

**CASE NO. S215614**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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**NYKEYA KILBY**, Individually and on behalf  
of a class of similarly situated persons  
Plaintiff-Petitioner,

v.

**CVS Pharmacy, Inc.**  
Defendant-Respondent.

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**KEMAH HENDERSON**, et al.,  
Plaintiffs/Petitioners,

v.

**JPMORGAN CHASE BANK, N.A.**,  
Defendant/Respondent.

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**APPLICATION OF AARP TO FILE AMICUS CURIAE BRIEF;  
PROPOSED AMICUS CURIAE BRIEF OF AARP  
IN SUPPORT OF PLAINTIFFS/PETITIONERS**

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Questions Certified by Request of the  
Unites States Court of Appeals for the Ninth Circuit  
Ninth Circuit Case Nos. 12-56130 and 13-56095

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**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF  
AND PROPOSED BRIEF IN SUPPORT OF PLAINTIFFS/  
PETITIONERS NYKEYA KILBY & KEMAH HENDERSON**

**To the Honorable Chief Justice Cantil-Sakauye and Associate  
Justices of the California Supreme Court:**

Pursuant to California Rules of Court, rule 8.520(f), AARP respectfully requests leave to file this amicus brief in support of Plaintiffs-Petitioners Nykeya Kilby & Kemah Henderson. AARP is interested in this case since more than a third of AARP's membership are either currently working or seeking employment. The issue concerning when employees are entitled to a "suitable seat" has a direct impact on many older workers ability to obtain and keep a wide variety of jobs. Amicus Curiae AARP seeks to provide additional context as demonstrated below, and can indeed, give the Court a different perspective on the legal obligation of employers to provide their employees with suitable seats and also on the importance of the Wage Order in this case in protecting employees' health.

In accordance with California Rule of Court 8.250(f)(4), no party or counsel for any party, other than counsel for amicus curiae AARP, has authored or funded the preparation of the proposed brief in whole or in part.

**STATEMENT OF INTEREST OF AMICUS CURIAE**

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their dreams into real possibilities, strengthens

communities and fights for issues that matter most to families, such as employment, healthcare, income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to representing the interests and addressing the needs of people age fifty and above, including over one-third of AARP members, who are employed or seeking employment. In various ways, including legal advocacy as an *amicus curiae*, AARP supports the rights of all Americans, and older workers in particular, to achieve financial security. To this end, AARP has been vigilant in advocating for vigorous enforcement of state and federal employment laws.

## **ARGUMENT**

### **I. Legislation and Work Orders Mandating Suitable Seating Are Designed to Protect Workers' Health.**

In industrial and other workplaces, many workers are required to perform jobs in a standing position. While working in a standing position in some circumstances can be linked to versatility, several studies have noted that *prolonged* standing can result in “work-related musculoskeletal disorders, chronic venous insufficiency, preterm birth and spontaneous abortion, and carotid atherosclerosis.” (Halim & Omar, *A Review of Health Effects Associated With Prolonged Standing in the Industrial Workplaces* (2011) 8 Int’l J. Res. & Revs. Applied Sci. 14, 15.) Additionally, a significant number of workers experience foot or lower leg pain and

discomfort associated with prolonged standing. (Zander et al., *Influence of Flooring Conditions On Lower Leg Volume Following Prolonged Standing* (2004) 34 Int'l J. Indus. Ergonomics 279, 279-280.) Prolonged standing also has been linked to increased occupational injuries and increased workers' compensation and health treatment costs. (*Ibid.*; Halim, *supra*, 8 Int'l J. Res. & Revs. Applied Sci. at p. 14.) For example, "[o]ccupational health statistics estimated that hundreds of thousands of workers in the United Kingdom have suffered from injuries due to prolonged standing, and resulted over 2 million days sick leave a year." (*Id.* at p. 15.)

In recognition of the hazards of prolonged standing, in the late 1800s to early 1900s, many states, including California, began enacting legislation to protect the health and safety of female workers. (Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender* (2007) 14 Mich. J. Gender & L. 1, 12-14 (hereafter Kogan).) Such legislation included laws requiring employers to provide suitable seating to their female employees. (*Id.* at pp. 14-15.) By 1950, "[a]ll states except Illinois and Mississippi [had] laws requiring work seats for women"; moreover, Florida's statute also applied to men. (Board of Trustees of the Leland Stanford Junior University, *Sex, Discrimination, and the Constitution* (1950) 2 Stan. L.Rev. 691, 716.) The general purpose for enacting such statutes requiring seating for women was for the preservation of their



health, particularly to protect “wom[e]n’s reproductive capacity.” (Kogan, *supra*, 14 Mich. J. Gender & L. at p. 14; 52 N.Y.Jur.2d (2013) Employment Relations § 247.) Pregnant women can develop varicose veins and other medical complications if they stand for prolonged periods of time, especially circulation issues due to increased blood volume by thirty to forty percent and due to the uterus’s interference with major blood vessels. (Calloway, *Accommodating Pregnancy in the Workplace* (1995) 25 Stetson L.Rev. 1, 6 (hereafter Calloway).)

