No. S219434

SUPREME COURT OF CALIFORNIA

KRISTIN HALL,

Plaintiff and Appellant,

vs.

RITE AID CORPORATION,

Defendant and Respondent.

Court of Appeal No. D062909

San Diego County Superior Court
No. 37-2009-00087938-CU-OE-CTL
Hon. Joan Lewis

REPLY IN SUPPORT OF PETITION FOR REVIEW OF DECISION BY COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

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INTRODUCTION/SUMMARY OF ARGUMENT

In its petition for review, Rite Aid explained at length how the Court of Appeal's decision conflicts with *Brinker Restaurant Corp. v. Superior*, 53 Cal. 4th 1004 (2012), along with at least two court of appeal decisions. Plaintiff responds that the Court of Appeal did follow *Brinker*, but she can say that only by misstating the analytical framework this Court articulated in *Brinker*. The correct framework includes the critical step of evaluating the issues framed by the pleadings *and the law applicable to the claims.* The trial court followed this step; the Court of Appeal simply removed it from the court's analysis, and plaintiff ignores it here as well.

Plaintiff also contends that the Court of Appeal was correct to reverse the trial court for addressing the threshold legal dispute regarding the meaning of "nature of the work" under section 14(A) because that was not necessary to deciding class certification. But it was, and this Court's recent decision in *Ayala v. Antelope Valley Newspapers, Inc.*, No. S206874, 2014 WL 2924954 (June 30, 2014), makes that point even clearer. In *Ayala*, this Court acknowledged that to assess whether the trial court's denial of class certification was proper, it first had to address a threshold legal issue—the legal standard for when a worker is properly classified as an employee rather than an independent contractor. The approach this Court took in *Ayala* perfectly tracks the approach the trial court followed here in addressing the meaning of "nature of the work." The Court of

Appeal's opinion simply cannot be reconciled with *Ayala*, thus further deepening the conflict with decisions by this Court and other courts of appeal, and warranting this Court's review.

Finally, plaintiff's opposition to Rite Aid's request that the Court resolve the question of the meaning of "nature of the work," or alternatively grant and hold this petition pending the outcome in *Kilby v. CVS Pharmacy, Inc.*, No. S215614 (Mar. 12, 2014), is hard to follow. If this Court agrees that determining what "nature of the work" means is necessary to decide class certification, then there is no reason for the Court not to decide that question now, so that the case may proceed in the trial court as a class action or single-plaintiff case without further delay. Alternatively, the Court should grant the petition and hold it pending *Kilby*, just as the Court did in at least seven cases when *Brinker* was pending before this Court. That the trial court granted the parties' request for a stay pending the outcome of this petition or *Kilby* does not change anything, since no one can predict the outcome in *Kilby* and whether it necessarily will dispose of the issues in this case. Rite Aid should not be denied a hearing of its petition by this Court unless *Kilby* ends up being dispositive of the issues the petition raises.

Because plaintiff's answer does not refute Rite Aid's showing that the Court of Appeal's decision should be reviewed to ensure consistency of

court decisions and decide important questions of law, the Court should grant the petition.

ARGUMENT

I. THE COURT OF APPEAL DID NOT "CLOSELY ADHERE" TO *BRINKER* IN HOLDING THAT THE TRIAL COURT LACKED THE DISCRETION TO ADDRESS A THRESHOLD LEGAL DISPUTE NECESSARY TO DECIDING CLASS CERTIFICATION

A. Like the Court of Appeal Did, Plaintiff Ignores a Key Step in *Brinker*'s Analytical Framework —Evaluating the Law Applicable to the Plaintiff's Class Claim.

Plaintiff contends that the Court of Appeal "[c]losely adher[ed]" to *Brinker*'s "analytic framework for class certification motions" (Answer at 2), and therefore there are no grounds for review by this Court. But plaintiff can say that only by misstating the analytical framework actually followed by this Court in *Brinker.* When the framework is correctly stated, it is clear that the Court of Appeal did not follow it.

