Case No.

SUPREME COURT OF CALIFORNIA

KRISTIN HALL,

Plaintiff and Appellant,

vs.

RITE AID CORPORATION,

Defendant and Respondent.

SUPREME COURT
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Deputy

Court of Appeal No. D062909

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

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

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CERTIFICATE OF INTERESTED PARTIES

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party filing this certificate (Cal. R. Ct. 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. R. Ct. 8.208(e)(2)):

- Kristin Hall (Plaintiff and Appellant)
- Rite Aid Corporation (Defendant and Respondent)

Dated: June 19, 2014.

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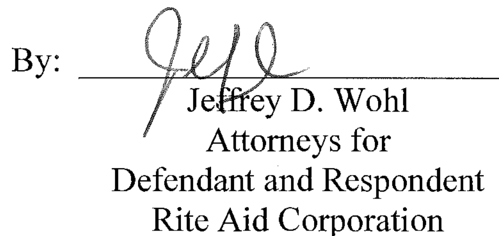
By: 
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INTRODUCTION

In *Brinker Restaurant Corp. v. Superior Court*, this Court explained that "[t]o the extent the propriety of [class] certification depends upon disputed threshold legal or factual questions, a court may, *and indeed must*, resolve them." 53 Cal. 4th 1004, 1025 (2012) (emphasis supplied).

In this "suitable seating" case, the trial court did just that. Presented with evidence showing a wide variation of job duties performed by Rite Aid Cashier/Clerks, the trial court realized that in order to decide whether the class should continue to be certified for trial or instead be decertified, it first needed to resolve the meaning of "nature of the work" as used in section 14(A) of Wage Order 7-2001. That regulation entitles working employees to suitable seats when the "nature of the work" reasonably permits their use. After interpreting "nature of the work" to mean the employee's job, viewed as a whole, rather than just particular job duties, the trial court concluded that the evidence showed a predominance of individualized issues, and on that basis decertified the class.

The Court of Appeal reversed, holding that the trial court's resolution of the threshold legal issue of the meaning of "nature of the work" was the same as deciding the merits of plaintiff's claim, and therefore improper. Notwithstanding the language from *Brinker* quoted above, the Court of Appeal ruled that when the plaintiff bases a class claim on a uniform employer policy, a trial court may not resolve threshold legal

issues necessary for class certification. In so ruling, the Court of Appeal ignored appellate decisions upholding denial of class certification that involved the resolution of threshold legal issues, while relying on others ordering class certification that did not involve such issues.

Because the Court of Appeal's decision is directly contrary to other appellate decisions, it has created a split in authority that should be resolved by this Court. This Court should accept review of the decision to ensure that appellate and trial courts are correctly following *Brinker*. Otherwise, if left to stand, the Court of Appeal's decision will at best create confusion, and at worst force courts to certify classes even when application of the law reveals a predominance of individualized issues.

The Court also should grant this petition to decide an important question: Where a plaintiff bases a class claim on a uniform employer policy, when may a trial court address threshold legal issues raised by the policy to determine whether common or individualized issues predominate?

Finally, the Court should decide what "nature of the work" as used in section 14(A) means. There currently is no published appellate decision on that issue, and resolution of the issue would guide the trial court in this case, whether the class is certified or not, as well as dozens of trial courts across the state hearing their own suitable seating cases. Recognizing the significance of the issue, this Court already has agreed to decide the meaning of "nature of the work" in *Kilby v. CVS Pharmacy, Inc.*,

No. S215614 (Mar. 12, 2014). Alternatively, the Court should grant this petition and hold it pending the outcome in *Kilby*.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This petition raises two questions worthy of review by this Court:

(1) Does a claim that a uniform employment policy is unlawful deprive a trial court of discretion to address a threshold legal question necessary to decide whether class certification is appropriate?

(2) In resolving the threshold legal issue to decide decertification, did the trial court correctly interpret the phrase "nature of the work" in section 14(A) of Wage Order 7-2001 to refer to the employee's job as a whole, rather than just one or more discrete duties?

REASONS WHY REVIEW SHOULD BE GRANTED

There are three reasons why Rite Aid's petition for review of the Court of Appeal's decision should be granted.

1. The Court of Appeal's Decision Creates a Split Among the Courts of Appeal.

Section 14(A) grants to employees the right to "suitable seats when the nature of the work reasonably permits the use of seats." To determine whether the class could be certified given the evidence about the work Cashier/Clerks perform for Rite Aid, the trial court addressed the meaning

of "nature of the work" in section 14(A). Once the trial court resolved that threshold issue—holding that "nature of the work" means the job considered as a whole—it was able to evaluate the propriety of class certification, leading to its ruling that the class should be decertified because of the predominance of individualized issues.

The Court of Appeal reversed. It held that the trial court abused its discretion by addressing a threshold legal issue at the decertification stage because plaintiff's challenge to a uniform employment policy was amenable to class treatment. By addressing the legal issue, the Court of Appeal held, the trial court prematurely decided plaintiff's claim on the merits.[1]

In reaching its conclusion, the Court of Appeal departed from at least two published court of appeal 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), the courts of appeal rebuffed a similar attack on the trial court's evaluation of a threshold legal issue at the certification stage. *Morgan* ruled that the resolution of a legal issue "for the limited purpose of assessing whether substantially similar question were common to the class and predominated over individual questions" was proper and

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[1] Exhibits A and B to this petition are the Court of Appeal's May 2, 2014, opinion (reported at 226 Cal. App. 4th 278), and its May 16, 2014, publication order. Rite Aid did not petition for rehearing.

consistent with this Court's precedent. 210 Cal. App. 4th at 1359. Likewise, *Dailey*, relying upon *Brinker*, stressed that the class certification inquiry must focus on "'the nature of the legal ... disputes likely to be presented'" as framed by the pleadings. 214 Cal. App. 4th at 990 (quoting *Brinker*, 53 Cal. 4th at 1025).

In brief, the courts in *Morgan* and *Dailey* preserved the "flexibility in dealing with class actions" that this Court has acknowledged trial courts must be afforded. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 443 (2000). The Court of Appeal's published opinion here removed that flexibility from the trial court. In doing so, it created a split in authority that this Court should resolve. *See* Cal. R. Ct. 8.500(b)(1).

2. This Petition Also Presents an Important Question of Law about a Trial Court's Authority to Address Threshold Legal Issues at the Certification Stage.

In *Brinker*, this Court upheld the propriety of deciding threshold legal issues as part of the class certification determination. It explained that "[t]o the extent the propriety of certification depends upon disputed threshold legal or factual questions, a court may, *and indeed must*, resolve them." 53 Cal. 4th at 1025 (emphasis supplied). At the same time, this Court cautioned that resolution of threshold factual or legal questions does not mean that the trial court should decide the merits of the parties' dispute. *Id.* at 1025.

The Court of Appeal conflated these concepts. It equated the trial court's resolution of a threshold legal question pertinent to a class certification determination—what does "nature of the work" mean?—with an evaluation of plaintiff's claim on the merits. But the trial court did not decide plaintiff's claim on the merits. Even under the trial court's interpretation of "nature of the work," plaintiff was free to proceed to trial on her seats claim, and win if she could prove that the nature of the work *she* performed for Rite Aid reasonably permitted the use of a seat. However, because plaintiff lacked common proof to support her class claim—due to the predominance of individualized differences with respect to the jobs class members perform for Rite Aid—the trial court held that the class had to be decertified.

Nevertheless, the Court of Appeal read *Brinker* as adopting a rule that a trial court may not address a threshold legal issue when a class claim is based on a uniform employment policy, even if resolution of that issue belies the propriety of certification. Review by this Court is therefore warranted to settle the important question of law regarding the role of the trial court in evaluating threshold legal questions necessary to class certification. *See* Cal. R. Ct. 8.500(b)(1).

3. Review Is Also Needed to Resolve the Correct Interpretation of "Nature of the Work."

Although section 14(A) or some variant of it has been on the books since the 1920s, to date there is no published appellate authority construing the meaning of "nature of the work." In recent years, dozens of "suitable seating" cases have been filed, leaving the trial courts without appellate guidance as to the meaning of section 14(A). Although it was presented to the Court of Appeal, the court declined to address the issue. This Court already has recognized the significance of the issue and agreed to resolve it as part of answering questions about the scope of section 14(A) certified by the U.S. Ninth Circuit Court of Appeals in *Kilby v. CVS Pharmacy, Inc.* The Court should resolve the issue here, as well.

Alternatively, if this Court does not grant plenary review of the Court of Appeal's decision, it still should grant and hold this petition until it resolves *Kilby*. *See* Cal. R. Ct. 8.512(d)(2).

BACKGROUND

I. PLAINTIFF BROUGHT THIS CLASS ACTION ALLEGING THAT THE NATURE OF THE WORK OF RITE AID CASHIER/CLERKS REASONABLY PERMITS THE USE OF SEATS

Plaintiff's class action complaint pleads a single cause of action for civil penalties under the Labor Code Private Attorneys General Act ("PAGA"), Cal. Lab. Code § 2698 *et seq.* 1 JA 14-18. Her theory arises from a longstanding—but rarely invoked or litigated—provision of a

California wage order: section 14(A) of Wage Order 7–2001, applicable to the mercantile industry, which states: "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." 8 Cal. Code Regs. § 11070(14)(A). Plaintiff alleged that by failing to provide seats to its front-end Cashier/Clerks, Rite Aid violated section 14(A), and in turn Labor Code section 1198, which prohibits the "employment of any employee ... under conditions of labor prohibited by" a wage order. 1 JA 17.

In the complaint, plaintiff alleged class certification was proper, in part, because of the existence of common issues of fact or law. Among them was the question of "whether the job of a cashier *or* the operation of a cash register at Rite Aid reasonably permits the use of a seat." 1 JA 16 (emphasis supplied). Thus, from the outset of the lawsuit, a threshold issue has been defining the scope of the work performed by Cashier/Clerks that frames the certification analysis: Does "nature of the work" refer to the comprehensive range of responsibilities comprising "the job of cashier," or only to one or more discrete tasks, *i.e.*, "the operation of a cash register"?

