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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON IN

MICHAEL BRADY,

Plaintiff,

v.

AUTOZONE STORES, INC., and AUTOZONERS, INC.,

Defendants.

AMICUS CURIAE BRIEF OF FAIR WORK CENTER

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TABLE OF CONTENTS

	Page No.
I. INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT	1
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT	4
A. Under Washington law, employers must affirmatively provide and ensure employees receive meal breaks no later than five hours after work begins.	4
B. If Washington employers are not required to affirmatively provide and ensure workers receive meal breaks within five hours of starting work, workplace health and safety will suffer.....	7
C. Washington’s long and proud history of protecting worker rights would be upended if employers merely had to show workers had an opportunity to take a break.....	11
V. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page No.

STATE CASES

Bostain v. Food Express, Inc.,
159 Wn.2d 700, 153 P.3d 846 (2007).11

Drinkwitz v. Alliant Techsystems, Inc.,
140 Wn.2d 291, 996 P.2d 582 (2000).....11

Helling v. Carey,
83 Wn.2d 514, 519 P.2d 981 (1974).....6

Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett,
146 Wn.2d 29, 42 P.3d 1265 (2002).....11

Lopez Demetrio v. Sakuma Bros. Farms, Inc.,
183 Wn.2d 649, 355 P.3d 258 (2015).....*Passim*

Pellino v. Brink’s, Inc.,
164 Wn. App. 668, 267 P.3d 383 (2011).....*Passim*

Ruiz-Guzman v. Amvac Chem. Corp.,
141 Wn.2d 493, 7 P.3d 795 (2000).....6, 7

Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.,
175 Wn. 2d 822, 287 P.3d 516 (2012)..... 10-13

Wingert v. Yellow Freight Sys., Inc.,
146 Wn.2d 841, 50 P.3d 256 (2002).....7, 13

FEDERAL CASES

Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.,
556 F.3d 920 (9th Cir. 2009)4

Brady v. AutoZone Stores, Inc.,
Case No. C13-1862-RAJ, 2015 WL 5732550
(W.D. Wash. Sep. 30, 2015)3

OTHER CASES

Illinois Hotel & Lodging Ass'n v. Ludwig,
374 Ill. App. 3d 193, 869 N.E.2d 846 (2007)8

Murphy v. Kenneth Cole Prod.,
155 P.3d 284, 40 Cal.4th 1094 (Cal. 2007)8, 10

STATE STATUTES

RCW 49.12.0057

RCW 49.12.0207, 13

FEDERAL STATUTES

28 U.S.C. § 1333(d)3

STATE RULES

WAC 296-126-092.....*Passim*

OTHER AUTHORITIES

Anna Arlinghaus et al., *The Effect of Rest Breaks on Time to Injury –
A Study on Work-Related Ladder Fall Injuries in the United States*,
8 SCAND. J. WORK ENVIRON. HEALTH 560 (2012)10

Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, at 22-23, 36-37 (2009), http://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br7o3.pdf.12

Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 2 *Ergonomics*, pp. 164-174 (2001)8

Jeff Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 *Colum. J. Eur. L.* 53 (2004/2005)8

Alan Levin & Jeff Plungis, *Tracy Morgan Crash Blamed on Truck Driver Fatigue, NTSB Says*, BLOOMBERG NEWS (August 11, 2015), <https://www.bloomberg.com/news/articles/2015-08-11/ntsb-says-walmart-driver-awake-for-28-hours-before-morgan-crash>8, 9

Michael I. Marsh & Dorothy A. Johnson, *A Real Heat shield for Farmworkers*, L.A. TIMES, Aug. 2, 2008, <http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2>.....9

Tony Schwartz, *The Personal Energy Crisis*, N.Y. TIMES (Jul. 24, 2011), <http://www.nytimes.com/2011/07/24/jobs/24pre.html>.....9

The Changing Organization of Work and the Safety and Health of Working People, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/niosh/docs/2002-116/pdfs/2002-116.pdf> at 148

Philip Tucker et al., *Rest Breaks and Accident Risk*, 361 *The Lancet*, Issue 9358 (Feb. 22, 2003).....8

Philip Tucker, *The Impact Of Rest Breaks upon Accident Risk, Fatigue and Performance: A Review*, 17 *WORK & STRESS*, 123-137 (2003).....9, 10