Plaintiff contends the Court of Appeal complied with *Brinker* by (1) finding that Rite Aid had a uniform seating policy for its Cashier/Clerks (*i.e.*, not to provide seats); (2) "articulat[ing] plaintiff's *theory of recovery* as it related to that policy" (*i.e.*, the policy deprived class members of seats when performing checkout functions at the register stations); and (3) concluding that "liability could be proved (or disproved) based on classwide evidence." (Answer at 2-3.) But those three steps are *not* the

formula this Court spelled out and applied in *Brinker*. Instead, the Court articulated the framework as follows:

> Presented with a class certification motion, a trial court must [1] examine the plaintiff's theory of recovery, [2] *assess the nature of the legal and factual disputes likely to be presented*, [3] and decide whether individual or common issues predominate. *To the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them.*

Brinker, 53 Cal. 4th at 1025 (emphases supplied).

Conspicuously absent from plaintiff's explanation of the Court of Appeal's "faithful" compliance with *Brinker* is a showing that the Court of Appeal performed *any* assessment of the nature of the legal disputes likely to be presented. How critical this step is to the *Brinker* framework cannot be overstated. *See* 53 Cal. 4th at 1024 ("To assess predominance, a court 'must examine the issues framed by the pleadings and the law applicable to the causes of action alleged.'" (quoting *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 916 (2001)). But as plaintiff does here, the Court of Appeal excised this critical step from the framework, and instead treated plaintiff's seating claim as certifiable so long as her theory of recovery, as she articulated it, arguably could rely on common proof, regardless of the law actually applicable to the claim and whether, under

that law, individualized issues would predominate. That is not what *Brinker* says.

B. The Trial Court, in Contrast, Faithfully Followed Each Step of *Brinker*'s Analytical Framework.

Unlike the Court of Appeal, the trial court faithfully adhered to the *Brinker* framework in deciding to decertify the class.

1. First, the Trial Court Examined Plaintiff's Theory of Recovery.

Plaintiff's theory of recovery is that Rite Aid violated section 14(A) by adopting a uniform policy of not providing seats to Cashier/Clerks while they were cashiering, *i.e.*, scanning merchandise, bagging merchandise, processing payment, and handing bagged items and a receipt to the customer. 15 JA 4222. The trial court examined this theory in compliance with *Brinker*.

2. The Trial Court Then Examined the Legal Issues Raised by Plaintiff's Theory.

The trial court then properly recognized that to evaluate the type of proof that would be needed to establish the merits of plaintiff's claim, *i.e.*, whether the work of a Cashier/Clerk "reasonably permitted" the use of a seat, it needed to address a threshold legal question: the meaning of "nature of the work" under section 14.

The outcome of this threshold issue controlled the type and scope of evidence that would be relevant to demonstrating liability. On the one

hand, if the trial court adopted plaintiff's position and construed "nature of the work" narrowly, plaintiff would need only present evidence related to a few cashiering tasks performed at the cash register. On the other hand, if the court adopted Rite Aid's position and interpreted the phrase holistically, then plaintiff would have to proffer evidence pertinent to the entire range of class members' job duties. Thus, class certification would turn on what evidence would be presented on plaintiff's claim, and that in turn would depend on the legal definition of "nature of the work."

The Court of Appeal deemed this evaluation to be inappropriate because under its construction of the *Brinker* framework, it asked only whether there is a uniform policy alleged and whether there was a theory of liability that turned on that uniform policy. By not assessing the legal issue raised by plaintiff's theory of recovery, the Court of Appeal skipped a crucial step in the *Brinker* framework.

3. Finally, the Trial Court Addressed the Predominance of Common and Individual Issues.

Having resolved the threshold legal question of what "nature of the work" means, the trial court finally could address whether common or individual issues would predominate, and therefore whether plaintiff's claim could be tried on a classwide basis. Looking at the evidence, the trial court found overwhelming proof of numerous individualized differences among Cashier/Clerks in the job duties they perform, a point plaintiff did

not dispute then, and does not now. Given that massive showing of individualized differences, the trial court concluded, correctly, that the class could not remain certified because common classwide proof was absent. The trial court's determination should have been upheld by the Court of Appeal because it was based on substantial evidence and was within the trial court's discretion to make. *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 329 (2004). By not deferring to the trial court's decision as required by *Sav-On*, the Court of Appeal erred, and its rationale for doing so placed it at odds with *Brinker*.

