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August 8, 2014

BY COURIER

Hon. Chief Justice and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Hall v. Rite-Aid Corporation*, No. S219434

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Chamber of Commerce of the United States of America, the California Chamber of Commerce, and the Retail Litigation Center, Inc. submit this letter as *amici curiae* in support of Rite-Aid Corporation's petition for review. The petition should be granted because it presents an issue of paramount importance to the analysis of commonality and predominance in class certification determinations under Code of Civil Procedure section 382:

Whether a trial court considering a motion for class certification must determine the correct substantive law when one proposed legal standard would permit the case to be adjudicated with common evidence, while the other would require individualized inquiries to resolve the case.

Interests of the *Amici Curiae*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of thousands of California businesses. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. In fulfilling that role, the Chamber has appeared many times before this Court, both at the petition stage and on the merits.

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The California Chamber of Commerce (“CalChamber”) is a voluntary, non-profit, California-wide business association with more than 13,000 members, both individual and corporate, who represent virtually every economic interest in the state. For more than a century, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state’s economic and jobs climate by representing businesses on a broad range of legislative, regulatory, and legal issues. CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community. The issue presented here is one such case.

The Retail Litigation Center, Inc. (“RLC”) is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC’s members include many of the country’s largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The *amici* and their members have a strong interest in further review because the decision below threatens to distort the class certification process by allowing class certification to proceed even when, under the correct legal standard, resolution of the certified claims would require predominantly individualized inquiries. Under the holding of the Court of Appeal, a class proponent can overcome the predominantly individualized nature of the inquiry necessary to resolve class members’ claims under the correct legal standard by the simple expedient of raising a question about the nature of that standard and declaring that legal dispute to be a “common” issue. If the decision below remains available as precedent to be followed by California trial courts, the rule it articulates would lead to the prolonged class treatment of disputes that as a matter of law are unsuited to the class device, imposing unwarranted litigation costs on many members of the *amici*.

Reasons Why Review Should Be Granted

The class action device provided by Code of Civil Procedure section 382 allows persons whose claims turn on common issues to resolve their claims *en masse* using common evidence that establishes claim elements pertinent to each class member. Class certification procedures properly delve into the nature of the claims asserted by the

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putative class—in particular, the extent to which each class member’s claims may be decided using evidence applicable to all. As this Court has phrased the inquiry, in order to determine whether common issues predominate, a court “must determine whether the elements necessary to establish liability are susceptible to common proof.” (*Brinker Restaurants Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1024.)

In light of the need to determine “whether the elements necessary to establish liability are susceptible to common proof,” in turn, the Court has recognized the need to resolve “disputed threshold legal ... questions” when “the propriety of certification depends” on them. (*Brinker, supra*, 53 Cal.4th at pp. 1024, 1025.) That inquiry may overlap with the merits of the claims, but a tightly circumscribed “merits resolution is permitted” in that context if “certification ‘depends upon’ the disputed issue. (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 327 P.3d 165, 175 [quoting *Brinker*, 53 Cal.4th at p.1025].) In a word, a court considering class certification should not determine who wins, but it may have to determine what legal standard the plaintiff must meet (and must be able to satisfy predominantly with common evidence in order for a class to be certified).

In the decision below, the Court of Appeal concluded that commonality and predominance need not be established under the correct substantive legal standards. Rather, so long as the plaintiffs propose a legal standard that would dispense with individualized inquiries, the very question whether that legal standard applies would present a common issue supporting class certification. That holding was misguided.

As the petition explains, in this suitable-seating dispute the plaintiffs contended that, under the applicable Wage Order, Rite Aid had a duty to provide a seat to any employee who worked at a check-out counter for any period of time, even if for much of that time the employee would not be able to perform the job while sitting. Rite Aid, in contrast, contended that the duty to provide a seat depended on the employee’s duties as a whole, so that the Order would not require providing a seat to an employee working at a check-out counter if the employee worked mostly at tasks where seating was inappropriate, or if particular check-out duties would not allow the employee to sit most of the time. Thus, under plaintiffs’ legal theory, any failure to have a seat at a check-out counter was a violation requiring no further inquiry, while under Rite Aid’s theory such a failure would violate an employee’s rights only under certain, largely individualized circumstances.