II. THE TRIAL COURT INITIALLY CERTIFIED THE CLASS BASED ON AN EXPANSIVE DEFINITION OF "NATURE OF THE WORK"

A few months prior to class certification, the trial court had declined on summary judgment to accept Rite Aid's argument that "nature of the work" means "the job as a whole." 2 JA 315. Instead, it accepted

plaintiff's position that the phrase may refer narrowly to a discrete task (*e.g.*, cashiering), regardless of the job's requirement of numerous other tasks requiring standing or moving. As a result, the trial court certified the class, 2 JA 315-16, even though Rite Aid presented overwhelming evidence of variations among class members in what job duties they performed and how much time they spent performing them.[2] The order did not identify what common issues were present or how they predominated over individualized issues.

III. PRESENTED WITH SUBSTANTIAL NEW EVIDENCE AND THE DECISION IN *KILBY V. CVS PHARMACY*, THE TRIAL COURT HELD THAT "NATURE OF THE WORK" MEANS THE JOB AS A WHOLE, AND DECERTIFIED THE CLASS

At a pre-trial conference three weeks before trial, the parties addressed manageability of the trial with the Court. 13 JA 3610. Plaintiff proposed trying the case with testimony from 11 Cashier/Clerks (less than one percent of the total class) and her ergonomist. 13 JA 3610. Hearing

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[2] Rite Aid showed that each of its almost 600 stores in California is unique in many ways that affect the tasks and movements required of Cashier/Clerks, including store layout, merchandise, services, and staffing levels. 3 JA 844, 848-49. Rite Aid also showed that Cashier/Clerks are not exclusively assigned to the front-end registers, and even when they work at the front-end, if there are no customers to ring up or other duties to perform there (*e.g.*, counting cash), they are supposed to return to the sales floor to attend to other tasks. 3 JA 731-36. Declarations from 130 Cashier/Clerks showed pronounced variability in the time an individual Cashier/Clerk spends each day on different duties, including store duties (1-95%); sales counter duties (2-99%); and stockroom duties (0-67%). 6-8 JA 1460-2124.

this, the trial court expressed concern with how the case could be tried, particularly in light of the then-recent court of appeal decision in *Duran v. U.S. Bank, N.A.*, 203 Cal. App. 4th 212 (2012). 4 RT 55:8-22.

In response, Rite Aid argued that there was no practical way to try the individualized issues presented by plaintiff's theory of recovery or reach a classwide conclusion as to liability, and that to defend itself, it would need to call hundreds of witnesses to establish class members' actual job duties. 4 RT 52:17-53:11. Plaintiff's counsel conceded that testimony from all of these witnesses would consume months and months of trial time. 4 RT 56:1-9. The trial court then continued the pre-trial conference, and ordered supplemental briefing on the trial plan. 4 RT 58:9-18. The trial court also invited a motion for decertification. 5 RT 113:3-114:7.

In support of decertification, Rite Aid offered substantial new evidence of the pronounced variation in how Cashier/Clerks perform their jobs, including deposition testimony from many of plaintiff's Cashier/Clerk declarants, 13 JA 3699, 3712-15, 3773-74, and an additional 11 declarations from Cashier/Clerks who had opted out of the class, 14 JA 3822-3884.

Shortly before the continued pre-trial conference, the trial court issued a tentative ruling decertifying the class because common questions did not predominate. 17 JA 4681. At the conference, the parties discussed the new order issued in *Kilby v. CVS Pharmacy, Inc.*, 2012 WL 1132854

(S.D. Cal. May 31, 2012), another seats case involving drug store cashier/clerks, decided after the parties had completed their briefing. 6 RT 115:17-116:13. The court permitted further supplemental briefing and continued the conference again. 6 RT 118:7-119:26.

The court thereafter granted Rite Aid's motion for decertification:

> [T]he Court concludes that individualized issues predominate as to whether the "nature of the work" of a cashier/clerk reasonably permits the use of a suitable seat. In this regard the Court agrees with the District Court's analysis in *Kilby* that the job must be viewed as a whole. Based on this, and based on the evidence before the Court concerning the variations of job functions performed by Rite Aid cashier/clerks, the Court believes the evidence demonstrates this is an individual-by-individual analysis and that class action treatment would not be superior.

20 JA 5551-52. Plaintiff appealed.

IV. THE COURT OF APPEAL REVERSED DECERTIFICATION, READING *BRINKER* AS PROHIBITING A TRIAL COURT FROM DECIDING ANY THRESHOLD LEGAL ISSUE, EVEN ONE NECESSARY TO DETERMINE CLASS CERTIFICATION

The Court of Appeal reversed the decertification, concluding that "the analytic framework promulgated by [*Brinker*]" mandated reversal. *Hall v. Rite Aid Corp.*, 226 Cal. App. 4th 278, 282, 293 (2014). The Court of Appeal construed this "analytic framework" as having two steps. First, a court weighing certification must start by identifying the plaintiff's theory of liability. *Id.* at 292-93. Next, if the theory of liability turns on a uniform policy, the theory is necessarily amenable to common proof. *Id.*

Applying this framework here, the Court of Appeal held that the trial court, by addressing "nature of the work," had prematurely decided the merits of plaintiff's claim. 226 Cal. App. 4th at 292-93. Instead, the Court of Appeal ruled, the trial court should have focused exclusively on plaintiff's theory itself, *i.e.*, that Rite Aid had a "uniform policy" that "did not allow its Cashier/Clerks to sit (and therefore provided no suitable seats for its Cashier/Clerks) while they performed check-out functions at the register." *Id.* at 292.

In reaching its conclusion, the Court of Appeal ignored consistent authority from other courts of appeal upholding a trial court's consideration of a threshold legal question for the limited purpose of assessing whether substantially similar question were common to the class and predominated over individual questions. *See Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341 (2012); *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974 (2013). Instead, the Court of Appeal cited three decisions—*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)—that it characterized as controlling, *Hall*, 226 Cal. App. 4th at 288-90, 292-93, even though the appeals in those cases did not turn on whether the trial court had resolved a threshold legal issue necessary to class certification. Instead, all three decisions involved the application of a uniform employer

policy resting on settled legal principles—a posture directly contrary to that presented in this case.

ARGUMENT

V. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE COURTS OF APPEAL AND DECIDE TO WHAT EXTENT A TRIAL COURT MAY ADDRESS A THRESHOLD LEGAL ISSUE NECESSARY TO DECIDE CLASS CERTIFICATION

A. In *Brinker*, this Court Held a Trial Court Can—and Sometimes Must—Resolve a Threshold Legal Issue to Determine Whether a Class May Be Certified.

In *Brinker*, this Court addressed the propriety of evaluating the merits of a claim as part of class certification. 53 Cal. 4th at 1017. Its decision acknowledged that a trial court need not always resolve threshold legal issues before deciding certification, *id.* at 1023-26. At the same time, however, the Court affirmed the power of a trial court—and its duty—to resolve threshold legal questions if necessary to answer whether common or individual questions predominate. The Court noted:

- "If the considerations necessary to certification 'overlap the merits then the judge *must* make a preliminary inquiry into the merits.'"
- "In particular, whether common or individual issues predominate will *often* depend upon resolution of issues closely tied to the merits."

- "[The trial court] *must* determine whether the elements necessary to establish liability are susceptible of common proof ...."
- "[A] trial court *must* examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, and decide whether individual or common issues predominate."
- "To the extent the propriety of certification depends on disputed threshold legal or factual questions, a court may, *and indeed must*, resolve them."

Id. at 1024-25 (citation and alterations omitted, emphases supplied).

Brinker was not the first time this Court acknowledged the propriety of a trial court addressing threshold legal questions pertinent to certification. This Court has long recognized that "issues affecting the merits of a case may be enmeshed with class action requirements." *Linder*, 23 Cal. 4th at 443. When typicality, commonality, and other class certification questions become "intertwined with the merits of the case ... a court considering certification *necessarily could and should* consider"

them. *Fireside Bank v. Superior Court*, 40 Cal. 4th 1069, 1091-92 (2007) (emphasis supplied).[3]

One of the cases this Court relied upon in *Brinker* is *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001). In that case, the class members were subject to choice-of-law agreements. The trial court granted certification without first determining a threshold legal question of whether the agreements were enforceable. *Id.* at 912-13. This Court reversed, concluding that "the choice-of-law determination is of central importance to issues of predominance and manageability where certification ... is sought." *Id.* at 915. In other words, "it was not possible to intelligently assess predominance and the manageability of claims asserted on behalf of nonresidents without those determinations." *Brinker*, 53 Cal. 4th at 1025. Notably, this Court commented that resolution of this legal question in *Washington Mutual Bank* prior to certification was "an *unexceptional application* of the principles [the Court had] articulated." *Id.* (emphasis supplied).

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[3] *See also Soderstedt v. CBIZ S. California, LLC*, 197 Cal. App. 4th 133, 152 (2011) ("The trial court's conclusion that the administrative exemption defense was available to CBIZ involved nothing more than the consideration of a threshold legal issue—a practice common and often necessary in class certification decisions."). *Accord Wal–Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (analysis of propriety of class certification "[f]requently ... will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped").

More recently, in *Duran v. U.S. Bank Nat'l Ass'n*, 2014 WL 2219042 (Cal. May 29, 2014), decided just last month, this Court again affirmed the importance of courts addressing threshold legal disputes in connection with certification. In *Duran*, the plaintiffs alleged that their employer uniformly misclassified them as exempt "outside salespersons." *Id.* at *1. The allegation of a uniform misclassification policy, however, did not preclude the evaluation of threshold legal issues. Rather, this Court evaluated the framework of substantive law applicable to the outside sales exemption, leading to its conclusion that the type of proof the class would have to present at trial would "generate individual issues because the primary considerations are how and where the employee actually spends his or her workday." *Id.* at *11. Specifically, because of the elements of the exemption, *i.e.*, "customarily and regularly work[ing] more than half the working time away from the employer's place of business," the trial court would have to evaluate how an employee's time was actually spent. *Id.* at *10 (citing *Ramirez v. Yosemite Water Co.*, 20 Cal. 4th 785 (1999)). With this issue resolved, the Court concluded that proof of how individual employees spent their time was necessary to determine the employer's overtime liability, and that certification was erroneously granted because the trial plan adopted by the trial court did not provide for truly representative proof of how class members spent their time while allowing the defendant to present its affirmative defenses.