C. *Brinker*'s Treatment of the Rest Period Subclass Is Not Analogous to the Court of Appeal's Treatment of the Seating Class Here, But *Brinker*'s Treatment of the Off-the-Clock Subclass Is the Same as the Trial Court's Approach.

Throughout her answer, plaintiff refers to *Brinker*'s treatment of the rest-period subclass in that case as supporting her position here. But plaintiff overlooks a material distinction between the rest-period subclass in *Brinker* and the seating class at issue here.

The defendant in *Brinker* "conceded ... the existence of[] a common, uniform rest break policy" that "authorize[d] breaks only for each full four hours worked." *Brinker*, 53 Cal. 4th at 1033. Thus, the Court in *Brinker* was able to determine if the common question was amenable to class treatment without resolving the underlying legal dispute because there was

an undisputed uniform policy that could be challenged with classwide proof.

In contrast, Rite Aid's policy of not providing seats to Cashier/Clerks cannot be challenged with classwide proof. Section 14(A) grants a right to a seat only when the "nature of the work" reasonably permits use of a seat. If "nature of the work" means the sum of the employee's job duties, and not just some duties as plaintiff contends, then there was no classwide proof that could be used to challenge the legality of the policy. Instead, the trial court would have had to examine, one by one, each class member's job duties to determine whether the nature of *his* or *her* work reasonably permitted the use of a seat. Thus, the ruling in *Brinker* on the rest-period subclass is not analogous here.

The analogous ruling in *Brinker* is, instead, the Court's determination of the off-the-clock subclass. There, the Court agreed with the trial court that regardless of the plaintiff's theory that Brinker had a policy not to pay for off-the-clock work, the lawfulness of the policy depended on whether employees actually worked off the clock with Brinker's knowledge or acquiescence, and there was no common proof by which that could be shown. *Brinker*, 53 Cal. App. 4th at 1052. Similarly here, the only proper way to challenge Rite Aid's policy of not providing seats to Cashier/Clerks is to prove that the "nature of the work" reasonably

permits seats, and if classwide proof of the "nature of the work" is missing, then class certification is inappropriate.

II. THIS COURT'S RECENT DECISION IN *AYALA* CONFIRMS AND FURTHERS THE CONFLICT BETWEEN THE COURT OF APPEAL'S DECISION HERE AND THIS COURT'S CLASS CERTIFICATION JURISPRUDENCE, AS WELL AS DECISIONS BY OTHER COURTS OF APPEAL

A. In *Ayala v. Antelope Valley Newspapers, Inc.*, This Court Did Exactly What the Court of Appeal Reversed the Trial Court for Doing—It Decided a Threshold Legal Issue to Determine the Propriety of Class Certification.

Since Rite Aid filed its petition for review, this Court issued its decision in *Ayala v. Antelope Valley Newspapers, Inc.*, No. S206874, 2014 WL 2924954 (June 30, 2014). Plaintiff cites *Ayala* twice in her answer, but does not address the further conflict that *Ayala* creates with the Court of Appeal's opinion.

In *Ayala*, the central question was whether home-delivery carriers for Antelope Valley, a newspaper company, were correctly classified as independent contractors, or actually should be treated as employees. Deciding their status "hinge[d] on the governing test for employment." 2014 WL 2924954, at *3. But there was a disagreement over the governing legal test. In denying class certification, the trial court determined there was considerable variation in the degree to which Antelope Valley exercised control over its carriers, and the carriers were not subject to Antelope Valley's pervasive control as to the manner and means of

delivering newspapers. In other words, the trial court concluded that liability turned on what degree of control Antelope Valley actually exercised over the manner and means of delivery of its newspapers. Because the trial court found individualized issues about that exercise of control predominated, it denied class certification. *Id.* at *2.