Workplace Safety & Health Topics, Heat Stress, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/topics/heatstress/>9

I. INTEREST OF AMICUS CURIAE

The Fair Work Center has an interest in ensuring that employers affirmatively provide meal breaks and that workers receive meal breaks at the times required by law.¹ *See* Fair Work Center Motion to Appear as Amicus.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Washington's meal break regulation requires employers to provide workers thirty-minute meal breaks that start no more than five hours after work begins. WAC 296-126-092. In this case, the Court is asked to decide if this essential worker protection is meaningful or illusory. From the standpoint of statutory interpretation, it is plain that employers must provide meal breaks at the times required. From a practical perspective, it is equally clear that workers in this case did not receive timely meal breaks. The employer's own records reveal over 150,000 instances when it did not provide or ensure a timely meal break. And from a policy perspective, the interest in protecting employee health and safety by mandating meal breaks within certain time periods can be furthered only by requiring employers to affirmatively provide meal breaks and ensure such breaks are received within the time limits provided by law.

¹ Counsel thank University of Washington law student Jordan Wada, who works with the Fair Work Legal Clinic, for the research he contributed for this brief.

Adopting a standard that would allow employers to simply sit back and say workers have the “opportunity” to take breaks if those workers so choose would lead to increased health and safety risks and the potential for employer abuse. Indeed, employer demands and productivity pressures in today’s workplaces often lead to missed breaks—increasing health and safety problems—even where employers claim their employees have the “opportunity” to take breaks. As this Court recently recognized: “It is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses.” *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 658, 355 P.3d 258 (2015). Employers must not merely provide an “opportunity” for meal breaks—they must also ensure workers receive full, uninterrupted meal breaks at the times required. *See Lopez Demetrio*, 183 Wn.2d at 658 (stating “employers must affirmatively promote meaningful break time”).

To protect worker health and safety, the Fair Work Center urges the Court to hold that employers have a mandatory obligation to both provide meal breaks at the proper times and ensure workers receive those breaks.

III. STATEMENT OF THE CASE

Plaintiff Michael Brady and the potential class members in this case are current and former hourly-paid AutoZone store employees who

worked more than five hours in a day but did not receive a meal break within five hours of the start of their shifts or who worked more than five hours after the conclusion of a first meal break but did not receive a second meal break.

Mr. Brady sued AutoZone in King County Superior Court in December 2012. After he amended his complaint in September 2013, AutoZone removed the case to the United States District Court for the Western District of Washington on the basis of the Class Action Fairness Act, 28 U.S.C. § 1333(d). On September 30, 2015, the district court denied Mr. Brady's motion for class certification based on its belief that employers do not have an affirmative duty to ensure workers receive thirty-minute meal breaks at the times set by Washington law. Rather, the court concluded that "employers need only make meal breaks available to employees who choose to take those breaks." *Brady v. AutoZone Stores, Inc.*, Case No. C13-1862-RAJ, 2015 WL 5732550, at *3 (W.D. Wash. Sep. 30, 2015). Under its interpretation of WAC 296-126-092, the district court found that showing employees were deprived of an "opportunity" to take a meal break "will require substantial individualized fact finding because the court will need to inquire into the reasons for any missed meal breaks." *Id.* at *6. Under this interpretation, the court found that common questions do not predominate over individual issues. *Id.* at *7.

After the Ninth Circuit denied Mr. Brady's Fed. R. Civ. P. 23(f) petition for permission to appeal, Mr. Brady sought to certify two questions to this Court. The district court granted certification in part but presented different questions to this Court:

1. Is an employer strictly liable under WAC 296-126-092?
2. If an employer is not strictly liable under WAC 296-126-092, does the employee carry the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break as required by WAC 296-126-092?²

Principal briefing is complete and oral argument is scheduled for March 14, 2017.

IV. ARGUMENT

A. Under Washington law, employers must affirmatively provide and ensure employees receive meal breaks no later than five hours after work begins.

Washington's meal break regulation provides that employees "shall be allowed a meal period of at least thirty minutes which commences" no more than "five hours from the beginning of the shift."