The comments of Justice Liu in his concurring opinion in *Duran* provide an apt summation of the law. He stressed that "[t]he *threshold task* for determining whether a class action is appropriate in a particular case is to inquire whether *the substantive law* governing the plaintiffs' claims renders those claims amenable to class treatment." 2014 WL 2219042 at *29 (emphasis supplied) (Liu, J., concurring). He continued:

> Because disputes over the facts or methods of proof that bear on class certification are often, in reality, disputes over "the substantive law that governs the litigation," it is important that courts employ a proper understanding of the substantive governing law to inform the class certification decision, and not the other way around.

Id. (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 104 (2009)).

B. The Trial Court Correctly Followed *Brinker* and Decided the Meaning of "Nature of the Work" to Determine Whether Plaintiff's Claim Could Be Tried on a Classwide Basis.

This case presented the very scenario described by *Brinker*: the question of whether common or individual issues predominate turns upon resolution of an issue closely tied to the merits. The trial court, therefore, followed *Brinker*'s formula by (1) examining plaintiff's theory of recovery, (2) assessing the nature of the legal and factual disputes likely to be presented, and (3) deciding whether individual or common issues predominate. *See Brinker*, 53 Cal. 4th at 1024.

1. The Trial Court Examined Plaintiff's Theory of Recovery.

In opposing Rite Aid's motion for decertification, plaintiff presented the trial court with her theory 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.

2. The Trial Court Examined the Legal Issues Likely to Arise.

The trial court assessed the legal issues that would arise under plaintiff's theory. The ultimate legal question that would resolve the merits of plaintiff's claim was whether the work of a Rite Aid Cashier/Clerk "reasonably permitted" the use of a seat. The trial court did not resolve that question.

But the type of evidence that the trial court would need to examine to decide whether a class of Cashier/Clerks was entitled to seats turned on a threshold legal issue: the meaning of "nature of the work." On the one hand, if the trial court adopted plaintiff's position and construed the phrase narrowly, then plaintiff would need only present evidence related to a few cashiering tasks performed at the 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.

3. The Trial Court Evaluated the Predominance of Common and Individual Issues.

Finally, the trial court addressed whether individual or common issues would predominate depending on how the threshold legal issue was decided. The predominance inquiry examines whether a proposed class is sufficiently cohesive to warrant adjudication by representation. Predominance is satisfied only where the resolution of questions that decide each class member's claim can be achieved through generalized proof, ensuring a class is certified only if it would promote uniformity of decision as to persons similarly situated. Without resolving the threshold legal question of the meaning of "nature of the work," however, the trial court could not resolve the predominance analysis. As the scope of the evidence pertinent to deciding whether the work of a Cashier/Clerk reasonably permitted the use of a seat expanded—jumping from analyzing a few job duties to over a dozen—the variability among the class members (*i.e.*, which tasks they performed, how much time they spent on each task, the range of physical movements demanded by each task) similarly expanded—defeating the cohesiveness and uniformity necessary for plaintiff's claims to proceed on a classwide basis.

4. Unable to Evaluate Predominance Without Deciding the Meaning of "Nature of the Work," the Trial Court—in Accordance with *Brinker*—Addressed This Threshold Legal Question.

Unable to decide commonality and predominance without resolving the meaning of "nature of the work," the trial court followed *Brinker* and resolved that threshold legal issue. Like the court in *Kilby v. CVS Pharmacy, Inc.*, the trial court concluded the phrase means the job considered as a whole. And since individualized issues, not common ones, predominated under that definition, the trial court decertified the class.

Contrary to the Court of Appeal's view, on its motion for decertification, Rite Aid *did not* ask the trial court to adjudicate the merits of plaintiff's seating claim. Nor did the trial court do so. Even after decertification, plaintiff was free to pursue her claim that the nature of *her* work for Rite Aid reasonably permitted the use of a seat. What she no longer could do, because of the predominance of individualized issues, was to pursue her claim on behalf of a class.

C. Because Other Courts of Appeal Have Approved the Resolution of Threshold Legal Issues Necessary to Class Certification, the Court of Appeal's Decision Creates a Split Among the Appellate Courts, Warranting This Court's Review to Resolve.

In *Morgan v. Wet Seal, Inc.*, 210 Cal. App. 4th 1341 (2012), the plaintiffs filed a class action contending that their former employer, a clothing retailer, violated the Labor Code by requiring employees to

purchase company apparel. *Id.* at 1344. The trial court denied certification, concluding that individual issues would necessarily predominate over any common issues. *Id.* at 1353.

On appeal, the plaintiffs contended that the trial court had improperly based its decision on a substantive evaluation of the merits of their legal claims, instead of letting the plaintiffs pursue their theory on a classwide basis that the employer's policy of requiring its apparel to be purchased was illegal because it forced employees to wear a uniform to work at their own expense. 210 Cal. App. 4th at 1358. There, as here, one of the threshold legal issues turned on the interpretation of statutory language: the meaning of "uniform." The plaintiff argued that for the trial court to interpret "uniform" was a premature resolution of the merits. The court of appeal disagreed, explaining that the plaintiffs "simply ignore the reason the trial court consulted these legal authorities, *i.e.,* 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 1359-60.

The court of appeal followed the same path in *Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974 (2013). There, the plaintiff sought to certify a class of auto center managers and assistant managers who allegedly were misclassified and denied meal and rest periods. The plaintiff argued certification was appropriate solely "because Sears's

uniform policies and practices resulted in a classwide erroneous exempt classification." *Id.* at 989. Because of the uniformity of the policies, the plaintiff contended, "any individual questions regarding the correctness of that classification as to each Manager and Assistant Manager, and how much time each may have spent on nonexempt activities, could be resolved in an efficient manner at trial." *Id.*

The court of appeal disagreed and upheld the trial court's denial of class certification. Contrary to the Court of Appeal's exclusive focus on the plaintiff's theory of liability here, the court in *Dailey* held that "the focus of the class certification inquiry is on 'the nature of the legal and factual disputes likely to be presented,' as those disputes are framed not only by the complaint but also by defendant's answer and affirmative defenses." 214 Cal. App. 4th at 990 (quoting *Brinker*, 53 Cal. 4th at 1025). Because the affirmative defense of exempt status was at issue, the threshold legal issue regarding the scope of the exemption was presented, which the court construed as requiring evidence of "Sears's expectations regarding how its managerial employees perform their duties," as well as "how these policies and procedures actually impact the potential class." *Id.* at 989. Rebutting the plaintiff's contention that this inquiry was an improper resolution of the merits, the court of appeal stressed that the trial court had resolved these threshold legal issues "for the sole, *entirely proper*, purpose of determining whether the record sufficiently supported the existence of

predominant common issues provable with classwide evidence, such that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Id.* at 991 (emphasis supplied, internal quotation marks omitted).

The Court of Appeal here ignored *Morgan* and *Dailey* and held that the presence of a uniform employment policy challenged by the plaintiff made resolution of a threshold legal issue necessary for class certification improper. The Court of Appeal's decision thereby created a split in appellate authority, warranting this Court's review. *See* Cal. R. Ct. 8.500(b)(1).

D. The Court Also Should Decide an Important Question of Law—to What Extent May a Trial Court Address Threshold Legal Issues Necessary to Decide Class Certification—and Reverse the Court of Appeal to Ensure Adherence to *Brinker.*

In resolving the split among the Courts of Appeal, this Court should also clarify to what extent a trial court may address threshold legal issues necessary to decide class certification, an important issue in certification jurisprudence, and reverse the Court of Appeal to ensure adherence to *Brinker*.

1. The Court of Appeal Misread *Brinker.*

The Court of Appeal disregarded this Court's direction in *Brinker* that "[t]o the extent the propriety of certification depends on disputed threshold legal or factual questions, a court may, *and indeed must*, resolve

them," 53 Cal. 4th at 1025. Instead, the Court of Appeal misread *Brinker* as mandating a different approach. It concluded *Brinker* required reversal of decertification because it was "based on an assessment of the merits of Hall's theory rather than on whether the theory was amenable to class treatment." 226 Cal. App. 4th at 282.

The Court of Appeal's decision focused upon *Brinker*'s discussion of certification with respect to a rest-period subclass. But this Court affirmed the certification of that subclass only because the defendant "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. The Court affirmed certification only after it construed the salient features of the obligation to provide rest periods. *Id.* at 1028-32. In other words, the Court agreed that the uniform policy was facially noncompliant with the Labor Code following its resolution of the threshold legal issue. By contrast, in *Brinker*, the uniform off-the-clock policy was facially compliant, and this Court held that certification was improper because plaintiff's theories of proof could not establish classwide liability. *Id.* at 1051-52. Similarly, after resolving what "to provide" a meal period means, the Court remanded the meal-period claim to the trial court for a new certification decision. *Id.* at 1052.

The Court of Appeal failed to appreciate that, notwithstanding her rhetoric, plaintiff had not identified a uniform Rite Aid policy that facially

violates the law. After all, section 14(A) does not provide employees with an automatic right to a seat; it grants a right to a seat only when the "nature of the work" reasonably permits use of a seat. Thus, the mere existence or non-existence of the policy is insufficient to establish liability without proof that the nature of the work reasonably permits use of a seat. And proof of the nature of the work of Rite Aid Cashier/Clerks cannot be decided on a classwide basis if the job is viewed as a whole.

In effect, the Court of Appeal turned *Brinker* on its head, misconstruing this Court's ruling that a trial court need not always resolve threshold legal issues as part of the certification decision as a mandate that that a trial court must never resolve threshold legal issues when deciding certification. The Court of Appeal mistakenly viewed *Brinker* as creating a presumption of classwide proof based merely on a uniform policy, and ignored this Court's direction that "[t]o assess predominance, a court 'must examine the issues framed by the pleadings *and the law applicable to the causes of action alleged*." 53 Cal. 4th at 1024 (emphasis supplied).