Deciding that threshold legal issue, this Court ruled that the trial court erred. This Court held that the test for independent contractor status turned on Antelope Valley's *right to control* how the carriers performed their jobs, not necessarily on how they actually performed their jobs. 2014 WL 2924954, at *12.

With the correct legal test established, the Court then stated the applicable question for class certification: "Is Antelope Valley's right of control over its carriers, whether great or small, sufficiently uniform to permit classwide assessment?" 2014 WL 2924954, at *5. As a result, the existence of variations in the extent to which Antelope Valley actually exercised control did not warrant denial of class certification because those variations did not necessarily show variation in the extent to which the company possessed a right of control. *Id.*, at *7.

This Court acknowledged it was addressing this threshold legal issue at the certification stage. Indeed, it noted that Antelope Valley's legal right of control was "likely the crux of the case's merits." 2014 WL 2924954, at *8. But citing *Brinker* and *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App.

4th 974, 990–91 (2013) (one of the cases in conflict with what the Court of Appeal did below), the Court recognized that it was entirely appropriate to address this threshold legal issue at the certification stage because it was necessary in order to determine whether class certification would be appropriate: "[T]he question at this stage is whether the operative legal principles, as applied to the facts of the case, render the claims susceptible to resolution on a common basis." 2014 WL 2924954, at *3. The Court further explained that "[t]he key to deciding whether a merits resolution is permitted ... is whether certification 'depends upon' the disputed issue." *Id.* at *8. Accordingly, at the certification stage, the Court addressed the legal analysis governing the right-to-control test. Whether individual issues predominated depended upon which inquiry was applied.

Plaintiff here insists that the trial court here erred "in deciding a merits issue (concerning the scope and meaning of Wage Order 7-2001 § 14) whose resolution was *not* necessary in determining whether to grant class certification." (Answer at 2.) That position cannot be reconciled with *Ayala*. Just as in *Ayala*, the trial court had to address a threshold legal issue—in *Ayala*, the legal standard for employee status, here the legal definition of "nature of the work"—in order to determine whether the case could be maintained as a class action with common proof. The Court of Appeal's reversal of the trial court on that point cannot be reconciled with

what the Court held in *Ayala*, and *Ayala* provides yet another reason for granting Rite Aid's petition.

B. Plaintiff's Attempt to Reconcile the Court of Appeal's Decision with *Morgan* and *Dailey* Fails.

Rite Aid's petition showed that the Court of Appeal's decision conflicted with the decisions in *Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341 (2012), and *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974 (2013). Plaintiff tries to harmonize those cases with what the Court of Appeal held here, but falls far short.

Plaintiff argues that *Morgan* is different from this case because the plaintiff there lacked "substantial evidence of a companywide policy or practice." (Answer at 11.) That is not an accurate characterization of *Morgan*.

In *Morgan*, Wet Seal had a companywide written dress code policy that was challenged as unlawful under Labor Code sections 450 and 2802. 210 Cal. App. 4th at 1345. In order for the trial court to evaluate whether the plaintiffs could challenge the policy with common proof, it followed *Brinker* by examining the issues framed by the pleadings and the law applicable to the causes of action alleged. Specifically, the trial court looked at the DLSE's definition of the term "uniform" for guidance on the governing legal standard. As the court of appeal noted, the trial court did so "in order to determine whether there was a common legal issue, not to

make a substantive ruling regarding the merits of plaintiffs' legal claim." *Id.* at 1360. As a result of its determination of the applicable law, the trial court ruled that for the plaintiff to establish the unlawfulness of Wet Seal's policy, individualized inquiries would be necessary (*i.e.*, whether purchased clothing constituted a "uniform," as well as what, if anything, the manager told the employee regarding the required wardrobe). *Id.* at 1357. Thus, what the court of appeal approved the trial court doing in *Morgan*, the Court of Appeal faulted the trial court for doing here. Plaintiff's attempt to distinguish *Morgan* from this case fails.

