Appeal No. 15-56162

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAYRA CASAS and JULIO FERNANDEZ,

individually and on behalf of all others similarly situated,

Petitioners and Plaintiffs,

v.

VICTORIA'S SECRET STORES, LLC, *et al.*,

Respondents and Defendants.

From The United States District Court
For the Central District of California
Hon. George H. Wu, District Judge
Case No. 14-cv-06412-GW (VBKx)

PROPOSED BRIEF OF *AMICI CURIAE* CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, CALIFORNIA WOMEN'S LAW CENTER, EQUAL RIGHTS ADVOCATES, PICK UP THE PACE, PUBLIC COUNSEL, UNITED FOOD AND COMMERCIAL WORKERS WESTERN STATES COUNCIL, AND WOMEN'S EMPLOYMENT RIGHTS CLINIC IN SUPPORT OF APPELLANTS' REQUEST FOR REVERSAL

Michael D. Singer (SBN 115301)
COHELAN KHOURY & SINGER
605 "C" Street, Suite 200
San Diego, California 92101
Telephone: (619)595-3001

Miles Locker (SBN 103510)
4156 22nd St.
San Francisco, CA 94114
Telephone: (415) 786-5662

Anne Richardson (SBN 151541)
PUBLIC COUNSEL
610 S. Ardmore Ave.
Los Angeles, CA 90005
Telephone: (213) 385-1977

Charlotte Fishman (SBN 88345)
PICK UP THE PACE
100 Pine St., Suite 3300
San Francisco, CA 94111
Telephone: (415) 217-7302

Counsel for Amici Curiae

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BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANTS' REQUEST FOR REVERSAL

I. IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae represent low-wage workers who are affected by the call-in scheduling practices at issue in this brief. The California Employment Lawyers Association (CELA) is an association of over 1,000 California employment lawyers whose members primarily represent the interests of employees. CELA's mission is to support its members' efforts to protect the legal rights of working women and men through litigation, education and advocacy. As a result, CELA has a significant interest in ensuring that California's reporting time pay requirement, providing partial compensation to employees when scheduled employment is canceled without adequate notice, is interpreted as intended to deter scheduling abuse.

The California Women's Law Center (CWLC) is a non-profit, public-interest law center focused on breaking down barriers and advancing the potential of women and girls. Since its inception in 1989, CWLC has worked to ensure that life opportunities for women and girls are free from unjust social, economic, and political constraints. In particular, CWLC has focused on promoting the advancement of women's economic security and self-sufficiency. Fair scheduling and other employment practices are essential to the economic well-being of low-

wage workers, the majority of whom are women. Therefore, CWLC has a particular interest in ensuring that this Court addresses the oppressive scheduling practices at issue in this case.

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education and has participated as amicus curiae in scores of cases involving the interpretation and application of procedural and substantive laws affecting low-wage workers' employment rights and access to justice. Through our toll-free, multilingual Advice and Counseling service, ERA assists hundreds of working people each year facing unfair employment practices and exploitative working conditions that contribute to gender inequality, including unpredictable scheduling.

Pick Up The Pace is a private law firm whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combatting glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Because women are disproportionately represented in low-wage occupations that subject employees to the scheduling practice challenged in this case, which intensifies work/family conflict and impedes advancement in the workplace, it has a particular interest in the resolution

of this case.

Public Counsel is the largest not-for-profit law firm of its kind in the nation. It is the public interest arm of the Los Angeles County and Beverly Hills Bar Associations and is also the Southern California affiliate of the Lawyers' Committee for Civil Rights Under Law. Established in 1970, Public Counsel is dedicated to advancing equal justice under law by delivering free legal and social services to indigent and underrepresented children, adults, and families throughout Los Angeles County. In 2013, Public Counsel assisted more than 30,000 people with direct legal services and assisted hundreds of thousands more through filing impact lawsuits, influencing policy, and sponsoring legislation on a wide range of issues, including issues affecting low-wage workers. Public Counsel has a strong interest in reducing the widening economic gap through increasing the stability of low-wage workers by addressing such anti-employee policies as "Just in Time" call-in practices.

United Food and Commercial Workers Western States Council is the policy and legislative arm of California, Nevada and Arizona locals representing over 160,000 members in the Food Retail Grocery and Pharmacy Industry, Food Processing and Farm Workers. UFCW States Council has been on the forefront of advocating local and state legislative policy to ensure two week advance notice of work schedules and predictable pay for all workers in the retail industry.