Here, plaintiff's complaint framed the meaning of "nature of the work" as a threshold legal issue, but the Court of Appeal treated the examination of that issue as forbidden before certification.

2. The Court of Appeal Relied on Inapposite Cases.

Compounding its error, the Court of Appeal relied on three inapposite cases: *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). To be sure, those cases involved a uniform employment policy (or the uniform absence thereof), but in each of these cases the existence or non-existence of the uniform policy was dispositive of plaintiff's theory of liability. Further, none of the cases addressed whether a trial court should resolve a threshold legal issue before deciding class certification. On the contrary, the courts of appeal in those cases recognized that the applicable law was settled, and the only issue was whether the uniform policy (or uniform lack thereof) was unlawful.

In *Bradley*, the plaintiff's theory of recovery was that the employer lacked a uniform meal and rest-period policy, and that it therefore uniformly failed to provide meal and rest periods. 211 Cal. App. 4th at 1150. Similarly, in *Faulkinbury*, the plaintiffs asserted that the employer had a mandatory on-duty meal period policy for security guards, did not have a policy providing rest breaks, and required security guards to remain at their posts at all times, thereby failing to provide meal and rest periods. 216 Cal. App. 4th at 236. And in *Benton*, the plaintiffs argued that their employer failed to adopt a policy authorizing and permitting meal and rest breaks. 220 Cal. App. 4th at 707. In each of these cases, there were no threshold legal issues to decide; *Brinker* had resolved previously unresolved legal questions regarding the scope and timing of the

obligations to provide meal and rest periods. Further, the plaintiffs' theory in the cases was that the existence of a uniform policy, or the uniform non-existence of a policy, was, itself, the source of the legal violation alleged. As a result, the established law simply needed to be applied to the evidence, and the courts of appeal concluded that the trial court could do so on a class-wide basis.

In this material regard, this case was unlike *Bradley*, *Faulkinbury*, and *Benton*. While plaintiff alleged a uniform policy of not providing seats to Cashier/Clerks, the legality of the policy did not rest upon settled legal principles, and its mere existence was not dispositive of liability. Indeed, there is no published appellate authority interpreting "nature of the work" as used in section 14(A). In the face of an unsettled legal question that would frame the type of evidence that plaintiff would have to proffer to establish the merits of her claim, the trial court needed to answer that question before it could decide whether the claim could be tried on a class-wide basis. Consistent with Justice Liu's remarks in *Duran*, the trial court confronted this "threshold task" by inquiring "whether the substantive law governing the plaintiffs' claims renders those claims amenable to class treatment." 2014 WL 2219042, at *29. By contrast, in *Bradley*, *Faulkinbury*, and *Benton*, that threshold task already had been resolved by precedent, and the courts in those cases could proceed directly to determine

if common issues raised by the uniform policy (or uniform lack thereof) predominated within the boundaries of those established legal principles.

3. The Court of Appeal's View That a Defendant Should Favor Class Certification in Order to Extinguish the Claims of All Class Members in a Single Proceeding Does Not Justify Certification Based on an Erroneous Legal Predicate.

The Court of Appeal also justified its ruling with a troubling rationale. It stated that if a plaintiff's theory is "ultimately incorrect at its substantive level," a court should nonetheless proceed with certification "because such an approach relieves the defendant of the jeopardy of serial class actions and, once the defendant demonstrates the posited theory is substantively flawed, the defendant 'obtain[s] the preclusive benefits of such victories against an entire class and not just a named plaintiff.'" 226 Cal. App. 4th at 293-94 (quoting *Brinker*, 53 Cal. 4th at 1034)). This justification overlooks the costly implications of a presumptive rule that certifies uniform-policy class actions without any examination of the substantive law.

This Court has thoroughly examined the role of class actions in the justice system. *See Linder*, 23 Cal. 4th at 434-36. The use of class actions generally, according to the Court, is "appropriate when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer." *Id.* at 435 (citation and internal quotation marks omitted). Class actions,

however, also have "the potential to create injustice," and consequently, trial courts must weigh the benefits to and the burdens on the parties and the courts, and permit class actions only where they are of substantial benefit. *Id.*[4]

Class actions are notoriously complex, time-consuming, and costly. As a result, once a class is certified and the threat of a trial of class claims is assured, defendants are left confronting a choice between paying to settle unmeritorious claims and bearing the costs of fully litigating a massive class. Despite the fact that a class action includes unmeritorious claims, the risk of a single jury deciding claims of thousands of individuals—as is the case here—imposes tremendous pressure to settle. This Court highlighted this very phenomenon at the outset of *Duran*, observing that "[t]he vast majority of cases settle after a class action is certified." 2014 WL 2219042, at *11 n.27 (citing 2010 study conducted by the Administrative Office of the Courts, finding that 89 percent of cases certified as a class action ended

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[4] The Court of Appeal missed the point that if a class is certified and then loses at trial, the claims of all class members are barred from future litigation arising from the same dispute under principles of *res judicata* and collateral estoppel. That means that even if an individual employee would have had a good seating claim had he litigated alone, because he was joined with the other class members, his claim is forever barred. Courts, therefore, should be cautious in certifying classes and make sure there is a legal predicate for the claim. *See Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) (noting that "windfalls" awarded to plaintiffs bringing frivolous claims may cause those who actually suffered injury to receive "insufficient compensation").

in settlement, compared with 15 percent of cases in which certification was denied); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting *in terrorem* effect of class actions that "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

The Court of Appeal's view that a class should be certified regardless of its lack of conformity with existing law is a tantalizing one for plaintiffs. Under usual circumstances, potential plaintiffs hesitate or decline to file claims lacking any merit because the likelihood of prevailing is low while the certainty of incurring significant attorneys' fees and costs is high.

The Court of Appeal's decision removes that deterrent. Under its ruling, the plaintiff need only couch his or her class claim as challenging a uniform policy, and the trial court must certify the class without regard for any threshold legal issue raised by the claim. *See* 226 Cal. App. 4th at 293 (court "should certify the action for class treatment *even if* the plaintiff's theory is ultimately incorrect at its substantive level") (emphasis in original). Erroneous grants of class certification—and there will be many under the Court of Appeal's ruling—will inevitably encourage plaintiffs to file unmeritorious class claims in order to secure large settlements. *See In re Gen. Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) (warning that "class actions create the opportunity for a kind

of legalized blackmail: ... to extract a settlement far in excess of the individual claims' actual worth").

The combination of a low bar (or no bar at all) for class actions based on alleged uniform policies, and the likelihood of large settlements post-certification, also bodes poorly for the California judiciary. Following certification, trial courts must supervise the subsequent litigation and entertain exhausting trials. The enhanced regularity with which class actions will be certified will drain and burden court resources. *See City of San Jose v. Superior Court*, 12 Cal.3d 447, 459 (1974) (class certification is appropriate only where "substantial benefits accrue both to litigants and the courts").

Moreover, if courts were to apply the Court of Appeal's ruling to "certify now, figure out the law later," it would result in a severely inefficient and costly system for courts. After all, a trial court will need to rule on threshold legal issues at some point before judgment, and there is no reason to think with the benefit of full briefing from the parties (as the trial court had here), the trial court would not render as valid a decision sooner rather than later. And, of course, if the trial court believes that it needs to receive evidence to help shape the record for that legal determination, under *Brinker* it remains free to do so.

But if a trial court is forced to defer consideration of a threshold legal issue, and that issue is enmeshed with predominance and

manageability, it will simply delay a decision to decertify at a stage where the consequences will be inordinately more costly. The outcome benefits no one.

For all these reasons, the petition presents the Court with an important issue of law that should be decided. *See* Cal. R. Ct. 8.500(b)(1).

VI. THIS COURT ALSO SHOULD GRANT REVIEW TO DECIDE THE MEANING OF "NATURE OF THE WORK" IN SECTION 14(A) AND UPHOLD THE TRIAL COURT'S CONSTRUCTION, OR AT A MINIMUM, ISSUE A GRANT-AND-HOLD ORDER PENDING *KILBY*

In its decision, the Court of Appeal declined to rule on the issue of whether "nature of the work" means the job as a whole or discrete job duties, stating its belief that Rite Aid did not join in plaintiff's request for a ruling and declining to exercise its discretion to decide the issue even if Rite Aid had. 226 Cal. App. 4th at 291-93.

The Court of Appeal's conclusion that Rite Aid did not seek a ruling on the meaning of "nature of the work" is puzzling, given that Rite Aid spent eight pages of its brief on appeal arguing that the trial court's construction of "nature of the work" is correct, *see* Respondent's Brief at 20-28, and an additional seven pages of its answer to an *amicus* brief submitted in support of plaintiff arguing the same, *see* Answer to *Amicus Curiae* Brief of AARP at 2-8. In any event, the Court should decide what "nature of the work" means so that the trial court below, and the dozens of trial courts across the state facing "suitable seating" cases, will know what

law to apply. The Court already has recognized the importance of deciding that issue, as it is among the questions the Court has agreed to answer in *Kilby v. CVS Pharmacy, Inc.*, No. S215614 (Mar. 12, 2014):

> Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe "nature of the work" holistically and evaluate the entire range of an employee's duties?

Kilby v. CVS Pharmacy, Inc., 739 F.3d 1192, 1193 (9th Cir. 2013). Indeed, in certifying this and other questions about section 14 to this Court, the Ninth Circuit noted that the Court's answers "could have a dramatic impact on public policy in California as well as a direct impact on countless citizens of that state, both as employers and employees." *Id.* at 1196.

Even if this Court does not wish to undertake a plenary review of the Court of Appeal's decision at this time or in this case, at minimum it should grant and hold Rite Aid's petition pending resolution of the issues raised in *Kilby*. *See* Cal. R. Ct. 8.512(d)(2) ("On or after granting review, the court may order action in the matter deferred until the court disposes of another matter or pending further order of the court."); Eisenberg *et al.*, *California Practice Guide: Civil Appeals and Writs* ¶ 13:125 (2007) ("[The] 'grant and hold' procedure commonly occurs when several appeals present the same issue and in fact accounts for a significant number of cases granted review.").