² If the Washington State Supreme Court decides to consider certified questions, it may in its discretion reformulate the questions. *See Affiliated FM Ins. Co. v. LTK Consulting Servs. Inc.*, 556 F.3d 920, 922 (9th Cir. 2009). Here, the term "strict liability" has never been used by this Court or the Washington Court of Appeals to describe the standard for liability for violations of WAC 296-126-092. This Court should consider reformulating the questions to focus on whether WAC 296-126-092 requires that employers affirmatively provide and ensure employees receive meal breaks within five hours of starting work.

WAC 296-126-092(1). The regulation also provides: “No employee shall be required to work more than five consecutive hours without a meal period.” WAC 296-126-092(2).

This Court has recognized that WAC 296-126-092 “imposes a mandatory obligation on the employer.” *Lopez Demetrio*, 183 Wn.2d at 658 (quoting *Pellino v. Brink’s, Inc.*, 164 Wn. App. 668, 688, 267 P.3d 383 (2011)). In *Pellino*, the Court of Appeals held that employers have an “affirmative obligation to make sure [rest and meal periods] are provided and taken.” *Pellino*, 164 Wn. App. at 685–688 (emphasis added) (quoting trial court conclusion and rejecting employer’s arguments that (1) the employer is only required to allow employees an opportunity to take rest and meal breaks by not standing in their way and (2) the employer does not have a duty to ensure employees take rest and meal breaks). In *Lopez Demetrio*, this Court confirmed that principle, holding it “is not enough for an employer to simply schedule time throughout the day during which an employee can take a break if he or she chooses.” *Lopez Demetrio*, 183 Wn.2d at 658 (emphasis added). Instead of simply allowing the opportunity for a break, the Court held the regulation both ““imposes a mandatory obligation on the employer’ to provide” required breaks at the proper times and requires employers to take action to “affirmatively

promote meaningful break time.” *Id.* (quoting *Pellino*, 164 Wn. App. at 688).

These principles establish that the standard for liability for a violation of WAC 296-126-092 is whether the employer affirmatively provided and ensured employees received meal breaks within five hours of starting work. The term “strict liability” has never been used to describe the standard for violating WAC 296-126-092, and there is no reason to co-opt that term into rest and meal break law now. “Strict liability” concerns liability without a showing of fault. *See Helling v. Carey*, 83 Wn.2d 514, 520, 519 P.2d 981 (1974) (Utter, J., concurring). An employee seeking to prove a violation of WAC 296-126-092 shows fault by establishing the employer did not affirmatively provide and ensure the employee received a meal break within five hours of starting work. *See Pellino*, 164 Wn. App. at 687–87 (quoting trial court’s conclusion of law that “Brink’s had actual or constructive knowledge that the class members were not receiving lawfully adequate breaks and therefore may be held liable for the missed time” (emphasis added)).

Although the parties in this case assume for the sake of argument that meal breaks may be waived, that question has never been addressed by this Court. Because the question is not before the Court and has not been briefed, this Court should not reach it. *See Ruiz-Guzman v. Amvac*

Chem. Corp., 141 Wn.2d 493, 508, 7 P.3d 795 (2000) (“In answering federal certified questions, we do not seek to make broad statements outside of the narrow questions and record before us.”). Future cases may raise the question of whether allowing a meal break waiver is consistent with the health and safety purposes underlying WAC 296-126-092. In answering the certified questions in this case, the Court should avoid any conclusion that would allow employers to use the potential availability of “waiver” as an escape hatch from the requirement to affirmatively provide and ensure meal breaks are received at the required times.

B. If Washington employers are not required to affirmatively provide and ensure workers receive meal breaks within five hours of starting work, workplace health and safety will suffer.

The “fundamental purpose” behind Washington’s rest and meal break regulations is to protect employee health and safety. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). Indeed, the enabling legislation for WAC 296-126-092 states it is “unlawful to employ any person in any industry or occupation within the state of Washington under conditions of labor detrimental to their health,” RCW 49.12.020, and defines “conditions of labor” as including “the conditions of rest and meal periods for employees.” RCW 49.12.005.