The Women's Employment Rights Clinic (WERC) is a clinical program of Golden Gate University School of Law focused on the employment issues of low-wage workers. WERC advises, counsels and represents clients in a variety of employment-related matters, including individual and systemic claims for wage and hour violations. This case is of great interest to WERC because of how it will impact low-wage workers, who often work in industries that require "call-in" scheduling policies.

II. RULE 29 (c)(5) CERTIFICATION

Filing of this amici curiae brief is permitted by Fed. R. App. P. Rule 29. As required by Rule 29(c)(5), the undersigned certifies that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person - other than the amici curiae, their members, or their counsel - contributed money that was intended to fund preparing or submitting this brief.

III. SUMMARY OF ARGUMENT

Amici curiae urge this Court to reverse the district court's decision construing the reporting time requirement set forth in Section 5 of the Industrial Welfare Commission Wage Orders on grounds that 1) the District Court's decision did not interpret the Wage Order's language on reporting time pay broadly to effectuate its purpose of protecting employees; 2) the Wage Order's "reporting for

work" language includes reporting by phone when required by the employer to do so; and 3) a "call-in" scheduling policy that denies reporting time pay to employees who are required by their employer to call in two hours before the beginning of a scheduled shift in order to find out whether work is available violates the public policy behind California's reporting time pay requirement. Alternatively, Amici request that the issue be certified to the California Supreme Court for resolution.

IV. ARGUMENT

A. The Court below erred by failing to construe California's reporting time pay requirement broadly in favor of protecting employees.

As the California Supreme Court held in *Murphy v. Kenneth Cole Productions Inc.,* 40 Cal. 4th 1094, 1103 (2007), "statutes governing conditions of employment are to be construed broadly in favor of protecting employees." *Id.* at 1103 (*citing cases).* California courts have repeatedly made clear that the IWC's wage orders are to be given a liberal interpretation to effectuate the purpose of worker protection. "Wage and hour laws are to be construed so as to promote employee protection. These principles apply equally to the construction of wage orders." *Mendiola v. CPS Security Solutions, Inc.,* 60 Cal.4th 833, 840 (2015) (internal quotes and citations omitted).

In *Industrial Welfare Com. v. Superior Court of Kern County*, a frequently

cited case, the California Supreme Court explained:

> [P]ast decisions . . . teach that in light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection. As the court observed in *California Grape etc. League, supra,* 268 Cal. App. 2d 692, 698: "Remedial statutes such as those under consideration [i.e., the statutes governing the adoption of wage orders] are to be liberally construed. [Citation.] They are not construed within narrow limits of the letter of the law, but rather are to be given liberal effect to promote the general object sought to be accomplished. . . ."

Id. at 27 Cal. 3d 690, 702 (1980). *See also Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785, 794 (1999) (*quoting Industrial Welfare Com. v. Superior Court)*; *Martinez v. Combs*, 49 Cal. 4th 35, 61 (2010) (same); *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004, 1027 (2012) (IWC "wage order provisions must be interpreted in the manner that best effectuates [employee] protective intent."); *Bono Enterprises, Inc. v. Bradshaw,* 32 Cal. App. 4th 968, 974 (1995) (*overruled on other grounds by Tidewater Marine Western, Inc. v. Bradshaw,* 14 Cal. 4th 557, 572 (1996) (The Labor Code "specifically empower[s] the DLSE to interpret and enforce IWC Orders with the primary objective of protecting workers. . . . IWC orders must be liberally construed to accomplish this primary objective." [citations omitted].)

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B. Employees who call in at their employer's command shortly before the commencement of a scheduled shift to learn whether work will be available are "reporting for work."

Section 5 of Industrial Welfare Commission Order 7-2001 sets forth the circumstances under which employees are entitled to "reporting time pay," and provides certain exceptions under which employers are relieved from the obligation to make such payments. Pursuant to subdivision (A) of Section 5 : "Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid" in the amount specified by that regulation. The specified exceptions from the general requirement for reporting time pay are set out at subdivisions (C) and (D) of Section 5.[1]

The Court below failed to construe the phrase "report for work" *as a whole* and *as it actually worded* in Section 5(A). Rather, the Court premised its analysis on a misstatement of the language used in the IWC wage order. The Court's

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[1] Subdivision (C) makes reporting time pay provisions inapplicable when "(1) Operations cannot continue or commence due to threats to employees or to property, or when recommended by civil authorities; (2) Public utilities fail to supply electricity, water or gas, or there is a failure in the public utilities, or the sewer system operations; or (3) The interruption of work is caused by an Act of God or other cause not within the employer's control." Subdivision (D) makes reporting time pay inapplicable to "an employee on paid standby status who is called to perform assigned work at a time other than the employee's scheduled reporting time."

inquiry focused on the meaning of the phrase "report to work," and considered the question before it to be "what the Wage Order means by 'report to work' or whether someone 'reports to work' by calling in for a call-in shift." (Appellants' Excerpts of Record ["AER"] 1:13.) But the phrase in the IWC Order is "report *for* work," not "report *to* work." The Court's erroneous formulation led to its conclusion "that a person 'reports to work' by physically showing up at the place ready to work." (AER 1:14.)