More recently, scientific studies have noted that prolonged standing can be a problem for both men and women. “[W]orking in a standing position on a regular basis can cause sore feet, swelling of the legs, varicose veins, general muscular fatigue, low back pain, stiffness in the neck and shoulders, and other health problems. These are common complaints among sales people, machine operators, assembly-line workers and others whose jobs require prolonged standing.” (*Working in a Standing Position: Basic Information* (July 2008) Canadian Centre for Occupational Health and Safety <<http://bit.ly/14v4ED>> [as of Aug. 25, 2014].) Further, “[k]eeping the body in an upright position requires considerable muscular effort that is particularly unhealthy even while standing motionless. It effectively reduces the blood supply to the loaded muscles. Insufficient blood flow accelerates the onset of fatigue and causes pain in the muscles of the legs, back and neck.” (*Ibid.*)

Relevant scientific research indicates that the health of workers regardless of their gender is advanced if they are allowed to alternate between sitting and standing. (E.g., Halim, *supra*, 8 Int'l J. Res. & Revs. Applied Sci. at p. 18 [suggesting the use of a sit-stand stool to alternate between standing and sitting positions]; Lehman et al., *Effects of Sitting Versus Standing and Scanner Type on Cashiers* (2001) 44 Ergonomics 719, 721 [recommending that cashiers should alternate between sitting and standing]; Tuchsén et al., *Prolonged Standing at Work and Hospitalisation Due to Varicose Veins: A 12 Year Prospective Study of the Danish Population* (2005) 62 Occupational & Environmental Medicine 847, 849 ["standing or walking at work should be limited and alternate[d] with other positions such as sitting"].) Hence, "[i]t has been well established that occupations requiring prolonged periods of static standing are associated with development of musculoskeletal disorders including low back pain." (Nelson-Wong & Callaghan, *Is Muscle Co-Activation a Predisposing Factor For Low Back Pain Development During Standing? A Multifactorial Approach for Early Identification of At-Risk Individuals* (2009) 20 J. Electromyography & Kinesiology 256, 256.) The aggregate cost of low back pain to American industries is in excess of one billion dollars per year. (Zander, *supra*, 34 Int'l J. Indus. Ergonomics at p. 279

[citing Webster & Snook, *The Cost of Compensable Low Back Pain* (1990)  
32 J. Occupational Med. 13].)

**A.) Enforcement of California's Industrial Wage Order Is  
Important to Older Workers.**

Older workers are the nation's fastest growing segment of the  
working population. (Centers for Disease Control and Prevention, *Nonfatal  
Occupational Injuries and Illnesses Among Older Workers – United States,  
2009* (Apr. 29, 2011) <<http://1.usa.gov/1eCiA6N>> [as of Aug. 25, 2014].)  
“As of 2013, 50.7 million people age 50 and older were in the labor force,  
33 percent of the total. These figures are projected to increase as the  
boomer population ages and as older workers opt to delay retirement  
because they want to continue working or, increasingly, because they  
cannot afford to retire” (U.S. Bureau of Labor Statistics, *Employment and  
Earnings*, January 2014, Table 3.) For many workers over 50, the need to  
work is nothing short of a matter of basic survival. ( Bernard, *The Impact of  
Baby Boomers Working Past 65*(Jan 18 2013)< <http://bit.ly/1plXIsJ>> [as of  
Aug 25, 2014].)

By 2022, the U.S. Department of Labor projects that the number of  
workers over age 50 will increase to 57.9 million, 35.5 percent of the total .  
(U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment Projections*  
(2013) <<http://1.usa.gov/1ugu6zS> >[as of Aug 10, 2014].) Increased life-  
spans, and the loss of traditional pension plans have contributed to the

long-term rise in work participation rates among the 55-years-and-older population. (Engemann & Wall, *The Effects of Recessions Across Demographic Groups* (2010) F. Reserve Bank of St. Louise Rev. 1, 18 <<http://bit.ly/1oSsQRp> > (as of Aug. 16, 2014) (hereafter Recession Effects).) The move by employers to replace defined-benefit retirement plans with defined-contribution retirement plans, allowing employers to shift more responsibility for retirement income to the employee significantly impacted older workers ability to retire. (Poterba et al., *The Decline of Defined Benefit Retirement Plan and Asset Flows* (June 2009) Chap. 10 pp. 333-336. )

Prolonged standing has a negative impact on workers of all ages and can be particularly difficult for some older workers. As the Ohio Bureau of Workers' Compensation has noted, “[h]igh repetition and sustained loading associated with prolonged standing and/or walking can harm an aging musculoskeletal system. People feel the effects of skeletal aging mainly in their knees, fingers, hips and spinal column.” (Lampl, *Protecting Older Workers* (2009) Ohio Bureau of Workers' Compensation <<http://bit.ly/176Zl0E>> [as of Aug. 25, 2014].) Thus, prolonged standing should be avoided whenever possible, and cashiers should be given the opportunity to sit down when their work reasonably permits the use of seats.

