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Honorable Tani Gorre Cantil-Sakauye, Chief Justice
and the Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Duran, et al. v. U.S. Bank National Association* (No. S200923)
Cal. Rule of Court 8.500(g) Letter Supporting Petition for Review

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

On behalf of *amici curiae* AARP, the Asian Law Caucus, the Asian Pacific American Legal Center, California Rural Legal Assistance Foundation, the Disability Rights Education and Defense Fund, the Impact Fund, the National Immigration Law Center, the Lawyers' Committee for Civil Rights of the San Francisco Bay Area, the National Center for Youth Law, Public Advocates, the Public Interest Law Project/California Affordable Housing Law Project – Programs of the Law Foundation of Silicon Valley, and the Women's Employment Rights Clinic of Golden Gate University School of Law, we urge this Court to grant the Petition for Review of the decision in *Duran, et al. v. U.S. Bank National Association*, 203 Cal. App. 4th 212 (2012).

Amici are California-based nonprofit advocacy organizations dedicated to advancing and protecting the rights of traditionally disenfranchised groups, including low-wage workers, minority groups, women, the elderly, and persons with disabilities. As such, we often represent plaintiffs in class actions, representative actions, and actions involving multiple plaintiffs. We are acutely aware of the importance of pattern and practice evidence, including statistical evidence, surveys, representative testimony, and expert testimony, in vindicating our clients' rights. We are concerned that the Court of Appeal's misapplication of the law governing this type of evidence will sow confusion among the lower courts and strike a devastating blow to the enforceability of workplace standards, to the detriment of California workers, law-abiding employers, and the State's economy as a whole.

Duran erroneously decided critical issues that were not addressed in *Brinker Restaurant Corp. v. Superior Court*, No. S166350, 2012 WL 1216356 (Cal. April 12, 2012): the role of representative evidence at class certification and trial and the existence vel non of a due process right to insist on individual testimony and adjudication of each class member's claim. While the *Duran* decision is lengthy and confusing, its broad assertions and flawed analysis have already been interpreted to mean that ***all*** class defendants have a due process right to challenge the claims of ***all*** absent class members.[1] If this is indeed what it stands for, the decision represents a complete departure from existing law with the potential to upend many pending class action cases and to make it nearly impossible to litigate all but the smallest such cases in the future.

The recent supplemental brief filed by petitioner employers in *Brinker* highlights this danger. In *Brinker*, petitioners claimed that *Duran* established a new rule that statistics, surveys, and other forms of representative proof may ***never*** be used to establish class-wide liability where a defendant might be able to avoid liability to some class members through individualized proof. *See* Brinker's Supp. Brief re *Duran* at 3-4. While we do not agree with this characterization of *Duran*, the decision is so poorly reasoned and so clearly erroneous that it will inevitably lead to just this sort of misunderstanding and overreaching by class defendants in similar cases.

Duran is at odds with this Court's jurisprudence on: (1) the appropriate methodology for proving class or collective liability; (2) the applicable burden for proving classwide damages where an employer's failure to keep appropriate records makes greater precision impossible; and (3) the trial court's discretion to certify class actions even where some issues require individualized proof. The decision is directly

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[1] The *Duran* court paid lip service to the teaching of *Sav-On* that there is no "requirement that courts assess an employer's affirmative exemption defense against every class member's claim before certifying an overtime class action," but it distinguished this holding as applying only at the certification stage, not at trial. *Id.* at 220 n. 15 (stating that "[w]e do not read this passage as applying to the trial phase of a class action lawsuit."). The court also acknowledged that, "it has become acceptable to use statistical inference in determining aggregate damages in a class action suit." 203 Cal. App. 4th 212 at 252 n. 54. However, it also said that, "the possibility of error involved in such an approach may exceed constitutional bounds." *Id.* See also discussion *infra* at p. 7 & fn.7.

contradicted in several respects by *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319 (2004) and reflects a fundamental misunderstanding of the important role of pattern and practice evidence in cases arising in the workplace. The errors made in *Duran* include its holding that defendant U.S. Bank National Association ("USB") had a due process right to try each class member's individual claim; its holding that reliance on the representative testimony of 21 employees was an abuse of discretion; and its decertification of the class, rather than remanding the case for trial of any outstanding individual issues.