The Court's error was compounded by its failure to properly consider the meaning of the word "work." Controlling California law compels the conclusion that when an employer requires an employee to call in to the employer at a specified time for business reasons, the time spent on that call constitutes "work" within the meaning of the IWC order. In making this employer-required telephone call, the employee has "report[ed] for work." The term "hours worked" is defined in the IWC Orders as "the time during which an employee is subject to the control of an employer, and includes all time the employee is suffered or permitted to work, whether required to do so." (IWC Order 7-2001, Section 2 (G).)

In *Morillion v. Royal Packing Co.*, 22 Cal.4th 575 (2000), the California Supreme Court concluded that agricultural employees were entitled to compensation for time riding (and waiting to board) employer-provided buses that transported these employees from an employer designated pick-up point to the

fields, and transported them back from the fields to the pick-up point at the end of the workday, where the employer had required the use of those buses as the means of traveling to and from the fields. This conclusion was premised on the Court's holding that "by directing and commanding [the workers] to travel between the designated departure points and the fields on its buses, Royal 'controlled' them within the meaning of 'hours worked' under subdivision 2(G)" of the Wage Order. *Morillion*, 22 Cal. 4th 575, at 587.

Morillion makes clear that under the IWC orders, an activity compelled by the employer constitutes time worked even when that activity takes place away from the physical premises of the jobsite and even where it does not involve a task that the employee is required to perform at the jobsite. The workday for these farm workers commenced when they reported for pick-up at the designated pick-up point at the time designated by the employer.

Morillion was not a reporting time pay case. But there can be no doubt that for those farm workers, it was the act of reporting for pick-up at the time designated by the employer that constituted "reporting for work" within the meaning of the IWC's reporting time pay provision.

There is nothing in the plain language of the Wage Orders or in the IWC's legislative history to suggest that "work" has a different meaning under the reporting time pay provision than it does under those other provisions of the wage

orders analyzed in *Morillion*. Absent any indication that the IWC intended a narrower definition of "work" in Section 5 than in these other sections of the Wage Order, the application of a narrower definition contravenes basic rules of statutory construction.

C. California's reporting time pay requirement serves two remedial purposes — compensating employees and encouraging proper scheduling.

In *Murphy*, the Supreme Court noted the "dual-purpose" of the reporting time pay remedy, stating: "In addition to compensating employees, reporting-time and split-shift pay provisions encourage proper notice and scheduling," and serve as "an appropriate device for enforcing proper scheduling consistent with maximum hours and minimum pay requirements." *Murphy v. Kenneth Cole Productions*, *supra*, 40 Cal.4th at 1111-1112.

In *California Manufacturers Association v. Industrial Welfare Commission*, 109 Cal.App.3d 95, 112 (1980), the Court of Appeal upheld the IWC's authority to require reporting time pay, noting: "the stated purpose (encouraging proper notice and scheduling) is reasonably related to the welfare of employees (both male and female) and thus to the purpose of the enabling statute." The purpose of encouraging proper scheduling and notice is undermined by imposing an unduly narrow interpretation of the phrase "report for work" that renders that phrase the

equivalent of "report to the employer's premises."

Turning to the compensatory purpose of reporting time pay, the required payment was intended by the IWC to compensate the employee not only for transportation costs (that would only be incurred if the employee must travel to report for work), but also for non-travel related expenses (such as child care costs) and for lost wages resulting from the employee's inability to secure work for the day. *See, e.g.*, Minutes of IWC Meeting, January 10-11, 1967, AER 2:125-126.

Non-travel related damages, including lost wages, affect all employees who are required to report for work (whether or not they are required to physically report to the employer's premises) and who are not permitted to work their scheduled shifts. This is true for workers such as those in *Morillion* who report for work by showing up at a designated place other than the jobsite. It is also true for the ever-growing number of workers who "telecommute" with their employer's approval or at their employer's direction, by working scheduled shifts from their homes and it is true for shift workers who report for their work shifts by calling in at a time designated by the employer.

