employees to execute a written waiver form every time they should like to engage in work on a day otherwise scheduled for rest. For that matter, he does not want to have to deal with the burden of paperwork every-time he should decide to check his work email, or handle other work-related matters, on the seventh day of an already busy workweek.

Keith Street is a non-exempt employee for a property management company, in the Sacramento area. His employer is not affiliated with NFIB. He joins this brief as an individual because he has an interest in the resolution of this case. Principally he wants to continue receiving seventh day overtime pay, which often represents a sizable portion of his paycheck. He has long been aware of his right to a day of rest under the California Labor Code, but very often chooses to conduct work on the seventh day of a workweek. For that matter, his employer is comfortable with allowing him the flexibility to prepare his own schedule, and he chooses to work when he wants. He typically works 55 hours in a single workweek, including hours worked on the seventh day of a workweek. He believes that he should have the prerogative to choose to work when he likes both because he wants to continue earning seventh day overtime pay, and because he wants to maintain flexibility to fit work around his personal life.

Stacy Antonpoulos is a public school teacher in the Elk Grove Unified School District. She agrees that, if an employee chooses to do so, they should be allowed to work as many days as they might like. For that matter, she wishes to maintain the flexibility to occasionally grade papers or exams on the weekends, and or to do lesson planning on the seventh day of a workweek, as she sees fit. Accordingly, she would not want her employer to be compelled to implement a policy categorically prohibiting her from choosing to engage in work on the weekends. Further, she doesn't believe her employer could reasonably police her decisions to work on the weekend if she chooses.

Nathan Foli is an exempt employee for an Ohio-based company, which is not affiliated with NFIB. As a salesman, he works out of his home in Sacramento, and occasionally travels to meet prospective clients in the Bay Area. He joins this brief as an individual because he is offended by the notion that the California Labor Code might be construed in a manner that would foreclose him the right to decide for himself whether to engage in work on the seventh day of a workweek. While he knows that he is entitled to a day of rest, he also believes that it should be his prerogative to occasionally work on the weekends if it pleases him. He may on occasion desire to work through a full workweek in order to give himself flexibility with his schedule in the following week. And because

a large portion of his income is derived from commission on sales, he also has an interest maintaining his prerogative to work on the seventh day of a workweek if that helps facilitate the closing of an important deal.

Steve Duvernay is an attorney for Benbrook Law Group in Sacramento, which is not affiliated with NFIB. As an exempt employee, he wants to maintain the flexibility to work, as it may please him, on weekends. He believes he should be allowed to answer emails and to perform other work on the seventh day of a workweek if that best accommodates his professional and personal goals.

Tibor Machan is a professor emeritus at the Argyros School of Business and Economics at Chapman University. He is widely published and is the author of several books on classical liberalism. He is currently a Senior Fellow at the Heartland Institute, and performs work out of Silvarado, California. He believes that he is free to work as many hours as he might like during any given workday, and that he is likewise free to choose to work the weekends as it pleases him. Because he wants to maintain the flexibility to work when he likes, to advance both his professional and personal goals, he would not want his employer to feel compelled to implement a policy prohibiting him from engaging in work on the seventh day of a workweek.

II. THE PROPOSED BRIEF WILL PROVE HELPFUL TO THE COURT

Proposed *Amici* believe their brief will assist the Court in determining whether the California Labor Code prohibits employers from accommodating reasonable requests from employees to work additional hours when they have already worked six days in a given week, or six consecutive days. The brief will also help this Court by explaining the public policy rationales supporting the Department of Labor Standard Enforcement's ("DLSE") longstanding interpretations of the code sections in question, which have always permitted employers to accommodate such requests, or to allow employees the opportunity to work on the seventh day of a workweek if they like. Importantly, the proposed *amici* brief will explain to the Court the significant due process concerns raised by Plaintiff-Appellant's suggestion that this Court should interpret the Labor Code in conflict with DLSE's established interpretation.

The NFIB Legal Center files frequently in labor and employment cases, and has therein developed expertise on these regulatory issues. *See e.g.*, *Brinker Rest. Corp. v. Super Ct.*, 53 Cal. 4th 1004 (2012) (addressing the California Labor Code's requirements for rest breaks); *see Candy Shops, Inc. v. the Superior Court of San Diego County*, 210 Cal. App. 4th 889 (2012) (concerning the legality of neutral time-rounding policies under the California Labor Code). Of specific concern here, the NFIB Legal Center filed an *amicus* brief *in Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), in which the U.S. Supreme Court expounded upon the due process concerns raised where a litigant advances a new statutory interpretation, in contravention of prior guidance from regulatory authorities. As such, NFIB Legal Center submits that its expertise will prove helpful for this Court in resolving the issues presented in this case. *See Indiana Dept. of Natural Resources v. Whitetail Bluff, LLC*, 25 N.E.3d 218 (2015) (commending NFIB Legal Center on "the quality of [its] analysis[,]" and agreeing that a state agency is not entitled to deference when asserting a new position, after small businesses have reasonably relied on prior guidance or authorizations).

