No. EO71313

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT - DIVISION TWO

HOME DEPOT U.S.A., INC.,
Petitioner and Appellant,

v.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD; and DOES 1 – 10, inclusive,
Respondent and Appellee.

CONTINENTAL CASUALTY COMPANY and COLUMBIA CASUALTY COMPANY

Real Parties in Interest

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND PROPOSED BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER AND APPELLANT HOME DEPOT U.S.A., INC.

On Appeal from the Superior Court of California,
San Bernardino, Case No. 1716416
Honorable David Cohn

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL FOURTH **APPELLATE DISTRICT, DIVISION** TWO	COURT OF APPEAL CASE NUMBER: E071313
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 307414 NAME: Sonia A. Vucetic FIRM NAME: Morgan, Lewis & Bockius LLP STREET ADDRESS: 300 So. Grand Ave., 22nd Floor CITY: Los Angeles STATE: CA ZIP CODE: 90071 TELEPHONE NO.: 213.612.2500 FAX NO.: 213.612.2501 E-MAIL ADDRESS: svucetic@morganlewis.com ATTORNEY FOR (*name*): Retail Litigation Center, Inc.	SUPERIOR COURT CASE NUMBER: 1716416
APPELLANT/ PETITIONER: Home Depot U.S.A., Inc. RESPONDENT/ REAL PARTY IN INTEREST: Occupational Safety and Health Appeals Board	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Retail Litigation Center, Inc.

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

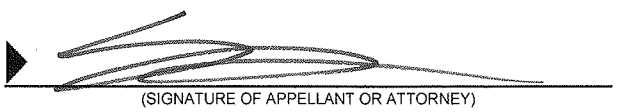
	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 27, 2019

Sonia A. Vucetic
(TYPE OR PRINT NAME)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APP-008 [Rev. January 1, 2017]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FOURTH APPELLATE DISTRICT, DIVISION TWO	COURT OF APPEAL CASE NUMBER: E071313
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 307414 NAME: Sonia A. Vucetic FIRM NAME: Morgan, Lewis & Bockius LLP STREET ADDRESS: 300 So. Grand Ave., 22nd Floor CITY: Los Angeles STATE: CA ZIP CODE: 90071 TELEPHONE NO.: 213.612.2500 FAX NO.: 213.612.2501 E-MAIL ADDRESS: svucetic@morganlewis.com ATTORNEY FOR (*name*): National Federation of Independent Business	SUPERIOR COURT CASE NUMBER: 1716416
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1. This form is being submitted on behalf of the following party (*name*): National Federation of Independent Business

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
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(5)		

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: March 27, 2019

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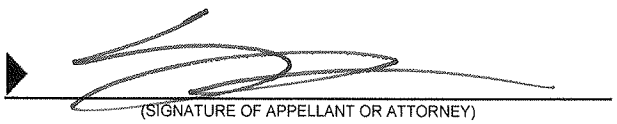
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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, the Retail Litigation Center ("RLC") and the National Federation of Independent Business Small Business Legal Center ("NFIB") respectfully request leave to file the accompanying *amicus curiae* brief in support of Petitioner and Appellant Home Depot U.S.A., Inc. ("Home Depot").[1]

RLC is the only public policy organization dedicated to representing the retail industry in the judiciary. The RLC counts as its members many of the country's largest and most innovative retailers, across a breadth of industries. These member retailers employ millions of workers in the United States and account for tens of billions of dollars in annual sales. The RLC seeks to present courts with the industry's perspective on significant legal issues that impact its members, and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. It regularly files *amicus curiae* briefs before state supreme courts, federal district courts, federal courts of appeal, and the U.S. Supreme Court in cases involving workplace health and safety regulations and other matters of importance to its members.

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than *amici*, their members, or counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (*See* Cal. Rules of Court, rule 8.200(c)(3).)

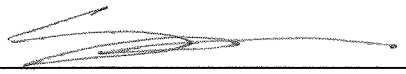
NFIB is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide.