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D. A "Call-In" Scheduling Policy that Denies Reporting Time Pay to Employees who are required to call in two hours before the beginning of a scheduled shift, only to find that work is unavailable, violates the public policy objective behind California's reporting time pay requirement.

Reporting time pay has long been California's chosen remedy for the twin evils of overscheduling and denial of the opportunity to work on inadequate notice. "Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half of said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event for less than two (2) nor more than four (4) hours, at the employee's regular rate of pay, which shall not be less than the minimum wage." Division of Labor Standards Policies and Interpretations Manual Section 45.1 (2006 rev). "The primary purpose of reporting time pay is to guarantee at least partial compensation for employees who expect to work a specified number of hours and who are deprived of that amount by the employer." Division of Industrial Welfare Enforcement Manual Section 320(a)(5).

The policy rationale for requiring premium pay when shifts are denied without proper notice is clearly set forth in the language of Section 45.1.2.1 of the DLSE Manual): "The reporting time premium requirement is designed to

discourage employers from having employees report unless there is work available at the time of the reporting and is further designed to reimburse employees for expenses incurred in such situation." As a result of sophisticated new software technology, Victoria's Secret and other retailers have gained the ability to predict fluctuations in customer demand using computer algorithms that track variables known to affect traffic to their stores. The information provided enables Victoria's Secret and other retailers to cut labor costs by adjusting staffing levels on short notice in response to real time fluctuations in anticipated demand, a practice that has become known as "just in time" scheduling.

"Call-in shifts," the scheduling device Victoria's Secret uses to capture the labor cost savings made possible by "just in time" scheduling, is *entirely* dependent upon its ability (1) to overschedule employees in advance of need *and* (2) to cancel shifts on short notice without penalty.

Employees scheduled to work "call-in shifts" are required to hold themselves available to work the scheduled time *and* to report for work by phone two hours in advance. When they do report, they may be (and frequently are) told that no work is available. However, unlike employees who are scheduled to report for work by showing up at the store, Victoria's Secret "call-in" shift employees do not receive reporting time pay when there is no work for them.

Taking into account California's strong and clearly expressed interest in

employee welfare, there is no basis in law or policy to treat the two groups of employees differently with respect to reporting time pay. The economic "hit" of being denied a day's wages by telephone on two hours' notice is no different than the economic "hit" of being turned away at the start of the shift. The opportunity cost of foregoing other employment is the same. The economic and social cost of arranging coverage for domestic responsibilities in anticipation of work (e.g., dependent care) is the same. Both employee groups are harmed by denial of scheduled work on inadequate notice. California's clearly articulated strong public interest in income preservation is not satisfied unless both employee groups receive reporting time premium pay.

It is no secret that Victoria's Secret treats "call-in" shifts as "just in case" shifts — a hedge against the risk inherent in lean scheduling that fluctuating customer traffic will require more employees than have been scheduled to show up for work on a given day. In the absence of reporting time pay, "call-in" shifts are a cost-free scheduling option that shifts the financial burden of fluctuating traffic from the employer to the employee.

Allowing employers to deny premium pay to "just in case" employees whose shifts are canceled on short notice undermines the important public policy objective of deterring employers from overscheduling employees. In fact, removing the premium pay disincentive to overscheduling is likely to have the

opposite effect of *incentivizing* the practice.

E. Recent Studies Have Documented the Adverse Effect of "Just in Time" Scheduling on the Ability of Low-Wage Workers to Earn a Living Wage.

There is ample evidence that the proliferation of "just in time scheduling" in the retail industry and other low-wage occupations has incentivized employers to impose "just in case" schedules on employees - demanding a one-way commitment that adversely affects the social and economic health of low-wage workers and their families.

In fact, underemployment and unpredictable scheduling have rapidly been gaining recognition as the source of serious social and economic problems facing low-wage workers and their families. Briefing papers recently prepared by national nonprofit organizations, unions and university research centers confirm the adverse effects of schedule instability on the ability of low-wage workers to earn a living wage.

In April 2015, the Economic Policy Institute, a nonprofit, nonpartisan think tank, issued an extensively documented briefing paper entitled "Irregular Work Scheduling and its Consequences." The paper analyzes the economic and social consequences of "just in time" scheduling, concluding:

> Facilitated by new software technology, many employers are adopting a human resource strategy of hiring a cadre of part-

> time employees whose work schedules are modified, often on short notice, to match the employer's staffing with customer demand at the moment…Such jobs are disproportionately found in the service occupations and in the retail and wholesale trade and services industries…
>
> "One key source of underemployment is that at least periodically, employees are scheduled for fewer hours than they prefer to be working, in days or weeks that are not necessarily regular or predictable. Thus, the consequent experience of involuntary part-time employment not only constrains the incomes of those workers, but often makes the daily work lives of those individuals unpredictable and more stressful. It has the indirect effect of restraining or making unpredictable the income that would fuel consumption spending on which the economy depends, and directly affects workers' daily lives, by complicating the navigation of nonwork responsibilities such as parenting, other forms of caregiving, and schooling."