Additionally, the individuals who have joined on the proposed *amici* brief submit that this brief will prove helpful to the court in explaining the practical concerns that Plaintiff-Appellant's interpretation would raise for them. In outlining these practical considerations, the proposed *amici* brief will likewise help this Court in understanding the real world implications of this case. For these reasons, the Proposed *Amici* respectfully request that this Court accept the accompanying *Amici Curiae* brief for filing in this matter.

Dated: November 20, 2015

Respectfully submitted,

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QUESTIONS PRESENTED

Section 551 of the California Labor Code provides that "Every person employed in any occupation of labor is entitled to one day's rest therefrom in seven." In turn, Section 552 of the Labor Code provides that "No employer shall cause his employees to work more than six days in seven."

The questions presented are:

(1) Whether the requirement to allow an employee a day of rest applies on a fixed weekly basis, or a rolling seven-day basis?

(2) Whether the Labor Code categorically prohibits employees from choosing to forgo their "entitle[ment]" to a day of rest?

(3) Whether Plaintiff-Appellant's interpretation—imposing a day of rest requirement on a rolling basis, and prohibiting employees from choosing to work on a day otherwise scheduled for rest—conflicts with longstanding guidance from the Department of Labor Standards Enforcement in a manner that forecloses retroactive application?

IDENTITY AND INTEREST OF *AMICI CURIAE*

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici respectfully urge this Court to reject Plaintiff-Appellant's and Plaintiff-Intervenor's (collectively "Plaintiffs") audacious suggestion that employers are flatly prohibited—under threat of criminal sanction—from accommodating reasonable requests from employees to work more than six days in seven. Plaintiffs' unabashed paternalism should not be mistaken for good public policy, any more than it should be mistaken for the law. The plain language of the California Labor Code demonstrates that employees may choose not to indulge in a day of rest if that is their desire. This makes sense because employees may have innumerable personal reasons for wanting to forgo that benefit.

An employee may prefer to work through an entire workweek to bring in extra cash when saving for the holidays, a wedding, a vacation, a down-payment for a home, or in anticipation of a hefty college tuition bill. By that same token, employees may desire the flexibility to work through an entire workweek so as to accommodate their personal

lives. If an employer is flatly prohibited from allowing an employee to work through a full workweek in advance of, or immediately following, an extended romantic get-away, week-long backpacking trip, or lengthy visit to see relatives on the east coast or abroad, the employee may well be foreclosed from working hours necessary to pay his or her bills. Moreover, if Plaintiffs' draconian theory of the Labor Code were accepted here—so as to deny the employee the right to forego a day of rest—small business owners would be in a world of trouble. This is true not only because it would make scheduling employees difficult, but because—for tax purposes—many small business owners are designated as employees of their own companies. It would be patently absurd to assume that these business owners engage in a misdemeanor whenever they should choose to respond to emails, or to handle other vital tasks during the seventh day of a busy week.

But, Plaintiffs contend that, after 122 years, they have now deciphered the true meaning of California's day of rest statutes, and that they alone hold the key to interpretation—not withstanding nearly a century of contrary guidance from the courts and those state agencies charged with enforcement. Their proposed shift in interpretation should be rejected for numerous reasons. For one, it is for the Legislature to decide whether to effect any significant change in employment practices. Indeed, we can rest assured—with an especially aggressive labor lobby in Sacramento—that the Legislature would have acted by now if it saw a problem with the Department of Labor Standards Enforcement's ("DLSE") long-standing guidance allowing employers flexibility in scheduling. Accordingly, this Court should reject Plaintiffs' rigid interpretation of Labor Code §§ 551-552 ("Day of Rest Provisions") because it would result in an unfair surprise for small business owners who have long operated on the flexible understanding that they must afford an employee a single day off each fixed workweek, and that employees may choose to work even on that seventh day.

ARGUMENT

I. THE DAY OF REST PROVISIONS ALLOW EMPLOYEES AND EMPLOYERS MUCH NEEDED FLEXIBILITY

The plain language of the Labor Code is clear in establishing that (a) the day of rest is calculated on a fixed weekly basis, and (b) an employee may be allowed to work more than six days, if he or she so desires. Cal. Labor Code §§ 551-552. Accordingly, there is no need to resort to the canons of construction here. *Kavanaugh v. W. Sonoma Cnty. Union High Sch. Dist.*, 29 Cal. 4th 911, 919 (2003), *as modified* (Apr. 16, 2003) ("If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary."). Nor is there any reason for upsetting DLSE's longstanding guidance on these issues. *Infra* at 14-20.