Amici's members have a substantial interest in ensuring that the California Occupational Safety and Health Administration's ("Cal-OSHA's") regulations and corresponding standards are interpreted and implemented in ways that are fair and practical. All businesses with operations in California, including *Amici's* members, must comply with the footwear protection requirements set forth in the California Code of Regulations, title 8, section 3385(a), of Cal-OSHA and will be directly impacted if the Court upholds the Board's unsupported decision below, as will their employees. Thus, this Court's review of the decision of the Occupational Safety & Health Appeals Board (the "Board") in *Home Depot U.S.A., Inc. v. Occupational Safety and Health Appeals Board* ("*Home*

Depot") will have major policy implications and affect millions of workers and employers in California.

The RLC and NFIB support Home Depot's position that the State of California's Occupational Safety and Health Appeals Board's decision upholding the foot protection citation is impractical and inconsistent with statutory and regulatory requirements. The Board's decision to require protective footwear focused solely on one factor - the weight of an object being lifted – and ignored other relevant factors such as employee job responsibilities, the hazardous nature of the object and whether the employer had implemented other effective safety protocols. The RLC and NFIB write separately to provide examples of the real-life implications of the Board's unsupported and overbroad application of the footwear protection regulations. *Amici*'s examples demonstrate why this Court should reverse the Board's decision, which might otherwise require employers to provide steel-toed boots or similar protective footwear to virtually all employees in any workplace environment where employees may occasionally lift any item weighing 40 pounds or more.

Dated: March 27, 2019 Morgan, Lewis & Bockius LLP



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AMICI CURIAE BRIEF

INTRODUCTION

The California state legislature enacted the California Occupational Safety and Health Act ("Cal-OSHA") to assure safe and healthful working conditions for California workers by authorizing "the enforcement of effective standards." *See Cortez v. Abich* (2011) 51 Cal. 4th 285, 291 [citing Cal. Labor Code section 6300]. California has developed numerous regulations and standards to promote safe and healthy working conditions for California workers, including Title 8, Section 3385(a) of the California Code of Regulations, which requires footwear protection for employees in certain circumstances. *Amici* fully support the goals and objectives of the Cal-OSHA statute and regulations to create safe working environments for all employees. *Amici's* members take their responsibility to protect workers seriously and dedicate significant resources toward risk assessments, safety protocols, employee training, and personal protective equipment, all as appropriate.

At issue in this case is a decision by the Board that extra-statutorily expands employers' obligations to provide protective footwear in situations that involve minimal or no safety risks for employees. In a novel interpretation of Section 3385(a), the Board articulated a new standard suggesting that employers must provide protective footwear for all

employees that might lift an object that weighs 40 pounds or more or else risk a citation for violation of the footwear protection regulation, regardless of other mitigating factors. (*See In the Matter of the Appeal of Home Depot USA, Inc.* (July 24, 2017) Cal/OSHA App., Decision After Reconsideration, at p. 5 – 6.) In so holding, the Board failed to give due weight to several relevant factors including the employees' specific job responsibilities; the size, characteristics and nature of the object being lifted; and the employer's other controls to limit risks from falling objects, such as safe lifting protocols and employee training. *Amici* are concerned that the Board's recent decision undermines both Cal-OSHA's objective and *Amici's* members' efforts to ensure worker safety because the decision could be construed so broadly as to impose a blanket rule requiring steel-toed boots and other protective footwear for *virtually all e*mployees who work in any environment where they may occasionally lift items weighing 40 pounds or more.

If upheld, the Board's decision could have far-reaching consequences. In workplaces throughout California, employees may at some time lift and move items weighing 40 pounds or more. As a point of reference, a box of standard printer paper weighs approximately 50 pounds. But as a matter of common sense, not every employee who lifts a box of printer paper should be required to wear protective footwear because other factors (such as the limited frequency of lifting or standard safe lifting

practices) make the risk to the employee's safety minimal at best. The requirement to wear protective footwear in all situations where an employee may occasionally lift objects weighing 40 pounds or more is impractical and would not advance worker safety. Yet, taken at face value, the Board's decision could reach these lengths.

Amici's brief details the impacts the Board's bright-line rule could have by highlighted three key areas for the Court to consider when reviewing the Board's decision. Part A explains that the Board's failure to give due weight to relevant factors other than the weight of the object suggests that all employees who may be asked to lift items weighing 40 pounds or more in the workplace are in the "zone of danger" and should wear protective footwear at all times. Part B provides examples of how this new interpretation of the footwear protection requirement could lead to irrational results for California employees and employers, who could be required to provide protective footwear to all employees in a workplace even if there is little to no risk of injury. Part C elaborates on factors other than weight that the Board improperly failed to consider in its analysis of workplace hazards.