Plaintiff makes an even weaker effort to distinguish *Dailey* (which, as noted above, was cited by this Court in *Ayala* as being in harmony with *Brinker*). She briefly describes the trial court's findings denying class certification and summarily concludes that *Dailey* should be disregarded because the employer there lacked a uniform policy or practice. (Answer at 11-12.) But plaintiff simply ignores what the plaintiffs actually said in *Dailey*: They argued certification was appropriate "because Sears's uniform policies and practices resulted in a classwide erroneous exempt classification." 214 Cal. App. 4th at 989. And unlike the Court of Appeal here, the court in *Dailey* did not stop the analysis there; that court stressed the crucial step in *Brinker*'s analytical framework of determining "the nature of the legal and factual disputes likely to be presented." *Id.* at 990 (quoting *Brinker*, 53 Cal. 4th at 1025). Because under the law exempt

status turns on the job duties performed by the employees, the court held that individualized inquiries would dominate resolution of the key issues in the case, making class certification inappropriate. *Id.* at 991-92.

Because the Court of Appeal's decision here cannot be squared with *Morgan* or *Dailey* (much less *Ayala* and *Brinker*), this Court should accept Rite Aid's petition to resolve the conflict.*

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* In its petition, Rite Aid thoroughly distinguished the three cases upon which the Court of Appeal relied: *Bradley v. Networkers Int'l, LLC*, 211 Cal. App. 4th 1129 (2012); *Faulkinbury v. Boyd & Associates, Inc.*, 216 Cal. App. 4th 220 (2013); *Benton v. Telecom Network Specialists, Inc.*, 220 Cal. App. 4th 701 (2013). In her answer to the petition, plaintiff fails to directly address Rite Aid's argument that in all of these cases there were no threshold legal issues to decide, because *Brinker* had resolved previously unresolved legal questions regarding the scope and timing of the obligations to provide meal and rest periods and under the applicable law challenges to the employer's policies (or lack thereof) could be decided with classwide proof. In contrast, here, the legality of Rite Aid's policy not to provide seats to Cashier/Clerks arguably could be decided with common proof only if the legal definition of "nature of the work" was as narrow as plaintiff contends, and therefore that threshold legal issue needed to be decided. Plaintiff dismisses Rite Aid's treatment of *Bradley*, *Faulkinbury* and *Benton* as an attempt to "limit class certification to employment policies that are facially unlawful," (Answer at 14), but that is not the rule Rite Aid draws from the cases. The courts in those cases were not prejudging the lawfulness of the policies, but they were holding that the legality of the policies could be decided with classwide proof. That is not the situation here if "nature of the work" means the employee's job viewed holistically.

III. THE COURT SHOULD RULE ON THE MEANING OF "NATURE OF THE WORK" OR, AT MINIMUM, GRANT REVIEW AND HOLD THE PETITION PENDING THE OUTCOME OF *KILBY V. CVS PHARMACY*

Because the meaning of "nature of the work" is determinative of whether the trial court correctly decertified the class, Rite Aid also asks the Court to decide the legal definition of "nature of the work," or, at minimum, grant the petition for review and hold it pending the Court's decision in *Kilby v. CVS Pharmacy, Inc.*, No. S215614 (Mar. 12, 2014).

Plaintiff's response to this request is confusing. First, she argues that there is no reason why the Court in this case should accept review of the question of the meaning of "nature of the work" because *Kilby* is pending. But she cites to no authority why the pendency of one case presenting the same issue as the issue raised by a petition for review provides grounds for denying the petition. And until the Court actually decides *Kilby*, no one can say for sure that its decision will dispose of the legal issue here as well.