Yet, even if the Day of Rest Provisions, and their exceptions, were ambiguous, it would be inappropriate to construe these provisions as inflexibly imposing a non-waivable day of rest requirement on a rolling seven day basis for several reasons. For one, the rule of lenity requires that statutes should be interpreted so as to avoid a construction that would impose criminal liability, except where it is clear that the Legislature intended that result. *People v. Avery*, 27 Cal. 4th 49, 57-58 (Cal. 2002) (explaining that constitutional concerns over "fair warning" require that statutes imposing criminal sanctions must be construed in favor of the defendant, at least where the court is confronted with two reasonable interpretations that may appear equally viable). Secondly, a departure from the long-recognized fixed seven-day workweek should not be inferred lightly, especially where it would unnecessarily impose regulatory burdens that the Legislature did not likely intend. *See Reno v. Baird*, 18 Cal. 4th 640, 652 (1998) (rejecting an interpretation that would impose severe adverse effects on the regulated community—but with only "minimal potential [public] benefit[s]"—on the presumption the Legislature would not have intended such a result); *C.f., Torres v. Auto. Club of So. California*, 15 Cal. 4th 771, 779, 937 P.2d 290, 295 (1997), *as modified on denial of reh'g* (Cal. 1997) ("[C]ourts should not presume the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication."). Indeed, it is only reasonable to assume that the legislature intended to permit flexibility in

scheduling, which is beneficial to employers and employees alike. *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554, 567 (2007) ("When the statutory language is ambiguous, a court may consider the consequences of each possible construction and will reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity."); *Horwich v. Superior Court*, 21 Cal. 4th 272, 276 (1999) (explaining that it is a "settled principle of statutory interpretation that language of a statute should not be given[,]" an interpretation that "would result in absurd consequences which the Legislature did not intend.") (internal citations omitted).

A. The Day of Rest is Calculated on a Fixed Weekly Basis

Plaintiffs' suggestion that the Day of Rest Provisions should be construed as referring to a rolling seven-day calendar must be rejected because the legislature would have explicitly referenced a rolling calendar if that was its intent. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1037 (2012) (providing that when employers have "developed a settled sense" of their regulatory "obligations[,]" it is proper to assume that "the Legislature [does] not intend to upset existing rules, absent a clear expression of contrary intent."); *see also Borg-Warner Protective Servs. Corp. v. Superior Court*, 75 Cal. App. 4th 1203, 1208 (1999) ("[W]e must presume that the Legislature intended no change in the common law in the absence of any indication to the contrary."). This is especially true because such an approach would mark a significant change from the historic practice of recognizing a day of rest on Sunday.[1] Alternatively, the legislature might simply have said that employees shall be allowed a day of rest after working six consecutive days if it

[1] Plaintiffs assume a dramatic departure from the fixed workweek. Indeed, since at least the arrival of Christianity, English speaking peoples have operated on a seven day workweek, traditionally with the understanding that one should refrain from servile work once weekly on the Sabbath. *See* Lesley Lawrence-Hammer, *Red, White, but Mostly Blue: The Validity of Modern Sunday Closing Laws Under the Establishment Clause*, 60 Vand. L. Rev. 1273, 1274 (2007) (explaining that day of rest statutes "[o]riginat[ed] in England, [and] were enacted throughout colonial America in an effort to protect the Christian Sabbath as mandated by the Fourth Commandment[,] and discussing the constitutionality of Sunday restrictions that remain in effect "[d]espite centuries of change and secularization..."). It is plain that the Legislature sought to codify a secularized day of rest requirement, by reference to this historical seven-day workweek. *See Ex Parte Andrews*, 18 Cal. 678 (1861); *Ex Parte Westerfield*, 55 Cal. 550 (1880); *Ex Parte Koser*, 60 Cal. 177 (1882).

intended to reject the historical fixed calendar. *See Kamen v. Lindly*, 94 Cal. App. 4th 197, 204 (2001) (observing that the "Legislature knows how to establish" changes in the law when that is its intent).

Instead, Section 551 provides that "[e]very person employed in any occupation of labor is entitled to one day's rest therefrom in seven." Under Plaintiffs' construction the term "therefrom" is rendered surplusage. To be sure, the term "therefrom" can only be given meaning if understood as providing that the day of rest may be conferred on any given day within a fixed seven day period.[2] *In re Rosalio S.*, 35 Cal. App. 4th 775, 778 (1995) (statutes should be construed to "give effect to the usual, ordinary import of the language and to avoid making any language mere surplusage.") (quoting *People v. Lopez*, 20 Cal. App. 4th 897, 901-02 (1993)).