ARGUMENT

THE BOARD'S DECISION WILL HAVE FAR-REACHING CONSEQUENCES FOR RETAILERS, SMALL BUSINESSES AND WORKERS AND SHOULD BE REVERSED

A. The Board's Decision Articulates a Sweeping New Definition of the "Zone of Danger" Based Solely on the Weight of an Object Because The Board Ignored Other Relevant Risk Factors

Title 8, Section 3385(a) of the California Code of Regulations requires employers to provide "[a]ppropriate foot protection . . . for employees who are exposed to foot injuries from . . . falling objects [or] crushing or penetrating actions." (*See* Cal. Code Regs., tit. 8, § 3385(a).) Exposure may be established by either showing that the employee was actually in the "zone of danger" or "showing the area of the hazard was 'accessible' to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [other citations omitted].) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Id.*)

Here, the ALJ found, and the Board affirmed, that exposure existed based on the fact that "employees were required to lift and handle heavy

objects" and on that basis alone the Division cited Home Depot for failing to provide employees with adequate foot protection.[2] (*See In the Matter of the Appeal of: Home Depot USA, Inc.* (July 24, 2017) Cal/OSHA App., Decision After Reconsideration, at p. 5.) The facts of this case make the Board's decision particularly difficult to understand since the injury was to the worker's leg and caused by a fluke accident involving an electric pallet jack and not by a falling heavy object that the employee was lifting so protective footwear would not have prevented the injury in this case. Indeed, as the decision points out, the injured employee was stocking 40-pound buckets/drums of roof coating by hand when he sought help from a co-worker to move some pallets of merchandise with an electric pallet jack. While they were moving the merchandise, the electric pallet jack malfunctioned, moved erratically and then struck the worker, injuring his leg. (*See id.* at p. 2 – 3; see also Appellant's Opening Brief, *Home Depot U.S.A., Inc. v. OSHA*, No. E071313, at p. 10 (Cal. Ct. App. Sept. January 22, 2019).) Thus, the citation for lack of protective footwear seems especially difficult to square with the Board's decision.

[2] Although the Board's decision did not focus on a theory of exposure based on proximity to an electric pallet jack, to the extent that this issue is raised in this appeal, Amici's concerns with such a standard as expressed in *Amici's* brief in the sister case, *Home Depot USA, Inc.*, (May 16, 2017) Cal/OSHA App. 1011071, Decision After Reconsideration, are applicable here.

In a departure from the clear statutory and regulatory requirements and prior decisions,[3] the Board upheld the citation and articulated a new expansive interpretation of Section 3385(a) standard,[4] suggesting that evidence that an employee lifts items weighing 40 pounds or more is sufficient ***on its own*** without consideration of any other relevant risk factors (e.g., nature and size of object, employee responsibilities and employer safety protocols) to require the employer to provide protective footwear or else risk a citation for violating the footwear protection regulation. (*See In the Matter of the Appeal of: Home Depot USA, Inc.* (July 24, 2017) Cal/OSHA App., Decision After Reconsideration, at p. 5 – 6 (finding that lifting 40 pound items "is sufficient to demonstrate exposure to the hazard of the items falling and injuring [a worker's] foot demonstrating a violation of the safety order.").)

The Board upheld the citation on appeal based on speculation that "[i]t is a matter of ordinary intelligence that were an employee to drop an item weighing 40 pounds or more on an unprotected foot, even from a relatively small height, it will produce sufficient force to cause some injury from falling or crushing action." (*See id.* at p. 7.) While the Board

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[3] See discussion in Part C *infra.*

[4] As set forth more fully in Home Depot's opening brief, the Board's use of a citation to establish a novel interpretation of Section 3385(a) violated Home Depot's due process rights. Home Depot's brief fully details this issue. Accordingly, this brief will not focus on that specific argument.