We believe that *Duran* poses a danger to the strong policies protecting employees' right to statutory wages and favoring the use of the class action device. Class actions do not require individual testimony from every member. Far from it: an action on behalf of a class may be maintained even where its individual members cannot be identified. *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 706 (1967). The Court should take this opportunity to reaffirm that "pattern and practice evidence, statistical evidence, sampling evidence, expert testimony, and other indicators of a defendant's centralized practices" can form the basis for class certification determinations, as well as classwide proof of liability and entitlement to classwide relief. *Sav-On*, 34 Cal. 4th 319 at 333.

In this time of diminished funding for government agencies charged with the enforcement of workplace standards, private enforcement must be maintained and strengthened. The decision in *Duran* could significantly erode workers' ability to challenge unlawful practices through a class action, which is too often the only effective remedy they have.

I. There is no due process right to challenge the claim of every class member individually.

A. Pattern and practice evidence is routinely used in proving liability and damages in class cases.

Class cases, in contrast to individual cases, typically challenge an unlawful policy or a pattern or practice of unlawful behavior. This Court in *Sav-On* recognized the central role of pattern and practice evidence in such cases. While many courts have understood the principles discussed in *Sav-On*, others have had difficulty applying its teachings. *Compare, e.g., Capitol People First v. Department of Developmental Services*, 155 Cal. App.4th 676 (2007) (reversing denial of certification, noting that

"[o]ver the years, numerous courts have approved the use of statistics, sampling, policies, administrative practices, anecdotal evidence, deposition testimony and the like to prove classwide behavior") with *Walsh IKON Office Solutions, Inc.*, 148 Cal. App. 4th 1440, 1456 & n. 10 (2007) (acknowledging that, under *Sav-On*, "a variation in the mix of work performed by class members does not, in itself, preclude class certification," but affirming denial of class certification based on "inference" from defendant's declarations).

The jurisprudence on misclassification cases has become especially muddied as trial courts have struggled to find a way to manage them, with inconsistent results.[2] Yet the presumption that all employees are entitled to overtime, the obligation on employers to keep appropriate records, and the strong public interest in protecting workers and their families should provide the proper framework for class-wide adjudication in such cases.[3]

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[2] Many courts have granted class certification based upon common proof of misclassification in cases similar to *Duran*. *See, e.g., Sav-on*, 34 Cal. 4th 319; *Bell*, 115 Cal. App. 4th 715; *Campbell v. Price Waterhouse* Coopers, 253 F.R.D. 586 (E.D. Cal. 2008) (certifying a class of insurance associates allegedly misclassified as exempt); *Greko v. Diesel USA, Inc.*, 277 F.R.D. 419 (N.D. Cal. 2011) (certifying class of assistant store managers who allegedly worked the majority of time on nonmanagerial duties and were misclassified as exempt executives); *Whiteway v. Fedex Kinkos*, 2006 WL 2642528 (N.D. Cal. 2006) (certifying class of Fedex Kinkos center managers allegedly misclassified as exempt); *Tierno v. Rite Aid Corp*, No. C05-02520 TEH, 2006 WL 2535056 (N.D. Cal. 2006) (certifying class of store managers who alleged they did not spent more than 50% of their time on discretionary managerial functions and therefore were misclassified as exempt); *Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474 (E.D. Cal. 2006) (certifying class of route drivers alleging they were misclassified as exempt from overtime under "outside salesman" and/or "commissioned salesperson" exemptions; rejecting defendant's claim that common issues predominated because of need for individual inquiries).