What is more, this plain language interpretation is imminently reasonable whereas Plaintiffs' approach would cause scheduling nightmares for small businesses. Consider a coffee shop with three employees. Janet is only available on Mondays and Tuesdays because she has classes other days, and another job on the weekends. Jen can only work weekends because she is homeschooling her children during the rest of the week. And John is usually flexible.

In that scenario, the employer would typically schedule John Wednesday-Friday. But supposing that John had been scheduled to cover Jen's shifts on both Saturday and Sunday, so that she could be a bridesmaid at her friend's wedding, Plaintiffs' theory would cause an irreconcilable scheduling problem should Janet happen to call-in sick the following Monday and Tuesday. Assuming John is available and willing to work, he could cover Janet's shift on Monday, but he would be foreclosed from doing so on Tuesday because—if we are operating on a rolling calendar—John would have already worked six days in a row (Wednesday, Thursday, Friday, Saturday, Sunday, Monday). Perhaps the owner of the establishment might be able to fill-in on Tuesday, but the owner

[2] That construction is only reinforced by the exceptions spelled out in Labor Code § 556: "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…" (emphasis added).

might happen to be moving her daughter into a college dormitory, or visiting an ailing parent 500 miles away. In that unfortunate event, the only scheduling option would be for the business to close down until Wednesday—which means lost profits for the company and less money in John's pocket.

These practical difficulties would make it more difficult for employers to accommodate reasonable requests from employees to switch their schedules. For example, an employer might deny a request for an employee to take off a day to attend her child's Wednesday night baseball game if it would require the employer to schedule another employee (who has just worked six days straight) to take her shift.[3] By contrast, if we were operating on a fixed Monday-Sunday schedule, it would be easier to accommodate such a request because the employee who had worked six consecutive days could still work Wednesday night without a problem, so long as that employee received Thursday, Friday, or Saturday off.

B. Employers May Ask Employees if They Want Additional Hours, and May Accommodate Requests to Work Seven Days in a Week

The Labor Code does not say that employees must take a day of rest. Section 551 says that employees are "entitled" to a day of rest. Since an entitlement is a gratuitous benefit that one can freely choose to enjoy or to forgo, this term must be understood, in Section 551, as allowing the employee flexibility to choose whether to take a day of rest.[4]

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[3] These scheduling problems would occur more often for mom-and-pop businesses than for larger companies. And it can be no answer to say that they should simply hire more employees because they may not have enough work for additional employees—or they may lack the resources to hire any additional employees.

[4] No one would doubt that an individual could choose to forgo his entitlement to social security benefits, or that an employee might choose not to accept other entitlements—such as workers compensation benefits or unemployment. *See C.f.*, Ilya Shapiro, Supreme Court Snubs Citizens Whose Social Security Will be Confiscated if They Refuse Government Health Care, Cato Liberty Blog (Jan. 25, 2013) (discussing the Supreme Court's denial of a petition for *certiorari* in a case in which the D.C. Circuit held that the Social Security Administration may lawfully withhold social security benefits to individuals who *choose* not to enroll in Medicare), *available* at http://www.cato.org/blog/supreme-court-snubs-citizens-whose-social-security-will-be-confiscated-they-refuse-government (last visited Nov. 19, 2015).

Likewise, Section 552 provides that employers shall not "cause" an employee "to work more than six days in seven[,]" which necessarily implies that employers are prohibited from engaging in any sort of conduct that might force, or coerce, an employee to waive his or her entitlement to a day of rest. Merriam-Webster Dictionary, (defining "cause" as "a reason for an action[,] or something that brings about a condition.").[5] But neither provision implies an employer should be categorically barred from asking an employee if they may want to work on the seventh day of a workweek, or from accommodating an employees' request to work the seventh day of a workweek when that best serves the employees' personal needs.

Plaintiffs protest this plain meaning interpretation, insisting it invites employers to coerce employees into repeatedly waiving their right to a day of rest.[6] But this emphatic concern over employer coercion only emphasizes our point. The only reasonable interpretation is to construe the Day of Rest Provisions as permitting truly voluntary waivers and disallowing coerced waivers.[7] There is simply no public policy rationale for prohibiting employers from accommodating requests from employees to work additional hours, so long as they abide by wage and hour requirements.