Respondent CVS suggests that the Labor Commissioner's lack of enforcement of Section 14(a) indicates that employers need not provide suitable seating to their employees. (CVS' Answer Brief, pp 21-22.) The lack of enforcement of the suitable seating provision, however, could have been the result of lack of resources or any number of other factors. As the Labor Commissioner herself notes:

A prevailing custom or industry practice does not indicate or determine compliance with differing legislatively-established requirements or interpretations of law. (See, e.g., *Lance Camper Mfg. Corp. v. Republic Indemnity Co. of America*, 90 Cal. App.4<sup>th</sup> 1151, 1156 (2001) [prevailing custom of insurers to set reserves does not make them reasonable and proper]....

(Amicus Br. of the Cal. Lab. Comr., *Garvey v Kmart*, (ND Cal.

2012) No.3:11-cv-02575-WHA, ECF No. 238, p. 5, fn 2.)

A number of states other than California also require employers to provide suitable seats for their employees.<sup>1</sup> In Florida, for instance, it is not only an unfair labor practice for an employer to fail to provide employees

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<sup>1</sup> E.g., Mass. Gen. Laws ch. 149, § 103 requiring employers to provide "suitable seats for the use of their employees..."; N.J. Stat. Ann. §34:2-29 requiring seats except when manufacturing, mechanical and mercantile employees are "necessarily engaged in the discharge of duties that cannot properly be performed in a sitting position". Plaintiff Kilby likewise provided expert testimony that many supermarket and retail stores throughout Europe and Korea provide seating for cashiers. (Petitioner's Opening Brief p. 9.)

suitable seating when reasonable but it is also a second degree criminal misdemeanor for an employer not to provide suitable seating to their employees. (Fla. Stat. Ann. § 448.05.)<sup>2</sup>

California's Wage Order mandating that workers be allowed to sit down when their job permits it should be vigorously enforced to protect workers' health, safety, and comfort. (See, Lab. Code, § 90.5 (a).)

**II. The Plain Meaning of Section 14(A) Requires That All Working Employees Be Provided With Seats When Their Work Reasonably Permits The Use of Such Seats.**

The unequivocal intent of the Industrial Wage Commission in passing Wage Order 4-2001, sec. 14 (A) and Wage Order 7-2001, sec. 14(A) is to allow employees to sit down when their job can be performed while they are seated. The California Supreme Court has held that “[i]f the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.” (*California Teachers Association v. San Diego*

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<sup>2</sup> Specifically, the Florida statute provides that: “If any merchant, storekeeper, employer of male or female clerks, salespeople, cash boys or cash girls, or other assistants, in mercantile or other business pursuits, requiring such employees to stand or walk during their active duties, neglect to furnish at his or her own cost or expense suitable chairs, stools or sliding seats attached to the counters or walls, for the use of such employees when not engaged in their active work, and not required to be on their feet in the proper performance of their several duties; or refuse to permit their said employees to make reasonable use of said seats during business hours, for purposes of necessary rest, and when such use will not interfere with humane or reasonable requirements of their employment, he or she shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.”

*Community College District* (1981) 28 Cal.3d 692, 698; *Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 892 [113 Cal.Rptr.2d 483] [holding that when the language of the statute is clear, the court should not add to or alter them].) Additionally, Labor Code section 90.5, subdivision (a), mandates that minimum labor standards be vigorously enforced. The suitable seating provision is not permissive; rather, it is part of an order which states what an employer “shall” do. (*Home Depot USA, Inc. v. Superior Court* (2010) 191 Cal. App. 4<sup>th</sup> 210, 221-222 (2010); *Brite v. 99cents Only Stores* (2010) 189 Cal. App. 4<sup>th</sup> 1472, 1479.)

### **III. Wage Orders Are Quasi-Legislative Regulations That Should Be Liberally Construed In Favor of Employees.**

Wage orders should be “construed in accordance with the ordinary principles of statutory interpretation.” (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 43, reh'g. den. Apr. 2, 2013.) As the California Supreme Court has noted, “[i]n light of the remedial nature of the legislative enactments authorizing the regulation of wages, hours and working conditions for the protection and benefit of employees, the statutory provisions are to be liberally construed with an eye to promoting such protection.” (*Id.* at p. 44.) “[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees.” (*Thurman v. Bayshore Transit Management, Inc* (2012) 203 Cal.App.4th 1112, 1153.)

To prevail on a §14(A) seating claim, employees who have been provided no seat whatsoever only should be required to establish that the nature of their work reasonably permits "the use of seats," nothing more. By definition, an employer that has failed to provide *any* seating to its employees has failed to provide suitable seating.

### **CONCLUSION**

For all of these reasons, the Court should answer the Ninth Circuit's certified questions as stated in Plaintiffs/Petitioners' Opening Brief.

Dated: August 26, 2014

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### **CERTIFICATE OF COMPLIANCE**

In accordance with Rule 8.520(c) California Rules of Court, the undersigned counsel for Amicus Curiae AARP hereby certifies that the foregoing Amicus Curiae's Brief was produced on a computer in 13-point type. The word count, including footnotes but excluding those parts not subject the word-count limitation) contains 2712 words, as determined by the Microsoft Word word-processing system used by her firm.

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