EPI Briefing Paper #394, page 4 [internal citations and footnotes omitted], http://www.epi.org/publication/irregular-work-scheduling-and-its-consequences/.

In June 2015, DC Jobs with Justice, Jobs with Justice Education Fund, DC Fiscal Policy Institute and Georgetown University's Kalmanovitz Initiative for Labor and the Working Poor jointly released "Unpredictable, Unsustainable: The Impact of Employers' Scheduling Practices in DC," http://www.dcjwj.org/wp-content/uploads/2015/06/DCJWJ_JustHours_Report_Summary_2015.pdf. The report presents the results of a survey of retail, restaurant and food service workers in Washington, D.C., which found that "on-call/call-in" shifts were common, and that 49 percent of workers scheduled for such shifts report that they rarely end up actually working despite holding time each week for their employers.

A report prepared in 2014 by the Center for Law and Social Policy, Retail Action Project, and Women Employed entitled "Tackling Unstable and Unpredictable Work Schedules, a Policy Brief on Guaranteed Minimum Hours and Reporting Pay Policies," http://www.clasp.org/resources-and-publications/publication-1/Tackling-Unstable-and-Unpredictable-Work-Schedules-3-7-2014-FINAL-1.pdf, explains how unstable work schedules deprive low-wage workers of the hours required to earn a living wage. Inadequate hours may also prevent them obtaining employer-provided benefits (e.g., sick leave, medical insurance), and insufficient hours may threaten their entitlement to government benefits relied upon by the working poor as a safety net to support their families.

Finally, while the details of state and local government reporting time pay entitlements differ, it is undeniable that they are a vital tool in the war against abusive scheduling practices. See, e.g., "Reporting Time Pay: A Key Solution to Curb Unpredictable and Unstable Scheduling Practices," a Fact Sheet published by the National Women's Law Center in January 2015.

F. Accordingly, this Court should reverse the decision of the Court below, or in the alternative, certify the question to the California Supreme Court for resolution.

While there may be ambiguity in the term "report for work," there can be no doubt about the importance of the issue presented to the health and welfare of

California citizens. The district court erred in failing to honor California's commitment to compensating employees who are denied the opportunity to perform scheduled work on inadequate notice. Accordingly, this Court should reverse the judgment below, or, in the alternative, certify the question to the California Supreme Court for resolution.

This Court recently certified three wage and hour issues in the case of *Mendoza v. Nordstrom, Inc.*, 778 F.3d 834 (9th Cir. Cal. 2015). In *Mendoza*, the certified questions related to California Labor Code Sections 551, 552, and 556 and involved interpreting "day of rest" requirements: 1) whether "a day's rest" in seven as used in the code was calculated by the workweek or on a rolling basis; 2) whether an exemption from providing a day of rest applied when the employee works less than six hours in any one day of the workweek, or in every day of the week, and 3) the meaning of the word "cause" in the sentence "cause an employee to work more than six days in seven." *Id.* at 838.

This Court concluded that certification of these questions to the California Supreme Court was appropriate, as no controlling California precedent answered the question. There, as here, the issues involved statutory interpretation of the California's wage and hour laws in light of legislative history. As is also the case here, the *Mendoza* Court noted that "the text of the applicable statutes is

ambiguous, we are aware of no pertinent legislative history; and the answer to the certified questions is not obvious." *Mendoza* at 839.

In light of the importance of the question presented, and in the absence of controlling California authority, it too should be certified to the California Supreme Court for resolution.

V. CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to reverse the district court's opinion and remand for further proceedings. In the alternative, this Court should certify the issue to the California Supreme Court.

Respectfully submitted,

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, et.al

Dated: December 16, 2015

By: /s/ Michael D. Singer
Michael D. Singer
Miles Locker
Anne Richardson
Charlotte Fishman

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(C), I certify that this Amici Curiae brief is proportionally spaced in Microsoft Word Times New Roman, has a typeface of 14 points, and is 4,225 words (excluding tables and this Certification).

Dated: December 16, 2015 By: /s/ Michael D. Singer
Michael D. Singer

Counsel for Amici Curiae