It is worth noting Plaintiff-Intervenor's repeated assertion that "cause means permit." Plaintiff-Intervenor Reply Br. at 28. In their view this Court should engraft the "suffer or permit" standard that the legislature includes in other contexts here because

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[5] *Available* online at http://www.merriam-webster.com/dictionary/cause (last visited Nov. 9, 2015).

[6] The reality is that employers have little incentive to overwork employees because of (a) the law of diminishing returns (*i.e.*, morale and quality of work go down when an employee is overworked), and (b) overtime requirements, which provide economic incentives to spread workloads among more employees.

[7] Plaintiffs uncharitably portray small business owners as comic book villains, out for all the blood they can squeeze from their workers. In fact, most small business owners treat their employees well. Of course, in every industry there are a few bad actors that may push the bounds of fair play and decency. And, when those cases arise, *Amici* have no doubt that plaintiffs' counsel can aptly prosecute claims for malfeasance. The difficulty is that there are also actors who abuse the legal system to extort pay-outs from small business owners who have done nothing wrong, knowing full-well that the cost of defending against a frivolous claim is far greater than settling in most cases.

they would prefer to see a firm prohibition on employees working seven days in a given workweek. *See Futrell v. Payday California, Inc.*, 190 Cal. App. 4th 1419, 1434 (2010) (explaining that "early 20th century statutes prohibiting child labor" used the "'suffer or permit'" standard to impose liability broadly "on the proprietor of a business who knew that child labor was occurring in the business, under a common law employment relationship or not, but failed to prevent it…"). But that was not the language the Legislature choose, presumably because the intent was never to deny employees flexibility that they may need to accommodate their personal goals and schedules. *Gattuso*, 42 Cal. 4th at 567 (ambiguous statutes should be construed to produce workable results).

i. Employees Want Scheduling Flexibility

The reality is that employees want flexible work schedules, just as much as employers want flexibility in scheduling. And there is no good reason for foreclosing the right of an employee to take on more work if they occasionally desire to work a full seven-day workweek, or from prohibiting employers from allowing that opportunity. Indeed, there may be many reasons why seventh day overtime pay may be attractive to an employee. An employee might be saving for an engagement ring, planning for a trip to Europe, struggling to pay medical bills, or to attain innumerable other financial goals. Plaintiffs' paternalistic approach would deny employees the opportunity for seventh day overtime if they are already working more than 30 hours in a given workweek.

This approach would likewise prevent employers from accommodating reasonable requests to occasionally work through a full seven-day workweek, where an employee seeks flexibility necessary to avoid losing income during a pay-period in which he or she is taking time-off for personal reasons. Consider, for example, an employee who knows she will need a few days off for exams. She may want to work as many days as possible during the pay-period before exams. Under Plaintiffs' interpretation the employer would be forced to deny her request to work a full seven-day workweek, at a time when she is especially strapped for cash. This cannot be what the Legislature intended.

ii. Plaintiffs' Approach Would Result in Absurdities

Plaintiffs' unyielding approach would prevent exempt employees—who are presumed to work 40 hours per week—from even checking work e-mails on Saturday and Sunday. *See* 29 U.S.C. § 203(g) (2006) (providing that the term "employ" means to "suffer or permit to work."); *see also* Maria L. Barbu, *The Ubiquitous Blackberry: The New Overtime Liability*, 5 Liberty U.L. Rev. 47, 62-67 (2010) (discussing the recent trend to hold employers liable for overtime pay for work performed when non-exempt employees have responded to emails or text during non-working hours). It would prevent salesmen from returning a call from a client with whom they desperately want to close a major deal, or an attorney from communicating with a prospective client as promptly as he might like, if the call should come on the seventh day of the workweek. Similarly, it would prevent a teacher from working on lesson plans on Sunday night if he or she so much as graded a single quiz on Saturday. This radical paternalism would even force businesses to close one day a week if the owner is paid a salary as the sole employee of his or her company because—in Plaintiffs' view—an employee can *never choose* to forgo a day of rest. *See* Labor Code § 551 ("Every person employed *in any occupation* of labor is entitled to one day's rest therefrom in seven.") (emphasis added).