[3] It should be noted that misclassification cases include not only misuse of overtime exemptions, but also abusive schemes whereby employees are misclassified as non-employees or employees of subcontractors, and the defendant employer disclaims any responsibility for them at all. *See, e.g., Flores v. Albertsons,* 2002 U.S. Dist. LEXIS 6171, 2002 WL 1163623, *5 (C.D.Cal. Apr.9, 2002) (class action on behalf of janitors misclassified as employees of subcontractor); *Torres-Lopez v. May*, 111 F.3d 633 (9th Cir. 1997) (FLSA collective action on behalf of agricultural workers misclassified as

Misclassification cases such as *Duran* involve employers who unilaterally define a class of workers and declare them to be exempt from overtime pay. This means that members of that class forfeit the presumed entitlement to overtime and can be required to work an unlimited number of hours with no financial penalty to the employer. The financial incentive for employers to abuse the overtime exemptions is substantial: requiring one employee to work excessive hours rather than hiring more staff is clearly the cheaper alternative, given that payroll taxes, benefits, workers' compensation, etc. must be paid for each worker.[4]

If *Duran* is allowed to stand, it will become virtually impossible to bring misclassification cases as class actions, leaving abusive employers free to hide behind fictitious overtime exemptions almost at will. Employers will be allowed unilaterally to carve out a class of workers as to whom they claim the presumption of overtime pay does not apply, and every individual affected by that uniform policy will have to bring his or

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employees of contractor); *Antenor v. D & S Farms*, 88 F.3d 925 (11th Cir. 1996) (same); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 & n.12 (9th Cir. 1979) (same); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479 (C.D. Cal. 1996) (collective action on behalf of 72 Thai garment workers found working as virtual slaves and alleged to be employees of contractor). Similarly, workers are sometimes misclassified as independent contractors rather than employees. *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (finding de-boners working at slaughterhouse were employees, not independent contractors); *Brock v. Superior Care, Inc.*, 840 F.2d 1054 (2d Cir. 1988) (enforcement action by Department of Labor on behalf of nurses engaged by a health-care service who were misclassified as independent contractors); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001) (certifying class of delivery workers misclassified as independent contractors who worked for defendant grocery stores delivering orders for tips only).

[4] California courts have long recognized that wage and hours laws "concern not only the health and welfare of the workers themselves, but also the public health and general welfare." *California Grape Etc. League v. Industrial Welfare Com.*, 268 Cal.App.2d 692 at 703 (1969). One purpose of requiring payment of overtime wages is "'to spread employment throughout the work force by putting financial pressure on the employer'" *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal. App. 3d 16 at 39 (1990). Thus, overtime wages are an example of a public policy fostering society's interest in a stable job market. *Gould v. Maryland Sound Industries*, 31 Cal. App. 4th 1137, 1148 (1995).

her own case. Injunctive relief will not be available. In effect, although employers themselves will avoid the individualized determination required to treat employees as exempt, they will require the courts to make those determinations when challenged. This is why employers have cheered *Duran* as a "game-changer for California class actions." *Duran v. US Bank: Aftershocks of Wal-Mart v. Dukes* (2/24/2012) www.law360.com/articles/308271/print?section= classaction).

B. Representative testimony, surveys, and expert testimony are commonly used in wage and hour cases.

Employers make use of employee classifications to manage their workforces. This is pattern and practice evidence, including statistical evidence, representative testimony and class-wide surveys have long been the principal method of proof in class and collective cases involving disparate impact discrimination, wage and hour violations, and other employment-related claims.[5] *See, Int'l Bhd. of Teamsters v. United States*, 431