The threshold legal issue in this matter is identical to one of the certified questions accepted by this Court in *Kilby*. In addition, for the reasons stated above, the resolution of this issue is necessary to evaluating the certification of the class and, whether the case proceeds before the trial court as a class action or not, to adjudicating plaintiff's claim. Accordingly, at minimum, a grant-and-hold would be appropriate here.

VII. CONCLUSION

This Court has emphatically stated that trial courts should and must address threshold legal questions pertinent to certification. And decisions by the courts of appeal, such as *Morgan* and *Dailey*, have followed that rule by respecting the discretion and duty of trial courts to scrutinize a legal issue when weighing certification. The Court of Appeal's decision here cannot be reconciled with this Court's statements or the opinions of its sister courts. As such, the Court of Appeal created a conflict on an important question of law that should be resolved. The Court of Appeal also declined to resolve the meaning of "nature of the work," despite the lack of appellate guidance on this question and its importance to resolution of this case.

Accordingly, Rite Aid respectfully requests that the Court grant review of the Court of Appeal's decision that a trial court may not resolve a threshold legal issue, even though it is necessary to evaluating class certification, and to resolve the meaning of "nature of the work" in Wage

Order 7-2001 section 14(A). Alternatively, if this Court does not grant plenary review of the decision below, Rite Aid asks that this Court at least grant review and defer action in this case pending its decision on the identical threshold legal issue in *Kilby*.

Dated: June 19, 2014.

JEFFREY D. WOHL
RISHI N. SHARMA
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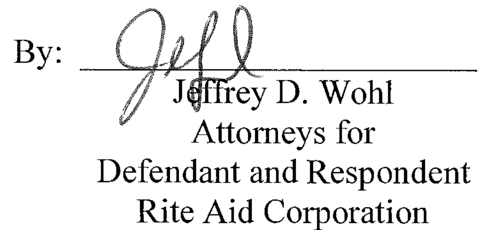
By: 
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CERTIFICATE OF COMPLIANCE

In accordance with Rule 8.204(c), California Rules of Court, counsel for defendant and respondent Rite Aid Corporation hereby certify that its foregoing Petition for Review (including footnotes) contain 8,196 words, as determined by our law firm's word-processing system.

Dated: June 19, 2014.

JEFFREY D. WOHL
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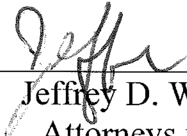
By: 

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EXHIBIT A

CERTIFIED FOR PUBLICATION

~~NOT TO BE PUBLISHED IN OFFICIAL REPORTS~~

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal Fourth District
FILED
MAY 02 2014
Kevin J. Lane, Clerk
DEPUTY

KRISTIN HALL, Plaintiff and Appellant, v. RITE AID CORPORATION, Defendant and Respondent.	D062909 (Super. Ct. No. 37-2009-00087938-CU-OE-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

Dostart Clapp & Coveney, James F. Clapp, James T. Hannink; Altshuler Berzon and Michael Rubin for Plaintiff and Appellant.

AARP Foundation Litigation and Barbara A. Jones for AARP as Amicus Curiae on behalf of Plaintiff and Appellant.

Paul Hastings, Jeffrey D. Wohl, Rishi N. Sharma, Regan A. W. Herald, Elizabeth J. MacGregor and Peter A. Cooper for Defendant and Respondent.

Kristin Hall filed this action, on behalf of herself and similarly situated persons, alleging defendant Rite Aid Corporation did not provide seats to employees while the employees were operating cash registers at Rite Aid check-out counters in violation of section 14 of Wage Order 7-2001 (section 14) (Cal. Code Regs., tit. 8, § 11070(14)), promulgated by California's Industrial Welfare Commission (IWC). Section 14 requires an employer to provide employees with suitable seats "when the nature of the work reasonably permits the use of seats." (Cal. Code Regs., tit. 8, § 11070(14)(A).)

The trial court initially granted Hall's motion for class certification. However, Rite Aid subsequently moved for decertification, citing additional evidence as well as decisions by other courts. The trial court granted Rite Aid's motion for decertification, and denied Hall's cross-motion to permit the action to proceed as a representative nonclass action under Labor Code section 2698 et seq. Hall appeals, contending (1) Rite Aid's decertification motion should have been denied because it was unsupported by an adequate showing of "changed circumstances"; (2) the trial court applied the wrong analytical approach and standards when it reevaluated the propriety of permitting Hall's action to proceed as a class action; (3) the trial court's order decertifying the class was based on an erroneous interpretation of section 14; and (4) the court erred when it denied Hall's cross-motion to permit the action to proceed as a representative nonclass action under the California Labor Code Private Attorneys General Act of 2004 (PAGA), codified in Labor Code section 2698 et seq.

We conclude that, under the analytic framework promulgated by *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*), the trial court erred

when it decertified the class action because its decertification order was based on an assessment of the merits of Hall's theory rather than on whether the theory was amenable to class treatment.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. The Complaint

Hall is a former employee of Rite Aid, where she worked as a Cashier/Clerk. She filed a putative class action against Rite Aid to recover penalties pursuant to Labor Code § 2699, subdivision (f). She alleged Rite Aid violated Labor Code section 1198, which makes it illegal to employ a person under conditions of labor prohibited by an applicable IWC Wage Order. She alleged Rite Aid violated a condition of labor because it did not provide its Cashier/Clerks with suitable seats, in violation of section 14 of Wage Order 7-2001, which provides:

> "(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
>
> "(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties." (Cal. Code Regs., tit. 8, § 11070(14).)

B. The Class Certification Order

Hall moved for class certification. In support of the motion, she submitted evidence that (1) all Cashier/Clerks are covered by the same job description and have similar job duties, including check-out work; (2) on average, Cashier/Clerks spend a

majority of their hours working at the register; (3) most check-out work (which largely involves scanning and bagging merchandise, processing payments, and handing the bags and receipt to the customer) can be done while seated, but Rite Aid required its Cashier/Clerks to stand while performing check-out work; and (4) Rite Aid's standard counter configurations could accommodate a seat with minimal modifications.

Rite Aid opposed the motion, arguing that individual issues would predominate. Rite Aid asserted (1) its stores differed in size, sales volume, number of Cashier/Clerks, and sales counter configurations; (2) when Cashier/Clerks are not performing check-out counter work they are tasked with duties that varied among the stores; and (3) the percentage of time each Cashier/Clerk spent behind the check-out counter varied from 2 percent to 99 percent (with an average of about 42 percent) and the time spent on stockroom or floor duties was equally varied. Rite Aid's evidence also showed that, even when performing duties at the check-out counter, the distance Cashier/Clerks had to move away from the register (to retrieve controlled items such as tobacco and liquor) varied depending on the specific configuration of each store, and they often or very often performed tasks requiring them to lift, bend, twist, lean over, or move around while working at the check-out register. Because of the variety of tasks, 69 percent of surveyed Cashier/Clerks reported they spent at least half their time moving behind the counter, and 31 percent reported they spent at least 3/4 of their time moving behind the counter.

Hall, whose proffered theory of recovery was that the work performed by Cashier/Clerks when stationed at the check-out registers reasonably permits the use of seats and therefore the failure to provide seats violated section 14, asserted many of these

variations were irrelevant to her theory and therefore were not an obstacle to class certification. Hall argued the lack of uniformity in the sizes and configurations of the stores, or the variations in the amount of time Cashier/Clerks reported spending working at the check-out counter, had no relevance to whether the failure to provide seats violated section 14 because the nature of the check-out work itself reasonably permitted the use of a seat. In October 2011 the trial court granted the motion for class certification.

C. The Decertification Motion

Three weeks before trial, the parties discussed the proposed trial plan at the trial readiness conference. Hall's proposal, which appears to have contemplated presenting plaintiff's case in seven days with testimony from 10 Cashier/Clerks, along with her ergonomist and Rite Aid employees regarding general company policies and practices, was challenged by Rite Aid's counsel because of due process issues discussed in a recently published opinion.[1] Hall's counsel conceded that, if the court believed the present case fell under the rationale of *Duran*, it would take "months" to try the matter. The court ordered supplemental briefing on the trial plan and on the impact of *Duran*.

Hall argued *Duran* had no application, and the sole question--whether "the nature of the work of a Cashier/Clerk at the front-end cash register reasonably permits the use of

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1 The case, *Duran v. U.S. Bank Nat. Assn.* (2012) 203 Cal.App.4th 212 (*Duran*), held that a class action in a "wage and hour" case was improperly tried using a "sampling" from the class because the trial plan did not provide a statistically valid sample and it violated the defendant's due process rights to present evidence refuting the claims of individual class members. (*Ibid.*) However, the Supreme Court granted review in *Duran* shortly after the pretrial conference. (*Duran v. U.S. Bank Nat. Assn.* (May 16, 2012) No. S200923.)

a seat"--was amenable to representative proof. Rite Aid's supplemental brief argued Hall had not proposed a manageable trial plan because it did not ensure that statistically valid representative proof would be provided on myriad questions,[2] and it would deny Rite Aid its due process right to present evidence refuting claims of specific class members. Rite Aid argued that, considering the absence of a manageable trial plan, the court sua sponte should decertify the class.

The court stated it did not at that point have enough information for it sua sponte to order the class decertified, but agreed to hear a motion to decertify. Rite Aid's motion relied on declarations from 11 Cashier/Clerks who had "opted out" of the class, excerpts from depositions of Hall's class declarants, and recent decisions from federal district courts.[3] Rite Aid argued any violation of section 14 required a two-step inquiry: first, the

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2 For example, Rite Aid argued, the percentage of time actually spent at the check-out counter rather than on other duties was material for defining the nature of the work within the meaning of section 14, and the evidence showed those percentages varied widely among the class. Rite Aid also argued that, even for time spent at the check-out counter, the percentage of time actually spent doing tasks incompatible with sitting was material to whether the nature of the work reasonably permitted the use of seats within the meaning of section 14, and those percentages also varied widely among the class. Rite Aid also asserted that questions of remedy, and in particular whether the check-out counter configurations among its 600 stores could absorb changes required to install seating facilities, also would require individualized determinations.