For that matter, Plaintiffs' fallback position, that any waiver must be memorialized in a written communication, is equally absurd. As a threshold matter there is no textual basis for inferring any paperwork requirement. Compare Wage Order No. 1-2001, § 11(C) (8 Cal. Code Regs § 11010(11)(C) ("An 'on duty' meal period shall be permitted only when… *by written agreement* between the parties an on-the-job paid meal period is agreed to." (emphasis added); with Cal. Lab. Code §§ 551-552 (providing that employees are "entitled" to a day of rest, and that employers shall not "cause [an] employee[] to work more than six days in seven."). And there is absolutely no point in a written waiver when the employee has affirmatively asked to work through a day that is otherwise scheduled for rest because, in such a case, its readily apparent that the employee desires to pursue the benefit of working on that seventh day and to forgo his or her "entitle[ment]" to rest. *DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III,*

Ltd., 30 Cal. App. 4th 54, 59 (1994) (explaining that, when a party expresses an intent to forgo a right, there is no requirement that another party consent or engage in any affirmative "act or conduct" to effectuate that waiver). Indeed, the fact that an employee asks to be scheduled more than six days in seven demonstrates that the employee believes that his or her rational self-interest is best advanced, on that occasion, by working the proposed schedule.[8]

Moreover, a requirement to memorialize and maintain a record of the waiver unnecessarily adds compliance burdens for small businesses. This opens up businesses to lawsuits if they are unaware of the requirement, which would be especially inappropriate here, given that DLSE guidance has never suggested that there is any such record-keeping requirement.[9] Further, it would be wholly impractical to require a written waiver each time an employee chooses to respond to an email on a day otherwise scheduled for rest.

II. PLAINTIFFS' INTERPRETATION WOULD RESULT IN AN UNFAIR SURPRISE

A. Employers Have Long Relied on DLSE's Permissive Guidance

In an age where almost all economic conduct is regulated in some form, it is essential that business owners can rely on the best available agency guidance to ensure compliance with pertinent laws.[10] This is especially important for small businesses,

[8] The same would be true for an employee who freely chooses to take on more work when presented with that opportunity.

[9] By contrast, this Court emphasized, in *Brinker Rest. Corp.*, 53 Cal. 4th at 1035 (2012), that the California Department of Industrial Relations had long required written waiver for employees to take an "on duty" meal period. Wage Order No. 6, subdivision 11(A).

[10] *See* Bruce D. Phillips & Holly Wade, Nat'l Fed'n of Indep. Bus. Research Found., Small Business Problems & Priorities, 9 (June 2008), *available* at http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf (explaining that regulatory compliance is a top concern for small businesses) (last visited Nov. 6, 2015).

which do not employ in-house compliance officers.[11] Thus, rather than forcing entrepreneurs to walk blindfolded through California's notoriously difficult regulatory minefields, agencies should—as a matter of good governance—aid businesses by offering clear guidance.

In this case, small business owners have long operated on the common-sense understanding that employees are entitled to one day of rest each workweek, and that an employee may be permitted to work on the seventh day of the workweek so long as overtime wages are paid. That understanding of the California Labor Code was confirmed by state regulators in a 1968 Wage Order, which provided that: "Employment… more than six (6) days in a workweek is permissible provided the employee is compensated for such overtime." Industrial Welfare Commission, Wage Order 7 (1968). And DLSE has since affirmed that interpretation in publically available guidance:

- "If an employee's workweek begins on Monday morning, but she is not called in to work until Wednesday to work seven consecutive 8-hour days, until Tuesday, she is not due any overtime. His or her workweek ends Saturday night and she has only worked 40 hours with no daily overtime Wednesday through Sunday.[12] Monday begins a new workweek, and she could work 8-hour days through Friday without any overtime due, *thus having worked 10 consecutive days without overtime*."
  DLSE Manual § 48.1.3.2 (emphasis added).

[11] *See* Testimony of Elizabeth Milto, House of Representatives Committee on the Judiciary Subcommittee on the Constitution, Hearing on Fraudulent Joinder Prevention Act of 2015 (Sept. 29, 2015), *available* at http://judiciary.house.gov/_cache/files/2c2dd5c0-6a3d-42c5-8be0-76411e026e61/milito-09292015.pdf ("NFIB members, and hundreds of thousands of small businesses across the country, do not have human resource specialists, compliance officers, or attorneys on staff.") (last visited Nov. 6, 2015).

[12] "Normally the workweek is the seven-day period used for payroll purposes. If it is not otherwise established in the record, for enforcement purposes DLSE will use the calendar week, from 12:01 a.m. Sunday to midnight Saturday, with each workday ending at midnight." DLSE Manual § 48.1.3.1.

- "An employer has no pre-designated workweek. An employee of that employer works the following schedule: Sunday-off; Monday-off; Tuesday-8 hours; Wednesday-8 hours; Thursday-8 hours; Friday-8 hours; Saturday-8 hours; Sunday-8 hours; Monday-8 hours; Tuesday-8 hours; Wednesday-8 hours; Thursday-8 hours; Friday-off; Saturday-off. Is this employee entitled to any … seventh day premium pay?
  Answer-NO… *[E]ven though the employee worked ten days in a row*, there is no seventh day premium pay, because the employee did not work seven consecutive days in any one workweek."
  1999 DLSE Memorandum (Emphasis added).