That appears to be exactly the type of threshold issue that this Court had in mind when it held in *Brinker* that, when “legal issues germane to the certification inquiry bear as well on aspects of the merits, a court may properly evaluate them,” and that, “[t]o the extent

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the propriety of certification depends on disputed threshold factual or legal questions, a court may, and indeed must, resolve them.” (53 Cal.4th at pp. 1023-1024, 1025.) Yet the Court of Appeal in the present case held, to the contrary, that the disputed legal elements of the plaintiffs’ claim were themselves common legal issues supporting class certification. According to that court, deciding exactly what the law required the plaintiff to prove in common—that is, deciding which “elements” were “necessary to establish liability” (*id.* at p. 1024)—amounts to an impermissible predetermination of the merits of the action. (See 226 Cal.App.4th 278, 293-295.)

The decision below reinjects substantial confusion into the standards for class certification. If left in place as precedent, the Court of Appeal decision could have far-reaching effects that would fundamentally change the nature of the class certification inquiry under Code of Civil Procedure section 382. The decision below might be construed to permit a plaintiff to obtain class certification simply by advancing a theory of liability that omits inherently individualized elements such as causation and injury, on the ground that the validity of the plainly erroneous legal theory could be determined on a class-wide basis. That would permit certification—and the pressure to settle regardless of the merits that attends certification (see, e.g., *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds* (2013) 133 S.Ct. 1184, 1200)—in a broad range of inappropriate cases.¹

The approach below also raises significant unanswered questions. The opinion suggests that defendants—especially employers whose policies are challenged—should want threshold legal questions to be decided after class certification so that the entire class is bound by the result. (See 226 Cal.App.4th at 293-294.) But if class counsel is wrong about the legal theory, and in fact the legality of the employer’s policy depends on individual circumstances, does the entire class lose because the class plaintiff’s overbroad theory fails, even though some or even many class members would have valid claims

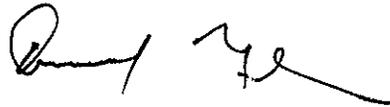
¹ For that reason, although the underlying legal issue as to the meaning of the Wage Order is before the Court in *Kilby v. CVS Pharmacy, Inc.*, S215614, the importance of the class certification issue presented here extends beyond that question and far beyond the context of wage-and-hour claims in general. As Rite-Aid points out (Reply p.2), a decision in *Kilby* would not necessarily resolve the certification issue here even indirectly. And *Kilby* will not even address the important class-certification issue that warrants review regardless of the specific underlying legal dispute. At a minimum, therefore, the Court should grant review in this case and defer review pending the disposition of *Kilby*.

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under the correct, more individualized standard? That might create adequacy and due process problems, elevating the interests of the class-action lawyers over those of their clients. If determination of the legal issue on a class basis instead simply results in decertification of the class, allowing new actions under the correct theory, then it makes no sense to defer the decision as to what exactly plaintiffs must prove through common evidence.

The class device is designed to provide a means to determine the claims of many persons simultaneously through the use of common evidence, not to provide a means of bringing extraordinary settlement pressure to bear upon a defendant before the court has even decided what the plaintiff class would have to prove in order to prevail. Because the decision below has the latter effect, it should be reviewed and reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Donald M. Falk", with a long horizontal flourish extending to the right.

Donald M. Falk

Erika Frank
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I, Kristine Neale, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, California 94306-2112. On August 8, 2014, I served the foregoing document(s) described as:

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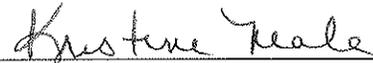
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Executed on August 8, at Palo Alto, California.


Kristine Neale
Kristine Neale