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[5] Pattern and practice evidence is, of course, not limited to employment cases but is commonly used in a variety of contexts to prove both liability and damages. *See, e.g., Capitol People First*, 155 Cal. App. 4th 696, 692-93 (stating, in case involving rights of developmentally disabled, that "courts may consider pattern and practice [or] statistical and sampling evidence . . . to assess whether that common behavior toward similarly situated plaintiffs renders class certification appropriate"). As the court noted in *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715 at 754 (2004), statistical assessments are integral to many kinds of cases, ranging from antitrust to voting rights. Such evidence has been used to support an inference of intentional discrimination in violation of the Equal Protection Clause of the 14th Amendment. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Castaneda v. Partida*, 430 U.S. 482, 495 (1977). It has been used extensively in proving various forms of damages. *See, e.g., Bruno v. Superior Court*, 127 Cal. App. 3d 120, 129 fn. 4 (1981) (explaining that "[d]ue process does not prevent calculation of damages on a classwide basis . . . In many cases such an aggregate calculation will be far more accurate than summing all individual claims."). In *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253 (2004) survey data was used to prove that defendant was targeting youth in advertising of tobacco products in violation of a consent decree. Statistical sampling is routinely used in cases seeking recoupment of Medicaid overpayments from medical providers. *See, e.g., Ratanasen v. Cal. Dep't of Health Serv.*, 11 F.3d 1467, 1471 (9th Cir.1993) (approving a claim by

U.S. 324, 337-40 (1977) (holding that plaintiff can show disparate impact discrimination through statistical proof of disparity), *cited with approval in Sav-On*, 34 Cal. 4th at 333 n.6; *Alch v. Superior Court*, 122 Cal. App. 4th 339, 381 & n.35 (2004) (holding that the class plaintiff "'is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy'") (quoting *Teamsters*, 341 U.S. 324 at 360).

The Court of Appeal in *Duran* disregarded this well-established body of law in ruling (1) that USB had a due process right to present an individualized defense against every single class member, and (2) that the trial plan was invalid because it imposed a reasonable limitation on the number of representative witnesses[6] and allowed plaintiffs' expert to extrapolate from that testimony to draw conclusions about the class as a whole.[7] This is an extreme and unprecedented departure from settled law that threatens to eviscerate the class action mechanism in wage and hour cases, where extrapolation of liability and damages from the testimony of representative employees has long been an accepted method of proof.

California's Medicaid program and rejecting doctor's argument that the audit on which the claim was based was invalid because it relied on sampling and extrapolation); *United States v. Freitag*, 230 F.3d 1019, 1025 (7th Cir. 2000) (approving use of sampling and extrapolation to calculate loss in Medicare criminal fraud case).

[6] Trial courts can refuse to receive evidence that is purely cumulative. Evid. Code, § 352; *Horn v. General Motors Corp.*, 17 Cal.3d 359 (1976) (stating that "the trial court has discretion to refuse to admit cumulative evidence" and "the exclusion of evidence which has only a cumulative effect will not justify reversal on appeal").. Further, "[t]he rule is well settled that the number of witnesses who may be called upon a single question rests in the discretion of the court." *People v. Casselman*, 10 Cal. App. 234, 241 (1909) (citations omitted); *accord People v. Hendrix*, 192 Cal. 441, 450 (1923); *see also* Evid. Code § 352.

[7] The Court of Appeal summarized its finding on this point as follows: "USB contends the trial court's trial management plan deprived it of its constitutional due process rights in that the plan prevented it from defending against the individual claims for over 90 percent of the class. We agree the trial management plan was fatally flawed and reverse the judgment. We also conclude the case must be decertified . . ." *Duran*, 203 Cal. App. 4th 212 at 216. *See also, id.*, 203 Cal. App. 4th 212 at 260 (ruling that "the trial court's refusal to allow USB to introduce evidence to challenge the claims of the other 239 class members violated its due process rights.")

As Justice Werdegar explained in her concurring opinion in *Brinker*:

> "[W]e have encouraged the use of a variety of methods to enable individual claims that might otherwise go unpursued to be vindicated, and to avoid windfalls to defendants that harm many in small amounts rather than a few in large amounts. Representative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability.