3 Rite Aid cited *Kilby v. CVS Pharmacy, Inc.* (S.D. Cal. Apr. 4, 2012, No. 09cv2051-MMA (KSC)) 2012 WL 1132854 (*Kilby*), in which the federal court denied class certification in a "suitable seat" case for cash-register operators, arguing the same rationale should be applied to this case. Rite Aid also cited *E.E.O.C. v. Eckerd Corp.* (N.D.Ga. July 02, 2012, No. 1:10–cv–2816–JEC) 2012 WL 2568225, which involved an action brought by the Equal Employment Opportunities Commission under the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) alleging Rite Aid violated the ADA by not permitting a Cashier/Clerk to sit. In the latter action, the court

court needed to decide what was the "nature of the work" of Cashier/Clerks, and second, whether that work "reasonably permits" the use of a seat. Rite Aid argued that, under section 14, the "nature of the work" inquiry requires examination of the job "as a whole," rather than whether some discrete subpart of the employee's duties was amenable to being performed while seated. Rite Aid argued the variations among class members as to their job as a whole, including the amount of time they spend at the check-out counter compared with other duties, the types of physical activity required even when stationed at the check-out counter, and the physical configurations among hundreds of Rite Aid stores, made class treatment improper because the "nature of the work" of any specific Cashier/Clerk required individualized inquiries for each class member, and whether that work would "reasonably permit" the use of a seat would also require individualized determinations based on the physical characteristics for each check-out counter.

Hall raised both procedural and substantive reasons to oppose decertification. She asserted a decertification motion must be based on new law or new facts and Rite Aid had not adequately shown either prerequisite. Hall also asserted that variations among Cashier/Clerks as to their job duties were irrelevant because class certification depends on the plaintiff's "theory of recovery," and her theory was that Rite Aid's policy requiring its Cashier/Clerks to stand while at the register violated section 14 because the nature of check-out work reasonably permits the use of seats regardless of the amount of time any

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entered summary judgment in favor of Rite Aid because many of the essential job functions involved physical movement and therefore the sitting accommodation demanded by the EEOC was per se unreasonable because incompatible with the essential job functions for a Cashier/Clerk. (*E.E.O.C. v. Eckerd Corp., supra,* 2012 WL at pp. *5-10.)

particular Cashier/Clerk might spend on other duties. Hall also argued the court should not employ Rite Aid's statutory construction (i.e. that the "nature of the work" inquiry requires examination of the job "as a whole") to evaluate the decertification motion because that substantive construction was inconsistent with the statutory purpose of section 14, was based on flawed authority, and was inconsistent with rulings from other courts.[4]

The trial court granted the motion to decertify the class. The court concluded that "individualized issues predominate as to whether the 'nature of the work' of a cashier/clerk reasonably permits the use of a suitable seat," and explained it agreed with the analysis in *Kilby* that section 14's obligations could only be assessed by examining "the job . . . as a whole." The court also rejected Hall's argument that the lawsuit could proceed as a PAGA representative action. Hall timely appealed.

II

LEGAL PRINCIPLES GOVERNING CLASS CERTIFICATION

A. Class Action Principles as Construed by *Brinker*

Class actions provide an avenue pursuant to which the claims of many individuals can be resolved at the same time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method of obtaining redress for claims that would otherwise be too small to warrant individual litigation. (*Richmond v. Dart*

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4 Hall cited *Garvey v. Kmart Corp.* (N.D.Cal., July 18, 2012, No. C 11–02575 WHA), 2012 WL 2945473 (*Garvey*) and *Echavez v. Abercrombie and Fitch Co., Inc.* (C.D.Cal., March 12, 2012, No. CV 11–9754 GAF (PJWx)) 2012 WL 2861348 to support her statutory construction.

Industries, Inc. (1981) 29 Cal.3d 462, 469.) "The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives." (*Brinker, supra,* 53 Cal.4th at p. 1021.) "In turn, the 'community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.' " (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089, quoting *Richmond,* at p. 470.)

The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-440 (*Linder*).) "A trial court ruling on a certification motion determines 'whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) "On the issue whether common issues predominate in the litigation, a court must 'examine the plaintiff's theory of recovery' and 'assess the nature of the legal and factual disputes *likely to be presented.*' [Citation.] . . . In conducting this analysis, a 'court must examine the allegations of the complaint and supporting declarations [citation] and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible. "As a general rule if the defendant's

liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages." ' " (*Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129, 1141-1142 (*Bradley*).)

Because the analytic framework announced by *Brinker* appears dispositive of the narrow question of whether the trial court erred when it granted Rite Aid's decertification motion, we examine *Brinker* and its progeny in detail. In *Brinker*, the trial court certified a class action for approximately 60,000 current and former nonexempt employees of defendant corporations for a complaint alleging the defendants violated state laws requiring meal and rest breaks for nonexempt hourly employees.[5] (*Brinker, supra*, 53 Cal.4th at pp. 1017-1019 & fn. 4.) On appeal, this court held the trial court erred in certifying each of the subclasses and granted writ relief to reverse class certification. The California Supreme Court subsequently vacated that decision by its grant of review "to resolve uncertainties in the handling of wage and hour class certification motions." (*Id.* at p. 1021.) The Supreme Court ultimately concluded the trial court properly certified the rest break subclass, remanded the question of certification of the meal break subclass for

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5 The class definition included several subclasses, three of which were (1) a rest period subclass comprising "all 'Class Members who worked one or more work periods in excess of three and a half (3.5) hours without receiving a paid 10 minute break during which the Class Member was relieved of all duties' " during the subclass period; (2) a meal period subclass comprising "all 'Class Members who worked one or more work periods in excess of five (5) consecutive hours, without receiving a thirty (30) minute meal period during which the Class Member was relieved of all duties' " during the subclass period; and (3) an off-the-clock subclass comprising "all 'Class Members who worked "off-the-clock" or without pay' " during the subclass period. (*Brinker, supra,* 53 Cal.4th at p. 1019.)

reconsideration by the trial court, and concluded the trial court erred by certifying the off-the-clock subclass. (*Id.* at p. 1017.)

Brinker's significance lies in its statements on the extent to which a trial court may or must reach the merits of a plaintiff's claim when deciding whether to certify a class. (*Brinker, supra,* 53 Cal.4th at p. 1023.) *Brinker* stated a class certification motion "is not a license for a free-floating inquiry into the validity of the complaint's allegations" (*ibid.*) and that "[i]n many instances, whether class certification is appropriate or inappropriate may be determined irrespective of which party is correct." (*Ibid.*) Although *Brinker* recognized that "[w]hen evidence or legal issues germane to the certification question bear as well on aspects of the merits, a court may properly evaluate them" (*id.* at pp. 1023-1024), it cautioned that "[s]uch inquiries are closely circumscribed" (*id.* at p. 1024), and "resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation], with the court assuming for purposes of the certification motion that any claims have merit [citation]." (*Id.* at p. 1023.) *Brinker*, summarizing the controlling approach, stated that "[p]resented with a class certification motion, *a trial court must examine the plaintiff's theory of recovery, assess the nature of the legal and factual disputes likely to be presented, 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. Out of respect for the problems arising from one-way intervention, however, a court generally should eschew resolution of such issues unless necessary." (*Id.* at p. 1025, italics added.)

Brinker ultimately concluded plaintiff's theory of liability as to the rest break subclass--the employer had a uniform policy that violated the mandated rest breaks under the statute as construed by *Brinker*--was properly certified for class treatment. *Brinker* explained class treatment was proper because there existed "a common, uniform rest break policy . . . equally applicable to all Brinker employees [and] [c]lasswide liability could be established through common proof if Hohnbaum were able to demonstrate that, for example, Brinker under this uniform policy refused to authorize and permit a second rest break for employees working shifts longer than six, but shorter than eight, hours. Claims alleging that a uniform policy consistently applied to a group of employees is in violation of the wage and hour laws are of the sort routinely, and properly, found suitable for class treatment." (*Brinker, supra,* 53 Cal.4th at p. 1033.) Although electing to accede to the parties' request to reach the *merits* of the plaintiff's theory of liability (*id.* at p. 1026), *Brinker* unequivocally reiterated that:

> "contrary to the Court of Appeal's conclusion, the certifiability of a rest break subclass in this case *is not dependent upon resolution of threshold legal disputes over the scope of the employer's rest break duties*. The theory of liability--that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law--is by its nature a common question eminently suited for class treatment. As noted, we have at the parties' request addressed the merits of their threshold substantive disputes. However, in the general case to prematurely resolve such disputes, conclude a uniform policy complies with the law, and thereafter reject class certification--as the Court of Appeal did--places defendants in jeopardy of multiple class actions, with one after another dismissed until one trial court concludes there *is* some basis for liability and in that case approves class certification. [Citation.] It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits,

> equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff." (*Id.* at pp. 1033-1034, italics added.)

B. *Brinker's* Progeny

Subsequent cases have concluded, considering *Brinker*, that when a court is considering the issue of class certification and is assessing whether common issues predominate over individual issues, the court must "focus on the policy itself" and address whether the plaintiff's *theory* as to the illegality of the policy can be resolved on a class-wide basis. (*Faulkinbury v. Boyd & Associates, Inc.* (2013) 216 Cal.App.4th 220, 232 (*Faulkinbury*); accord, *Bradley, supra*, 211 Cal.App.4th at pp. 1141-1142 ["[o]n the issue whether common issues predominate in the litigation, a court must 'examine the plaintiff's theory of recovery' and 'assess the nature of the legal and factual disputes *likely to be presented*' "]; *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 726 (*Benton*) ["under *Brinker* . . . for purposes of certification, the proper inquiry is 'whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment' "].) Those courts have also agreed that, where the theory of liability asserts the employer's uniform policy violates California's labor laws, factual distinctions among whether or how employees were or were not adversely impacted by the allegedly illegal policy does not preclude certification. (See, e.g., *Bradley, supra*, at pp. 1150-1153 [where theory of liability was employer's uniform policy violated labor laws by not authorizing employees to take meal and rest breaks, class certification is proper and fact some employees in fact took meal and rest breaks is a damage question that " 'will rarely if ever stand as a bar to certification' "].)