“Employees denied their rest and meal periods face greater risk of work-related accidents and increased stress, especially low-wage workers

who often perform manual labor.” *Murphy v. Kenneth Cole Prod.*, 155 P.3d 284, 296, 40 Cal.4th 1094 (Cal. 2007) (citing Tucker et al, *Rest Breaks and Accident Risk*, 361 *The Lancet*, Issue 9358, p. 680 (Feb. 22, 2003); Dababneh et al., *Impact of Added Rest Breaks on the Productivity and Well Being of Workers*, 2 *Ergonomics*, pp. 164-174 (2001); Kenner, *Working Time, Jaeger and the Seven-Year Itch*, 11 *Colum. J. Eur. L.* 53, 55 (2004/2005)).

The consequences of working without breaks can be dire.

Emerging evidence shows that as workload increases and the pace of work intensifies, the risk of stress, illness, and injury increases as well. *See The Changing Organization of Work and the Safety and Health of Working People*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/niosh/docs/2002-116/pdfs/2002-116.pdf> at 14 (last visited Jan. 24, 2017). When workers who engage in repetitive physical motions miss breaks, it can lead to injury, including “a significant increase in neck pain and lower back pain.” *Illinois Hotel & Lodging Ass’n v. Ludwig*, 374 Ill. App. 3d 193, 195, 869 N.E.2d 846 (2007). Fatigue from lack of adequate breaks has also been shown to lead to truck accidents. Alan Levin & Jeff Plungis, *Tracy Morgan Crash Blamed on Truck Driver Fatigue, NTSB Says*, BLOOMBERG NEWS (August 11, 2015), <https://www.bloomberg.com/news/articles/2015-08-11/ntsb-says-wal->

mart-driver-awake-for-28-hours-before-morgan-crash (last visited Jan. 24, 2017). Workers in high-temperature environments, such as farm workers, bakery workers, factory workers, and construction workers, risk heat stroke and even death when they do not receive adequate breaks. See *Workplace Safety & Health Topics, Heat Stress*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/niosh/topics/heatstress/> (last visited Jan. 24, 2017) (emphasizing need for breaks for workers exposed to extreme heat); Michael I. Marsh & Dorothy A. Johnson, *A Real Heat Shield for Farmworkers*, L.A. TIMES, Aug. 2, 2008, <http://articles.latimes.com/2008/aug/02/opinion/oe-marsh2> (last visited Jan. 24, 2017) (discussing dozens of farm worker deaths from heat stroke and noting importance of breaks to avoid such deaths).

Ensuring regular and timely meal breaks counteracts fatigue, provides relief from stress, prevents injuries, and helps to maintain a safe and healthy workplace. In a workday “devoid of real breaks,” workers do not “think as clearly [or] logically,” which leads to sickness, lower quality of work, and a decrease in reaction time. Tony Schwartz, *The Personal Energy Crisis*, N.Y. TIMES (Jul. 24, 2011), <http://www.nytimes.com/2011/07/24/jobs/24pre.html> (last visited Jan. 24, 2017). Research suggests that regular breaks are “an effective means of managing fatigue and maintaining performance.” Philip Tucker, *The*

Impact of Rest Breaks upon Accident Risk, Fatigue and Performance: A Review, 17 WORK & STRESS, 123-137 (2003) (noting study which recognized that “injury rates increased just prior to meal breaks or just prior to the end of the shift”). In one study, workers who reported taking breaks “worked significantly longer without an injury” than other workers. Anna Arlinghaus et al., *The Effect of Rest Breaks on Time to Injury - A Study on Work-Related Ladder Fall Injuries in the United States*, 38 SCAND. J. WORK ENVIRON. HEALTH 560, 563 (2012) (noting “a clear dose-response relationship showed that time into the shift without an injury increased substantially with increasing total rest break time”). *Id.*

Timely meal breaks will not eliminate every accident or health risk for workers, but ensuring workers receive timely meal breaks will help minimize the number of work-related accidents and injuries. *See Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn. 2d 822, 832, 287 P.3d 516 (2012); *Murphy*, 155 P.3d at 296. AutoZone’s position is contrary to the health and safety policy behind requiring meal breaks at certain times. The Court should thus reject AutoZone’s interpretation of the meal break regulation because it would result in more accidents, injuries, and adverse health effects for workers.

To protect employee health and safety, employers must be required to both provide meal breaks and ensure meal breaks are received within five hours of starting work.

C. Washington’s long and proud history of protecting worker rights would be upended if employers merely had to show workers had an opportunity to take a break.