Any reasonably prudent entrepreneur, seeking direction on whether an employee can work seven days in a week, would construe this guidance as unequivocally permitting the practice. Indeed, the assurance that an employer may permit an employee to work "ten days in a row" without having to pay "seventh day premium pay" necessarily implies that: (a) the day of rest requirements are imposed on a fixed weekly basis; and (b) it is permissible to allow an employee to work even seven days in a single workweek provided that he or she receives overtime pay for the seventh day. Indeed, it is only reasonable to assume that, when DLSE provides guidance on overtime requirements, the agency synthesizes all pertinent provisions of California's Labor Code. Otherwise small business owners could not begin to rely on any agency guidance for fear that they may be lead into a regulatory trap by some tangential provision of the Labor Code.

Plaintiffs dismiss DLSE's guidance on the hyper-technical theory that, when the agency assured businesses that it was safe to allow an employee to work ten days in a row over separate workweeks (or to permit an employee to work seven days in a single workweek with overtime pay), DLSE was offering a narrow exception to the Day of Rest Provisions. It's wildly inappropriate to assume that DLSE would tell employers that a given practice is legal—in guidance intended to help them comply with the law—without flagging a potential regulatory landmine. Because DLSE does not qualify its guidance

with any special warning that an employee must fall within a "special exception" for the guidance to be reliable, Plaintiffs' interpretation must be rejected.[13]

Small business owners are not experts in labor and employment law. When confronted with a legal question, therefore, small business owners seek direction from the agencies charged with enforcing the law. They reasonably assume that it is safe to proceed where an agency has stated that a given practice is legal.

B. The Due Process Clause Forecloses Retroactive Application of Newly Announced Restrictions

In *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), the U.S. Supreme Court held that an agency should not receive deference on a newly asserted position where the agency failed to give the public fair notice of the change, or where individuals and businesses acted—in reasonable reliance—on the agency's previous position. In fairness to the regulated public, these principles should apply just the same under California law. For the same reasons underpinning the Court's decision in *SmithKline Beecham*, it would be inappropriate to interpret the Day of Rest Provisions in conflict with DLSE's guidance—especially if the newly pronounced interpretation is to be given retroactive effect.

In *SmithKline*, pharmaceutical sales representatives sued their employer for back-wages under the Fair Labor Standards Act ("FLSA"), alleging that they were misclassified as "exempt employees" when they should have been classified as "non-exempt." *Id*. at 2165. The distinction is crucial for the purposes of wage and hour law because "non-exempt" employees are entitled to overtime for work performed in excess

[13] For that matter, DLSE guidance explicitly rejects Plaintiffs' contorted theory of the exception spelled out in Labor Code § 556, which provides that "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…" (emphasis added). The DLSE guidance provides that this exception applies whenever "hours of employment do not exceed 30 in the week or 6 in any one day." DLSE Manual at § 48.3; DLSE December 23, 1999 Memorandum; *see also* Wage Order 7 (emphasizing that the Labor Code allows for flexibility in scheduling).

of 40 hours per week. *See* NFIB Guide to Wage and Hour Laws, Feb. 2012.[14] Because mistakes can result in major liabilities, prudent employers are careful when classifying employees.[15]

The employer, in *SmithKline*, had prudently relied on existing Department of Labor ("DOL") regulations—which addressed the exemption for "outside salesm[e]n." 132 S. Ct. at 2164. Longstanding Department of Labor (DOL) regulations defined the term to mean "any employee… [w]hose primary duty is … making sales…" 29 C.F.R. § 541.500. Since 1940 DOL had stressed a *liberal interpretation* of the term. *SmithKline*, 132 S. Ct. at 2163 (citing Dept. of Labor, Wage and Hour Division, Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition (1940)). But in a 2009 *amicus* brief filed in the Second Circuit, DOL announced—for the first time—a new, and more narrow, interpretation of its regulations. *Id*. at 2165.

Under DOL's new interpretation, pharmaceutical sales representatives could not qualify as exempt "outside salesm[e]n" because they did not technically consummate sales. Yet for decades DOL had allowed pharmaceutical companies to treat their sales representatives as falling within the "outside salesman" definition. *Id*. at 2159-60. The Supreme Court appropriately viewed DOL's new position with skepticism—not only because it constituted a change in position, but because it would result in an "unfair surprise" for employers. *Id*. at 2167.

Specifically, the Court emphasized that DOL's new interpretation would impose "massive liabilit[ies] on [employers] for conduct that occurred well before [the new] interpretation was announced." *Id*. Thus, the decision to refuse deference to DOL was based on equitable concerns over the lack of notice to the regulated public. *Id*. ("To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"). This suggests that due process concerns can—and

[14] *Available* at http://www.nfib.com/Portals/0/PDF/AllUsers/legal/wage-hour/Wage_Hour_Laws_Guide.pdf (last visited Nov. 17, 2015).