Finally, those courts, although concluding the plaintiff's proffered theory of recovery (i.e. that the challenged uniform policy violated labor laws) mandated certification because common questions as to that theory predominated, also assiduously adhered to *Brinker's* admonition to defer any determination of the legal merits of a plaintiff's proffered theory at the class certification stage. For example, in *Faulkinbury, supra,* 216 Cal.App.4th 220, the plaintiff's theory of recovery was that the employer's policy of not providing off-duty meal breaks for its security guard employees violated the applicable wage order, and the court concluded, under *Brinker*, the focus must be on the policy itself and "whether the legality of the *policy* can be resolved on a classwide basis." (*Faulkinbury,* at p. 232.) After concluding the lawfulness of the employer's policy of requiring all security guard employees to sign the on-duty meal break agreement could be determined on a class-wide basis (*id.* at p. 233), *Faulkinbury* immediately stated that "[a]s *Brinker* instructs, we do not determine at this stage whether Boyd's policy of requiring on-duty meal breaks violates the law. Instead, the question we address is whether Boyd's legal liability under the theory advanced by Plaintiffs can be determined by facts common to all class members. . . . Under [the theory advanced by plaintiffs, employer's] legal liability can determined on a class basis." (*Id.* at p. 234.)

Similarly, in *Benton, supra,* 220 Cal.App.4th 701, the plaintiff's theory of legal liability was that the employer violated wage and hour requirements by *not adopting* a policy authorizing and permitting its technicians to take meal or rest break periods because (in plaintiffs' theory) an employer was obligated to implement procedures ensuring its employees received notice of their meal and rest period rights and were

permitted to exercise those rights. (*Id.* at pp. 724-725.) After concluding the plaintiff's theory (whether an employer's "failure to adopt a policy" violated applicable laws) could be determined on a class-wide basis, *Benton* turned to the defendants' claim that the trial court's order denying certification could be affirmed because "the applicable wage and hour provisions do not require employers to adopt a policy or implement procedures ensuring that nonexempt employees are notified of their meal and rest period rights and permitted to exercise those rights[,] [but instead] merely obligate an employer to provide a ' "reasonable opportunity" ' to take meal and rest breaks," and therefore individual issues would predominate because there was evidence showing many of the class members were provided such an opportunity. (*Id.* at pp. 726-727.) *Benton* rejected this argument in part because the employer's "assertion that it was not required to adopt the sort of meal and rest break policy envisioned by plaintiffs goes to the merits of the parties' dispute. The question of certification, however, is ' "essentially a procedural one that does not ask whether an action is legally or factually meritorious." ' [(Quoting *Sav-On, supra,* 34 Cal.4th at p. 326.)] Indeed, *Brinker* emphasized that, whenever possible, courts should 'determine class certification independent of threshold questions disposing of the merits.' " (*Benton,* at p. 727.)

Finally, in *Bradley, supra*, 211 Cal.App.4th 1129, the plaintiffs' theory of recovery was based in part on "[employer's] (uniform) *lack* of a rest and meal break policy and its (uniform) *failure* to authorize employees to take statutorily required rest and meal breaks." (*Id.* at p. 1150.) *Bradley* concluded that, after *Brinker*, class certification for these claims was appropriate. *Bradley* also explained why the employer's lengthy

argument on the merits (i.e. that the law did not require an employer to provide a *written* meal or rest break policy) did not alter the analysis of whether the plaintiffs' *theory* of liability was *amenable* to class treatment: "[First, the] plaintiffs' allegations concern the absence of any policy, not merely a written policy. Moreover, as *Brinker* instructs, a court should not address the merits of a claim in examining a class certification motion unless necessary. It is not necessary for this court to address the issue whether a written meal and/or rest break policy is legally required." (*Bradley,* at p. 1154, fn. 9.)

C. Standard of Review

Brinker also summarized the principles for our standard of review: "On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [(Quoting *Fireside Bank v. Superior Court, supra,* 40 Cal.4th at p. 1089, [citation].)] Predominance is a factual question; accordingly, the trial court's finding that common issues predominate generally is reviewed for substantial evidence. [Citation.] We must '[p]resum[e] in favor of the certification order . . . the existence of every fact the trial court could reasonably deduce

from the record . . . .' [(Quoting *Sav-On, supra,* 34 Cal.4th at p. 329.)]" (*Brinker, supra,* 53 Cal.4th at p. 1022.)

III

ANALYSIS OF DECERTIFICATION ORDER

The trial court's order decertifying the class action was based on its predicate determination that, for purposes of whether section 14 mandates provision of a suitable seat, it agreed with Rite Aid that the term "nature of the work" required it to examine whether the job *as a whole* reasonably permits the use of seats, and rejected the merits of Hall's theory of liability that Rite Aid's policy of requiring its Cashier/Clerks to stand while performing check-out work violated section 14's mandate because the nature of check-out work reasonably permits the use of seats, regardless of the amount of time any particular Cashier/Clerk might spend on other duties.[6]

Hall asserts the trial court first erred by reaching and resolving this predicate determination, and this error alone requires reversal of the decertification order. Hall

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6 As a preliminary matter, Hall argues the court was precluded from decertifying the class because there was no new law or facts warranting decertification. However, an order granting class certification is "subject to modification at any time." (*Shelley v. City of Los Angeles* (1995) 36 Cal.App.4th 692 [order granting certification not appealable until after final judgment].) Indeed, our Supreme Court has recognized that it may occur " 'that the trial court will determine in subsequent proceedings that some of the matters bearing on the right to recovery require separate proof by each class member. If this should occur, the applicable rule . . . is that the maintenance of the suit as a class action is not precluded so long as the issues which may be jointly tried, when compared to those requiring separate adjudication, justify the maintenance of the suit as a class action.' [(Quoting *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 815.)] And if unanticipated or unmanageable individual issues do arise, the trial court retains the option of decertification." (*Sav-On, supra,* 34 Cal.4th at p. 335.)

asserts *Brinker*, as well as subsequent decisions applying *Brinker*, stand for the proposition that (1) the certification phase is limited to determining whether the plaintiff's *theory* of liability is amenable to class treatment and a court should not reach the *merits* of that theory, and (2) when (as here) the plaintiff's theory alleges the employer has a uniform policy that offends labor laws, such an action "by its nature [involves] a common question eminently suited for class treatment" (*Brinker, supra*, 53 Cal.4th at p. 1033) and any distinctions in the actual work experience of employees governed by such policy do not preclude certification.

Our review of *Brinker*, which is binding on this court (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450), compels the conclusion the trial court erroneously based its decertification order on its assessment of the merits of Hall's claim rather than on the theory of liability advanced by Hall. We are instructed under *Brinker* that the starting point for purposes of class certification commences with Hall's theory of liability because, "for purposes of certification, the proper inquiry is 'whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment.' " (*Benton,, supra*, 220 Cal.App.4th at p. 726.) Here, as in *Brinker* and its progeny, Hall alleged (and Rite Aid did not dispute) that Rite Aid had a uniform policy of the type envisioned by *Brinker*: Rite Aid did not allow its Cashier/Clerks to sit (and therefore provided no suitable seats for its Cashier/Clerks) while they performed check-out functions at the register. Hall's theory of liability is that this uniform policy was unlawful because section 14 mandates the provision of suitable seats when the nature of the work reasonably permits the use of seats, and the nature of the work *involved in performing*

check-out functions does reasonably permit the use of seats. Hall's proffered theory of liability is that, regardless of the amount of time any particular Cashier/Clerk might spend on duties other than check-out work, Rite Aid's uniform policy transgresses section 14 because suitable seats are not provided for that aspect of the employee's work that *can* be reasonably performed while seated..

It does not appear that any aspect central to Hall's *theory* of recovery (i.e. what is Rite Aid's policy, and whether the nature of the work involved in performing check-out functions would reasonably permit the use of seats) would not be amenable to common proof. Indeed, the trial court's decertification order did not make a contrary determination (i.e., those inquiries would not be amenable to common proof), but was instead based on its conclusion that Hall's theory of liability was unmeritorious. Specifically, it concluded, contrary to Hall's postulated theory, that section 14 does not mandate the provision of suitable seats when the nature of a substantial *task* within an employee's range of duties would reasonably permit the use of seats, but instead mandates the provision of suitable seats *only* when the nature of an employee's *work as a whole* would reasonably permit the use of seats. Based on that construction of section 14, the trial court concluded decertification was proper because individual issues as to each class member's "job as a whole" would predominate over common questions. However, under *Brinker* as construed by *Bradley, Benton* and *Faulkinbury*, the trial court's decertification order was based on improper criteria and/or erroneous legal assumptions and must be reversed because it based its ruling on the merits of Hall's theory rather than on whether the theory itself would be amenable to common evidentiary proof.

Rite Aid's arguments on appeal largely ignore the analysis of *Bradley, Benton* and *Faulkinbury.* Instead, Rite Aid asserts the trial court properly reached the merits of (and correctly rejected) Hall's theory of liability when it ruled on the decertification motion because *Brinker* cannot be read to permit a plaintiff to "invent a class action by proposing an incorrect rule of law and arguing, 'If my rule is right, I win on a class basis.' " However, Rite Aid's argument appears to overlook the import of *Brinker's* statement that

> "the certifiability of a rest break subclass in this case *is not dependent upon resolution of threshold legal disputes over the scope of the employer's rest break duties*. The theory of liability--that Brinker has a uniform policy, and that that policy, measured against wage order requirements, allegedly violates the law--is by its nature a common question eminently suited for class treatment. . . . *[I]n the general case to prematurely resolve such disputes, conclude a uniform policy complies with the law, and thereafter reject class certification--as the Court of Appeal did--places defendants in jeopardy of multiple class actions*, with one after another dismissed until one trial court concludes there *is* some basis for liability and in that case approves class certification. [Citation.] *It is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, and thus permit defendants who prevail on those merits, equally with those who lose on the merits, to obtain the preclusive benefits of such victories against an entire class and not just a named plaintiff.*" (*Brinker, supra,* 53 Cal.4th at pp. 1033-1034, italics added.)