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). Thus, courts must liberally construe Washington’s remedial employee rights statutes and regulations in favor of employees. *Pellino*, 164 Wn. App. at 684–85 (citing *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002)). This mandate of liberal construction applies to the meal break regulation, which is intended to protect employee health, safety, and welfare. *See id.* at 684–90 (liberally construing meal and rest break requirements of WAC 296-126-092).

This Court recently explained that it must resolve ambiguities in employee rights regulations “in ways that ‘further, not frustrate, the[] intended purpose’ of the regulation.” *Lopez Demetrio*, 183 Wn.2d at 656 (quoting *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007)). The Court has also emphasized that the break regulation must be construed in a way that “will help to ensure that employers continue to

provide these breaks to their employees.” *Sacred Heart*, 175 Wn. 2d at 832. Here, requiring employers to affirmatively provide meal breaks and ensure such breaks are received within the time limits provided by law—as opposed to merely providing the “opportunity” for meal breaks—is the most useful way to ensure that employers “continue to provide these breaks to their employees.” *Id.*

The “opportunity” to take breaks is often illusory for workers. As this Court recently pointed out, even if employers supposedly provide an opportunity for breaks, workers are often “incentivize[d]” to miss breaks “at the expense of the[ir] health.” *Lopez Demetrio*, 183 Wn.2d at 658–59. A study published in 2009 found that 69 percent of surveyed low-wage workers from a wide variety of industries experienced a meal break violation in the previous week. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America’s Cities*, at 22-23, 36-37 (2009), http://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br7o3.pdf. Many workplaces reward “harder-working and more productive workers” in ways that encourage “skipping breaks.” *Id.* at 659. This kind of environment encourages employers to employ fewer workers and fosters “a culture of working through breaks,” which is “contrary to the regulation’s basic purpose.” *Id.* While hard work and productivity are

certainly laudable goals for workers, workplace safety and health regulations must be interpreted in ways that avoid “conditions of labor detrimental to their health.” RCW 49.12.020.

This Court has consistently interpreted Washington’s break regulations in ways that ensure worker safety and health—whether it be ensuring piece rate farm workers are not incentivized to skip breaks in order to earn more money, *Lopez Demetrio*, 183 Wn.2d at 659, ensuring nurses are not encouraged to skip breaks that ensure they “can maintain the necessary awareness and focus required to provide safe and quality care,” *Sacred Heart*, 175 Wn.2d at 832, or ensuring that employees cannot bargain away time for rest, *Wingert*, 146 Wn.2d at 852. The reality of today’s working world is that the “opportunity” to take a meal break is often non-existent, despite employer assurances that workers may take breaks. For example, a trucker may have a deadline to get freight to a destination that does not allow time for a meal break. A nurse may not be able to take a meal break because of the number of patients he is serving. An auto parts store employee may not have time for a meal break because customers are coming in one after another. The only way to ensure workers actually receive the timely meal breaks that are essential for their health and safety is to require that employers affirmatively provide and ensure meal breaks are received within the required timeframe. Setting

the standard as whether workers received an “opportunity” to take a break would lead to abuse and health and safety risks for workers across many industries. Therefore, AutoZone’s proposed standard should be rejected.

V. CONCLUSION

In a time when there are threats across the country to low-wage workers’ rights, maintaining Washington’s long and proud history of protecting workers is more important than ever. We ask that this Court uphold that history—and the principles enunciated in this Court’s recent case law—by holding that Washington employers must affirmatively provide and ensure meal breaks are received at the proper times. A holding that employers must merely give an “opportunity” for a break would result in abuse and uncertainty as well as conditions of labor detrimental to worker health and safety.

RESPECTFULLY SUBMITTED AND DATED this 26th day of
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I hereby declare under penalty of perjury under the laws of the State of Washington that on January 26, 2017, the above and foregoing Amicus Curiae Brief of Fair Work Center was filed with the Washington Supreme Court and copies were served to the following counsel of record by email, per agreement:

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Subject: No. 93564-5--Michael Brady v. Autozones Stores, Inc. et al.: Fair Work Center's Motion for Leave to File Amicus and Amicus Brief

Greetings,

Attached for filing with the Court is the Fair Work Center's Motion for Leave to File Amicus Curiae Brief and Amicus Brief.

Thank you for your attention.

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