2012 WL 1216356 at *28 (citations omitted).

Given the remedial purpose of the statutes guaranteeing minimum wage and overtime pay and employers' statutory obligation to maintain adequate records, where an employer does not comply with its record-keeping obligations, a plaintiff's burden of proof is not onerous. Employees have carried their burden if they prove their entitlement to compensation and the extent of his damages "as a matter of a just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1945). The burden then shifts to the employer to show the precise number of hours worked or to present evidence sufficient to negate the reasonableness of the inference to be drawn from the employees' evidence. If the employer fails to make such a showing, the court may award back pay to the employees, even if the amount is only approximate. *Id.*

This burden-shifting approach has been adopted in enforcing California state wage and hour laws. It generally applies where, as in *Duran* and most misclassification cases, records have not been kept regarding the employees' hours of work. *Hernandez v. Mendoza*, 199 Cal. App. 3d 721 (1988). And even where a duty to keep records is not explicitly imposed by statute, the burden of proof remains on the employer to prove exceptions to the overtime rule. For example, in *Monzon*, 224 Cal. App. 3d 16, 46, the court held that since an agreement to exclude sleep time from compensable time is an exception to the requirement that employees be paid for "hours worked," it is the burden of the employer to prove that an agreement exists and what the terms of the agreement are. The court further held that, "[o]n remand, it will be appellant's burden to show on which shifts a respondent received eight hours of uninterrupted sleep. Appellant's task may be a difficult one given that at best, appellant only 'guesstimated' the sleep time rather than recording it accurately. It appears that appellant counted the time between runs as sleep time even though some of that time might have been spent at meals,

reloading the truck, or on other duties." *Monzon*, 224 Cal. App. 3d 16, 46. Absent such proof, the employees would be entitled for 24 hours of pay per day.

Similarly here, because the employer in *Duran* regarded members of the plaintiff class as exempt from overtime, it did not keep track of their hours of work as the law requires. Nor did it record which hours class members spent working off-premises. In such cases, representative testimony is "sufficient to impose upon the district court a duty to estimate back wages." *Brock v. Seto*, 790 F. 2d 1446 at 1450 (9th Cir. 1986). Back wages may be awarded to nontestifying employees based upon fairly representative testimony of other employees. *McLaughlin v. Ho Fat Seto*, 850 F. 2d 586, 589 (9th Cir. 1988); *Donovan v. Kaszycki & Sons Contractors, Inc.*, 599 F. Supp. 860 (S.D.N.Y. 1984).

Ignoring this lenient standard, the *Duran* court assumed that the number of employees who testify must meet some threshold number. It faulted the trial court for not following "established statistical procedures in adopting its RWG-based trial methodology" and for choosing the size of the representative group "without any consideration as to probable margin of error and without the benefit of any surveys or pilot studies." 203 Cal. App. 4th 212 at 253. There are no such requirements under *Mt. Clemens*. All that is required is some representative testimony showing that plaintiffs were improperly compensated. Evidence from the 21 employees who testified in *Duran*, 19 of whom were randomly chosen, was sufficient to create an inference that the remaining 239 employees were improperly classified as exempt and deprived of overtime pay to which they were entitled.

Numerous cases have based liability for back wages on a showing similar to that in *Duran*. For example, in *Mt. Clemens*, the testimony of seven employees was sufficient to uphold an award to a workforce of 300. In *Reich v. Southern New England Telecommunications Corp.*, 121 F. 3d 58, 66-68 (2d Cir. 1997) the Second Circuit held that representative testimony from 39 out of approximately 1500 employees, or 2.5 percent, was adequate to support an award of back pay for all employees, noting that "there is no bright line formulation that mandates reversal when the sample is below a percentage threshold" and "[i]t is axiomatic that the weight to be accorded evidence is a function not of quantity but of quality." *Id.* at 67. *See also Kaszycki & Sons*, 599 F. Supp. 860 (29 employees testified by deposition for over 200 employees); *Herman v. Hector I. Nieves Transport, Inc.*, 91 F. Supp. 2d 435, 446 (D. P.R. 2000) (testimony of 14 employees was deemed sufficient for over 100 employees); *McLaughlin v. DialAmerica*