We read *Brinker* to hold that, at the class certification stage, as long as the plaintiff's posited theory of liability is *amenable* to resolution on a class-wide basis, the court should certify the action for class treatment *even if* the plaintiff's theory is ultimately incorrect at its substantive level, because such an approach relieves the defendant of the jeopardy of serial class actions and, once the defendant demonstrates the posited theory is substantively flawed, the defendant "obtain[s] the preclusive benefits of

such victories against an entire class and not just a named plaintiff." (*Brinker, supra,* 53 Cal.4th at pp. 1034, 1033.) For these reasons, *Brinker* has concluded "[i]t is far better from a fairness perspective to determine class certification independent of threshold questions disposing of the merits, [because] defendants who prevail on those merits, equally with those who lose on the merits" (*id.* at p. 1034) have the benefits of their substantive legal victory applied to the class as a whole.

Rite Aid, seizing on *Brinker's* observation that "[*t*]*o the extent* the propriety of certification depends upon disputed threshold legal or factual questions, a court may, and indeed must, resolve them" (*Brinker, supra,* 53 Cal.4th at p. 1025, italics added), argues the court properly evaluated the merits of Hall's legal theory as a predicate to ruling on the decertification motion. However, *Brinker* repeatedly cautioned that "[s]uch inquiries are closely circumscribed" (*id.* at p. 1024) and ordinarily should not be addressed as part of the certification evaluation. (*Id.* at p. 1023 ["resolution of disputes over the merits of a case generally must be postponed until after class certification has been decided [citation] with the court assuming for purposes of the certification motion that any claims have merit"].) We interpret the highlighted language in the passage from *Brinker* cited by Rite Aid to mean, by negative implication, that to the extent *the propriety of certification* does not depend on determining threshold legal matters, such determinations should be deferred.[7] Here, the propriety of certification does not depend on whether Hall's

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[7] Rite Aid cites no relevant authority, other than the quoted passages from *Brinker*, holding that trial courts may resolve the merits of a plaintiff's claim as a predicate to the certification determination. Although Rite Aid cites *Marlo v. United Parcel Service, Inc.*

interpretation of section 14 is correct because, "assuming for purposes of the certification motion [Hall's] claims have merit," the certification question must focus on whether common questions relevant to proving Hall's theory would predominate over individual issues. Certainly, whether Rite Aid had a policy requiring Cashier/Clerks to stand while working at the register is subject to common proof. Moreover, the other factual question central to Hall's theory of recovery--whether the nature of the work involved *in performing check-out functions* would reasonably permit the use of seats--appears equally amenable to common proof. Thus, regardless of whether Hall's or Rite Aid's interpretation of section 14's mandate is correct, class certification for Hall's claim would be proper,[8] and resolution of disputes over the merits of Hall's theory of recovery must be deferred until after the class certification has been decided.

(C.D.Cal. 2008) 251 F.R.D. 476 as additional authority purporting to approve an examination and resolution of the merits of a plaintiff's claim as a predicate to the certification determination, *Marlo* does not stand for that proposition. To the contrary, it appears *Marlo's* concern when it considered decertification was whether class-wide treatment was feasible because it observed there would be an absence of commonality in the evidence necessary to prove the underlying claim (*id.* at pp. 480-481), and *Marlo* expressly cautioned that it was "*careful to distinguish this observation from the kind of merits-determination that is disfavored with respect to class certification decisions.* When considering class certification, a court should not weigh the evidence or otherwise evaluate the merits of a plaintiff's class claim." (*Id.* at p. 480, fn. 2, italics added.)

8 This question--whether common issues would predominate over individualized issues in deciding if the nature of the work involved in performing check-out functions would reasonably permit the use of seats--is of course vested in the first instance to the trial court's discretion, and we caution our observations should not be construed as deciding this question de novo or as holding that, as a matter of law, the common factual questions relevant to proving Hall's theory of liability necessarily predominate over individualized questions. However, because the trial court originally found in *favor* of certification, and its subsequent decertification order was premised on its conclusion that

We conclude that under *Brinker*, consistent with the decisions in *Bradley, Benton* and *Faulkinbury*, the trial court's decertification order was based on improper criteria and/or erroneous legal assumptions and must be reversed because it was based on the merits of Hall's theory rather than on whether the theory itself would be amenable to common treatment of the evidentiary or legal issues.

IV

THE REMAINING ISSUES

Because we conclude the trial court's decertification order must be reversed, we need not reach Hall's alternative claim that the action should have been permitted to proceed as a representative nonclass action under PAGA. However, we briefly address one other argument presented by Hall on appeal. Hall acknowledges that *Brinker* admonishes against deciding the merits of the plaintiff's theory of liability when such decision is unnecessary to the certification question, and also acknowledges such decision on the merits should be postponed until after the certification issue is determined and would be binding on the class. However, notwithstanding *Brinker's* admonitions, Hall argues we are required to decide the proper construction of section 14's mandate because the trial court resolved the merits and therefore "as in *Brinker*, [this court] must reach out to decide that ill-timed and incorrectly decided issue."

We decline Hall's invitation to reach the merits of the parties' competing constructions of section 14, for several reasons. First, we adhere to *Brinker's* instructions

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Hall's theory of recovery was substantively flawed, we do not construe the trial court's decertification order as signaling an intention to reverse its original decision that class treatment of Hall's *theory* of recovery was appropriate.

that, unless necessary to the certification issue, a court should not decide the merits of the plaintiff's theory when evaluating the certification issue. As previously discussed, other post-*Brinker* decisions have followed that instruction and evaluated rulings on certification motions while declining to reach issues impacting the merits of the plaintiff's theory of liability. (*Faulkinbury, supra,* 216 Cal.App.4th at p. 234 ["[a]s *Brinker* instructs, we do not determine at this stage whether Boyd's policy of requiring on-duty meal breaks violates the law"]; *Benton, supra,* 220 Cal.App.4th at pp. 726-727 [rejecting defendant's claim the order denying certification could be affirmed because applicable wage and hour provisions are satisfied if employer provides "reasonable opportunity" to take meal and rest breaks because this "assertion that it was not required to adopt the sort of meal and rest break policy envisioned by plaintiffs goes to the merits of the parties' dispute"]; *Bradley, supra*, 211 Cal.App.4th at p. 1154, fn. 9 ["[A]s *Brinker* instructs, a court should not address the merits of a claim in examining a class certification motion unless necessary. It is not necessary for this court to address the issue whether a written meal and/or rest break policy is legally required."].) Indeed, Hall's argument appears to constitute an invitation to this court to travel the same path as it did in *Brinker*--of ruling on the merits of the plaintiff's theory when evaluating a trial court's ruling on a certification motion--which our Supreme Court in *Brinker* determined was error requiring reversal of the appellate court's opinion.

Although Hall argues her suggestion falls within the ambit of *Brinker's* approach, *Brinker* reached the merits only because it recognized there was " 'nothing to prevent a court from considering the legal sufficiency of claims when ruling on certification where

both sides jointly request such action.' [(Quoting *Linder, supra,* 23 Cal.4th at p. 443.)]" (*Brinker, supra*, 53 Cal.4th at p. 1026.) We have found no request from Rite Aid that, assuming we vacated the decertification order, we reach the merits of Hall's claim and resolve the merits of Hall's theory of recovery in a manner that would become binding on the class and on Rite Aid. Moreover, even assuming Rite Aid's brief on appeal could be construed to include an embedded request to resolve the merits of Hall's theory, it appears the power to reach the merits as part of the certification process is at most a discretionary power to be employed in exceptional cases. (Cf. *Linder,* at p. 443 ["we do not foreclose the possibility that, *in the exceptional case* where the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, the trial court *may*, after giving the parties notice and an opportunity to brief the merits question, refuse class certification because the claim lacks merit as a matter of law"], italics added.)

Here, Rite Aid does have other "reasonable pretrial means to challenge the merits of [Hall's] claim," such as a motion for summary adjudication or for judgment on the pleadings (cf. *Linder, supra,* 23 Cal.4th at p. 440 ["[w]hen the substantive theories and claims of a proposed class suit are alleged to be without legal or factual merit, the interests of fairness and efficiency are furthered when the contention is resolved in the context of a formal pleading (demurrer) or motion (judgment on the pleadings, summary judgment, or summary adjudication) that affords proper notice and employs clear standards"]), and we therefore believe it is more appropriate to adhere to the general rule against resolving issues unnecessary to the disposition of this appeal. (Cf. *Conte v.*

Wyeth, Inc. (2008) 168 Cal.App.4th 89, 114 ["[a]s a general rule, we will not resolve an issue that is unnecessary to disposition of an appeal"].) Moreover, it would be premature to resolve the merits of Hall's theory because, although we have reversed the present decertification order, we have done so because it was predicated on a premature assessment of the merits of Hall's claim rather than because the trial court was categorically precluded from decertifying the class for other and proper reasons. (See fn. 8, *ante*.) Rather than resolve a question that could be potentially mooted by subsequent rulings, we believe the prudent course is to remand the matter to the trial court for orderly resolution of the claims asserted by Hall.

DISPOSITION

The trial court's order granting Rite Aid's Motion for Class Decertification entered October 29, 2012, is reversed, and the matter is remanded for further proceedings consistent with this opinion. Hall shall recover costs on appeal.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.

EXHIBIT B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Court of Appeal Fourth District
FILED
MAY 16 2014
Kevin J. Lane, Clerk
DEPUTY

KRISTIN HALL, Plaintiff and Appellant, v. RITE AID CORPORATION, Defendant and Respondent.	D062909 (Super. Ct. No. 37-2009-00087938-CU-OE-CTL) ORDER CERTIFYING OPINION FOR PUBLICATION

THE COURT:

The opinion filed May 2, 2014, is ordered certified for publication.

BENKE, Acting P. J.

Copies to: All parties

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 June 19, 2014, I placed with this firm at the above address true and correct copies of:

- **PETITION FOR REVIEW OF DECISION BY COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE**

in envelopes, postage fully pre-paid, addressed as follows:

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Court of Appeal

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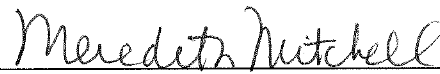
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I also declare that I am employed in the office of a member of the State Bar of California at whose direction the service was made.

Executed on June 19, 2014, at San Francisco, California.



Meredith Mitchell