Even more strangely, plaintiff also opposes Rite Aid's alternative grant-and-hold request, even though she must be well aware that when *Brinker* was pending before this Court, the Court issued grant-and-hold orders in as many as seven other cases raising the same issues as in *Brinker*. *See In re Lamps Plus Overtime Cases*, 143 Cal. Rptr. 3d 527 (Cal. 2011); *Tien v. Tenet Healthcare Corp.*, 124 Cal. Rptr. 3d 829 (Cal. 2011);

Hernandez v. Chipotle Mexican Grill, 120 Cal. Rptr. 3d 530 (Cal. 2011); *Faulkinbury v. Boyd & Associates*, 117 Cal. Rptr. 3d 1 (Cal. 2011); *Brookler v. Radioshack Corp.*, 2010 Cal. LEXIS 11817 (2010); *Bradley v. Networkers Intern. LLC*, 2009 Cal. LEXIS 4808 (2009); *Brinkley v. Public Storage, Inc.*, 87 Cal. Rptr. 3d 674 (Cal. 2009). There is no reason why the Court should act differently in this case than it did in those.

Finally, that the trial court granted the parties' request for a stay of all proceedings pending the outcome of this petition or *Kilby* does not change anything. Rite Aid should not be deprived of a hearing by this Court of its petition if the outcome in *Kilby* turns out not to decide the issues presented by the petition. The stay was agreed to by the parties and ordered by the trial court for the common sense reason that until this Court decides the issues presented by the petition, it potentially would be a waste of judicial and litigant resources for the case to proceed back in the trial court. Nothing in the stay suggests that the Court should not grant the petition and decide those issues.

Rite Aid's request for review of the question of the meaning of "nature of the work," or alternative request for a grant-and-hold pending *Kilby*, should be granted.

IV. THE COURT SHOULD NOT REVIEW THE TRIAL COURT'S RULING ON PLAINTIFF'S PAGA REPRESENTATIVE CLAIM

Plaintiff completes her answer with an exceptional request: She asks that, in the event the Court grants Rite Aid's petition and rules in its favor, the Court also should review the trial court's ruling on plaintiff's last-minute request to proceed with a representative action in lieu of a class action under PAGA. The trial court ruled that for the same reasons the class should be decertified, a PAGA representative claim would be unmanageable and should not be allowed to proceed. (Rite Aid also opposed PAGA representative status because up to the eve of trial plaintiff had chosen to proceed with the case as a class action, and did not seek to proceed with a representative claim until only after the class was decertified.)

Plaintiff's request is improper. Plaintiff did not file her own petition requesting review of that issue. It is well recognized that a party who "desires review regardless of the ruling on another party's petition for review" must file "a *separate petition for review* (rather than an answer)." Jon B. Eisenberg *et al.*, *Cal. Prac. Guide: Civil Appeals & Writs* Ch. 13-B (The Rutter Group 2003) (emphasis in original).

CONCLUSION

In *Ayala*, this Court observed "when the supporting reasoning [of a certification determination] reveals the court based its decision on

erroneous legal assumptions about the relevant questions, that decision cannot stand." 2014 WL 2924954, at *8. The Court of Appeal's opinion here itself rests on an erroneous legal assumption—that the mere allegation of an unlawful uniform policy is inherently amenable to class proof and deprives a trial court of the discretion to address threshold legal questions relevant to class certification. Under *Brinker*, *Ayala*, *Morgan*, and *Dailey*, the Court of Appeal's decision cannot stand. For the foregoing reasons, Rite Aid respectfully requests the Court to grant its petition for review.

Dated: July 21, 2014.

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CERTIFICATE OF COMPLIANCE

In accordance with Rule 8.204(c), California Rules of Court, counsel for defendant and respondent Rite Aid Corporation hereby certify that its foregoing Reply in Support of Petition for Review (including footnotes) contain 4,192 words, as determined by our law firm's word-processing system.

Dated: July 21, 2014.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in the City and County of San Francisco, California. I am more than 18 years old and not a party to the within-entitled proceeding. My business address is 55 Second Street, 24th Floor, San Francisco, California 94105-3441.

On July 21, 2014, I placed with this firm at the above address true and correct copies of:

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Court of Appeal

Following ordinary business practices, the envelopes were sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I also declare that I am employed in the office of a member of the State Bar of California at whose direction the service was made.

Executed on July 21, 2014, at San Francisco, California.

Meredith Mitchell

Meredith Mitchell