Mktg., Inc., 716 F. Supp. 812, 823-25 (D. N.J. 1989) (testimony of 43 witnesses, both at trial and by deposition, confirmed violations for approximately 350 non-testifying employees).[8]

As the Court of Appeal noted in *Bell*, the determination of aggregate damages using the *Mt. Clements* standard entails the possibility of awarding back wages to particular employees who are not entitled to them, but this possibility "is inherent in many class action decisions. [Defendant's] argument for individualized proof of damages, if accepted, would challenge all class action judgments adopting reasonably expeditious means of distributing the recovery among class members. We decline to adopt this point of view, preferring the more pragmatic approach characterizing federal decisions." *Id.* at 750 (citations omitted). *See also* See 3 Conte & Newberg, Newberg on Class Actions § 10:5 at 487 (stating that "aggregate proof of the defendant's monetary liability promotes the deterrence objectives of the substantive laws underlying the class actions and promotes the economic and judicial access for small claims objectives of Rule 23").

Here, the trial court heard testimony from a representative sample of class members. It refused to allow two class members who had opted out to opt back in, as the employer wanted them to do. The court also heard testimony from plaintiffs' expert who opined that substituting alternate employees for the opt-outs was "statistically acceptable as there was 'no reason to infer that the sample is not representative, or that there is any bias in the sample.'" *Duran*, 203 Cal. App. 4th 212 at 223. The margin of error on ***liability*** was 13%, clearly proof by a preponderance sufficient to support the trial court's findings in plaintiffs' favor on that issue. Although the margin of error on ***damages*** was

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[8]*See also Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982) (upholding judgment based on testimony of 23 employees for back pay award to 207 employees); *Donovan v. Burger King Corp.*, 672 F.2d 221, 225 (1st Cir. 1982) (upholding a finding that assistant managers were not exempt based on testimony of 6 employees out of 246 where the parties stipulated that another 20 witnesses Awould give substantially the same testimony@); *Donovan v. Simmons Petroleum Corp.*, 725 F.2d 83, 86 (10th Cir. 1983) (testimony of 12 former employees supported award to all former employees); *Cowan v. Treetop Enterprises, Inc.*, 163 F. Supp. 2d 930, 934 (M.D. Tenn. 2001) (upholding award based on testimony of 10 workers on behalf of employees in 85 stores).

43.3%, indicating that the range of potential damages was relatively broad, that error measurement did not exist in isolation, but was bolstered by additional factors which the trial court credited that provided greater confidence in its accuracy. USB, whose burden it was to overcome the *Mt. Clemens* showing, rejected numerous alternative procedures that would have provided more precision, and failed to overcome plaintiffs' showing of damages "by a just and reasonable inference."

The Court of Appeal erred in rejecting plaintiffs' evidence and improperly substituting its own judgment that the trial plan did not include enough representative witnesses. But it went even farther, reaching the sweeping conclusion that USB had a due process right to introduce testimony from potentially ***every member of the class***. In doing so, it imposed a far higher burden on plaintiffs than is permitted under *Mount Clemens* and *Hernandez v. Mendoza*, and redefined the nature of the class action device as an established means of adjudicating the claims of ***absent parties***.

II. The decision below contravenes this Court's holdings on the role of pattern and practice evidence in determining the appropriate use of the class action device.

The *Duran* court also erred in decertifying the class. Trial courts "'are afforded great discretion in granting or denying certification'" and their rulings on class certification will stand unless "'improper criteria were used'" or "erroneous legal assumptions were made.'" *Sav-On*, 34 Cal. 4th at 326-27 (quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435-36 (2000)). For this reason, "[w]here a certification order turns on inferences to be drawn from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." *Id.* at 328.