acknowledged that the, "Employer had adopted administrative and engineering controls, including things such as the stretch wrap and zone of safety" to address safety risks to employees working around pallet jacks and items falling from shelves, the Board dismissed these controls as ineffective to "prevent exposure during the time-period an employee is actually physically lifting and moving heavy objects." (*Id.* at p. 6.) The Board also disregarded the employer's safety protocols for moving and lifting heavy objects, which included employee training and review of safe lifting procedures prior to each work shift. (*Id.* at 4; *see also* Appellant's Opening Brief, *Home Depot U.S.A., Inc. v. OSHA*, No. E071313, at p. 16 (Cal. Ct. App. Sept. January 22, 2019) (citing AR Tab 22 at pp. 115:14-116:14, pp. 86:13-87:18, pp. 25:4-18).) Instead, the Board faulted the employer for not providing an employee with steel-toed boots because employees "have been or will be required to lift [40 pound or heavier] items during the course of their work . . . ." (*Id.*) In other words, the Board expanded the definition of the "zone of danger" beyond its historical meaning to encompass *any* situation in which employees may lift and move items weighing 40 pounds or more regardless of any factors that mitigate the safety risk. As detailed further below, such a sweeping standard—premised solely on the weight of the object lifted—will have far-reaching consequences for employers and employees in workplaces across California.

B. The Board's Decision Will Lead to Irrational Results for Employees in Large and Small California Retailers and Businesses

Countless retailers and small independent businesses have merchandise or items weighing 40 pounds or more in their workplace that may pose little to no safety risk for employees. For example, grocery stores, pet stores, big box retailers, home improvement centers, convenience stores and even gas stations carry merchandise such as bulk laundry detergent, firewood, cases of bottled water and kegs of beer, or large bags of flour, rice, pet food, kitty litter and mulch. Small independent businesses, including craft breweries and wineries, small batch or specialty manufacturers, landscaping companies, repair companies, technology support, product dealers and distributors also have workplace environments where employees may occasionally lift and move items weighing 40 pounds or more.

In addition, nearly every employee who works in an office environment and any retail or small business employee that engages in office-type activities could be impacted as well. Consider that just one box of standard office copy paper weighs approximately 50 pounds. Bottles of water for office water coolers also can weigh in excess of 40 pounds. Likewise, computers and printers (and the endless variety of such equipment critically important to modern office operations) may weigh 40 pounds or more. By merely engaging in everyday business activity such as

moving a box of copy paper or piece of office equipment or refilling an office water cooler, an employee could now fall under the Board's expansive definition of "zone of danger." Taken at face value, the Board's decision could require employers to provide protective footwear for every employee who might perform those tasks. And those employees would either have to wear steel-toed boots all the time or else, stop what they are doing so that they can take off their regular shoes, put on the protective footwear, lift the paper or the jug of water, take off the protective footwear and then put their regular shoes back on. This outcome is unreasonable.

These examples illustrate the potential problems employees and employers will face if the Court does not reverse the Board's new standard that may pull all employees who lift items weighing 40 pounds or more into the "zone of danger" definition.

C. A More Thoughtful Approach Considers Other Factors in Addition to Weight, Such as the Employee's Overall Job Duties, the Nature of the Objects, and Alternative Protective Measures

A one-size-fits-all rule requiring protective footwear for all employees who may lift or move items above a certain weight without adequate consideration of other relevant factors is not practically sound or legally supported, especially where the risks to employees vary widely depending on the particular work environment and the employee's job responsibilities.

Cal-OSHA's framework envisions employers assessing hazards based on the nature of the safety risk and a hierarchy of controls, with personal protective gear such as steel-toed boots as the least preferable control against a safety risk when compared to engineering or administrative controls. A more thoughtful approach that takes into account engineering and administrative controls considers factors such as: the nature of the employee's job duties and responsibilities; the nature of the objects (*e.g.*, whether they are hazardous, sharp, or contain toxic materials); the degree of exposure to heavy objects that could fall on an employee; the availability of other safety measures such as safety zones that control employee exposure; and employer safety protocols, rules and guidelines requiring employees to take precautions when lifting and moving objects.[5] It is for good reason that the regulations require employers to take this more thoughtful approach to protective footwear to assess various factors and determine the extent to which footwear protection enhances employee safety. This approach allows employers to balance the benefits and risks of protective footwear and to consider other measures that might achieve the same workplace safety goals while reducing the overall risk to employees.

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[5] *See* e.g., Cal. Code Regs., tit. 8, § 3380 Personal Protective Devices Non-Mandatory Appendix A (assessment guidelines to assist employers in assessing the foot, head, eye and face, and hand hazards that may exist in workplace as well as appropriate protective devices to address particular hazards.)