[15] The FLSA exempts employers from paying over-time wages for certain specified types of workers—based on the nature of the employee's duties. *Id*.

should—trump even an agency's discretion where individuals or businesses have acted in reliance on the agency's original position. *See* Mark Seidenfeld & Jim Rossi, *The False Promise of the "New" Nondelegation Doctrine*, 76 Notre Dame L. Rev. 1, 8 (2000) (discussing pre-*SmithKline* cases holding that an agency violates the Due Process Clause in those "extreme instances whe[re] an agency [has] ignore[d] reasonable reliance interested created by its own prior decisions…"); Kermit Roosevelt III, *A Little Theory Is A Dangerous Thing: They Myth of Adjudicative Retroactivity*, 31 Conn. L. Rev. 1075, 1115 (1999) ("Applying new rules to parties who acted in good faith reliance on the law that governed at the time of their actions is simply unjustifiable.").

Applying these principles to this case, DLSE would not be entitled to deference if it should someday seek to switch course, so as to assert that the Day of Rest Provisions prohibit conduct that DLSE guidance has long condoned. Yet, if that's true then, *a fortiori*, Plaintiffs' self-serving interpretation should be approached with special skepticism. Indeed, it seems highly unlikely that the State of California would have utterly failed to enforce the Day of Rest Provisions over the last 122 years if the statute meant what Plaintiffs say it means.

Instead DLSE's guidance has long indicated that employers may comply with the Day of Rest Provisions by providing a day off once each calendar week and that the employee may choose to work seven days in fixed week if paid overtime. But Plaintiffs advocate a change in interpretation, which, if imposed retroactively, would result in severe financial penalties and criminal misdemeanor charges for many small business owners who have acted in reliance of DLSE's guidance. Thus, even if this Court were to accept Plaintiffs' interpretation, it would offend the principles of due process to impose retroactive liability. Where a new interpretation would amount to an unfair surprise for businesses that have operated under the prior *status quo*, it should be applied only prospectively. *C.f.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law.").

Moreover, this Court should reject Plaintiffs' suggestion that a defendant business must show that it has affirmatively reviewed DLSE's guidance to avoid retroactive

application of their proffered interpretation. In 122 years since the original enactment of the Day of Rest Provisions, the State of California has never signaled to business owners that they must provide a day-off on a rolling seven-day basis. *See Brinker Rest. Corp.*, 53 Cal. 4th at 1037 (recognizing that the business community develops a "settled sense" of their regulatory obligations in light of an enforcement agency's longstanding guidance or practices). Nor has the State ever signaled to businesses that they may not accommodate requests to work on the seventh day of a workweek. *Id*. Accordingly, any change in policy would require at least some advance notice to the regulated community.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm that the Labor Code requires only one day of rest on a given workweek, and that employees may choose to work through a full workweek if they so desire. But, if this Court should hold otherwise, *amici* request that the new interpretation be given only prospective effect.

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RULE 8.204(c)(1) CERTIFICATION

I hereby declare as follows:

1. I am an attorney duly licensed to practice law in this state, and counsel of record for *amici curiae*. The facts stated herein are known to me personally, and if called as a witness I would competently testify thereto. I make this declaration under Rule 8.204(c)(1), California Rules of Court.

2. I certify that this brief was produced on computer and does not exceed 8,400 words, including footnotes. According to the Word program used to produce this brief, the word count is 7,250, not including this certificate, tables of contents and authorities, proof of service, cover, the date and signature blocks.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 20th day of November, 2015.

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STATE OF CALIFORNIA, COUNTY OF SACRAMENTO:

I am an attorney licensed to practice law in all courts in the State of California. I am over the age of 18 years; my business address is 921 11th Street, Suite 400, Sacramento, California 95814.

On November 20, 2015, the foregoing Application for Leave to File Brief *Amici Curiae* and Brief *Amici Curiae* of National Federation of Independent Business Small Business Legal Center, Cato Institute, Reason Foundation, Manuel Cosme, Jr., Paul Cramer, Kieth Street, Stacy Antonpoulos, Nathan Foli, Steve Duvernay, and Tibor Machan in Support of Defendant – Appellee-Respondent was served, by THE LEX GROUP, on the interested parties in this action, by U.S. Mail, postage pre-paid, as follows:

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I further certify an electronic copy was filed for service on the California Supreme Court this 20th of November, 2015 pursuant to Rule 8.212(c)(2), Cal. R. Ct.

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