In order to maintain a class action challenging the overtime exemption, a plaintiff must have common evidence to support a legal theory of misclassification, either "that deliberate misclassification was defendant's policy or practice" or that "classification based on job descriptions alone resulted in widespread de facto misclassification." *Sav-On*, 34 Cal. 4th 319 at 329. A class action is appropriate if "plaintiffs are able to demonstrate pursuant to either scenario that misclassification was the rule rather than the exception. . . ." *Id.* at 330.

In *Duran*, while there may have been some employees who were in fact exempt or who did not work any overtime hours, substantial evidence elicited through representative testimony at trial established that these isolated cases, if they existed, were exceptions, not the rule. The Court of Appeal court ignored this evidence and the principles of *Sav-On* in improperly substituting its own judgment for that of the trial court in decertifying the class.

Even assuming that the Court of Appeal was correct in rejecting the trial plan, which *amici* vigorously dispute, the matter should have been reversed with instructions to remand to the trial court for a new trial. *See, e.g., Brinker,* No. S166350, 2012 WL 1216356 at *25 (stating that remand for reconsideration is "the prudent course"); *Linder*, 23 Cal. 4th 429, 448-49 (2000) (reversing denial of class certification and remanding to court of appeal with directions to remand to the trial court for further proceedings and a "fresh look" at the class certification issue); *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906 (2001) (same).

III. Pattern and practice evidence is crucial in class actions by traditionally disenfranchised groups.

Class plaintiffs must be allowed some leeway in using pattern and practice evidence, especially where a defendant employer has failed to keep appropriate records. Otherwise, defendants would be rewarded for failing to keep records and in many cases would pay little or nothing for their wrongdoing because the vast majority of class plaintiffs would be unable to assert their claims. Legal service organizations such as *amici* do not have the resources to bring hundreds or thousands of individual actions and the claims are usually too small to interest private counsel. As the Court of Appeal observed in *Bell*,

> [S]tatistical inference offers a means of vindicating the policy underlying the Industrial Welfare Commission's wage orders without clogging the courts or deterring small claimants with the cost of litigation. In a particular case, the alternative to the award of class-wide aggregate damages may be the sort of random and fragmentary enforcement of the overtime laws that will fail to effectively assure compliance on a class-wide basis. In *Mt. Clemens*, the court held that 'the remedial nature of this statute and the great public policy which it embodies' justified a reduced standard of proof of damages. The same

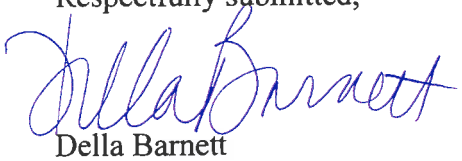
> consideration militates in favor of a reasonably expeditious means of calculating and distributing class-wide aggregate damages if individual adjudication of the entitlements of all class members, or a substantial portion of the members, would impose impossible burdens on the courts and litigants.

Id. at 750-51 (quoting *Mt. Clemens*, 328 U.S. 680, 687) (footnotes omitted).

IV. Conclusion

The class action device is critical to the ability of traditionally disenfranchised groups, especially low-wage workers, to vindicate their rights. Pattern and practice evidence is a key component of the trial strategy in proving such cases. While such evidence is not perfect, it can provide a reasonably accurate assessment of damages and is often the only means of proving aggregate harm. The decision in *Duran* is at odds with accepted methodology for establishing the appropriate use of the class action mechanism, and for proving liability and damages in wage and hour cases. We urge the Court to grant the Petition for Review to correct this dangerous precedent.

Respectfully submitted,



Della Barnett
The Impact Fund

PROOF OF SERVICE

I, Lara Ortiz-Luis, declare that:

I am employed at the Impact Fund, 125 University Avenue, Suite 102, Berkeley, California, 94710. I am over the age of 18 years and not a party to this action. On April 23, 2012, I served a true and correct copy of the following document(s):

Rule 8.500(g) Letter in Support of Petition for Review

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