Prior Board decisions and case law support this considered approach. For example, in *Interline Brands, Inc.*, noting that the employer had presented evidence of employee training and other effective administrative and engineering controls designed to limit employee exposure to injuries by powered industrial trucks or their loads, the Administrative Law Judge found that the Division failed to meet its burden of establishing employee exposure to a safety hazard because its investigator "failed to consider the effectiveness of Employer's administrative and engineering controls." *In the Matter of the Appeal of: Interline Brands, Inc.*, 2019 WL 639205 (Ca. O.S.H.A. A.L.J.), at *7-10 (Jan. 10, 2019). Moreover, in assessing the hazard of foot injuries where employees are required to physically lift items in the workplace, the Board has repeatedly articulated the principle that exposure is established based on *both* the nature and weight of the objects carried. (*See, e.g.*, *FMC Corp., Food Processing Mach. Div.*, (Aug. 28, 1979) Cal/OSHA App. 77-R1D4-498, Decision After Reconsideration, 1979 WL 31508 (finding that where employees lifted sheets of metal with sharp edges by hand weighing as much as 100 pounds, "the nature and weight" was sufficient to establish exposure); *Gen. Elec. Co., Vertical Moto Plant*, (Feb. 29, 2984) Cal/OSHA App. 81-R1D2-1130, Decision After Reconsideration, 1984 WL 183094 (finding exposure was established where an employee moved heavy

castings weighing 200 to 500 pounds with a hoist just a few inches above the employee's foot).)

While the Board in this case pays lip service to the concept of employer discretion to prioritize administrative and engineering controls and determine "appropriate" footwear, its final decision imposing an arbitrary object weight standard does not reflect such considerations. (*See In the Matter of the Appeal of: Home Depot USA, Inc.* (July 24, 2017) Cal/OSHA App., Decision After Reconsideration, at p. 5, 8.) Other than weight, the Board's decision includes no discussion of other factors such as the nature and character of potential falling objects and ignored the employer's safety protocols and administrative controls, which included training on safe lifting protocols that the employer provided to employees immediately prior to each work shift. Further, the Board's decision failed to give due weight to the flexibility that the law gives employers to evaluate risks to worker safety and determine appropriate safety protections or protocols. If the Board had utilized the appropriate considerations, the Board would not have articulated a standard that could be read so broadly that it could impose a blanket requirement for protective footwear encompassing situations in which protective footwear does not enhance employee safety, such as for most office workers.

Amici's members strive to provide their employees with a healthy and safe work environment, but it benefits no one to override employers'

ability to take multiple factors into account with a standard that imposes a uniform requirement that could harm employees in some circumstances.

CONCLUSION

Accordingly, for the reasons set forth above and in Home Depot's brief, we respectfully urge the Court to reverse the Board's decision.

Dated: March 27, 2019 Morgan, Lewis & Bockius LLP

Jonathan Snare
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Attorneys for *Amici Curiae*
The Retail Litigation Center and National Federation of Independent Business

CERTIFICATION OF WORD COUNT

I certify that according to the word count generated by Microsoft Word, the program used to prepare this brief, this brief contains 4,315 words.

Dated: March 27, 2019 Morgan, Lewis & Bockius LLP

Jonathan Snare
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The Retail Litigation Center and National Federation of Independent Business

PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Morgan, Lewis & Bockius LLP, 300 S. Grand Ave., 22nd Floor, Los Angeles, California 90071.

On March 27, 2019, I caused the following document to be served:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, AND PROPOSED BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS IN SUPPORT OF PETITIONER AND APPELLANT HOME DEPOT U.S.A., INC.

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and via U.S. Mail. By placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below:

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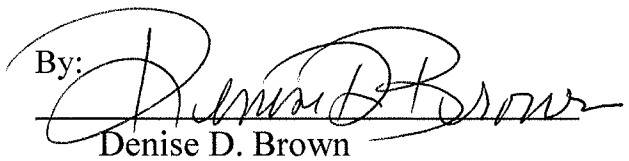
Court
Clerk of the Court
Hon. David Cohn Dept.
247 West Third Street
San Bernardino, CA 92415

Superior Court (Trial Court)

I declare under penalty of perjury, under the laws of the United States of America and the State of California, that the above is true and correct. Executed March 27, 2019, at Los Angeles, California.

By: 
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