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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

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MICHAEL BRADY,

Plaintiff/Appellant,

v.

AUTOZONE STORES, INC., and AUTOZONERS, LLC,

Defendants/Appelles.

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REPLY BRIEF OF APPELLANT MICHAEL BRADY

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## I. INTRODUCTION

AutoZone's own written meal break policies recognize that Washington law requires employers to actually *provide* employees who work more than five hours with a meal break and not, as the district court incorrectly held, merely the opportunity to take a meal break if the employees so choose. AutoZone's defense of the district court's misapprehension of Washington law ignores the fundamental purpose underlying WAC 296-126-092: to promote employee health and safety. *See Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 852, 50 P.3d 256 (2002). Instead, AutoZone baselessly contends that the "purpose" of WAC 296-126-092 is to promote "employee choice" and "flexibility," which, in AutoZone's view, must be furthered by allowing employers to disregard the plain language of the regulation. But as courts have recognized since the end of the *Lochner* era, "employee freedom" is not a magical incantation that can make health and safety standards disappear.

Disregarding the employee-protective polices that animated *Wingert*, *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012) ("*WSNA*"), and *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015), AutoZone attempts to distinguish those precedents by making the obvious point that they addressed rest breaks rather than meal breaks. As the questions the district

court certified to this Court recognize, rest and meal breaks share common rights-enabling language: that employees “shall be allowed” meal and rest breaks and “no employee shall be required” to work more than a specified time period without a break, WAC 296-126-092(1), (2), (4). Whatever answers this Court gives to the certified questions in this case will govern all future meal and rest break actions.

The language and purpose of WAC 296-126-092, the Washington Department of Labor and Industries (“L&I”)’s own interpretation of the regulation, and controlling appellate precedent all refute the argument that employers must only provide “meaningful opportunities” for breaks. In answer to the district court’s certified questions, this Court should reaffirm that WAC 296-126-092 imposes an affirmative duty upon employers to provide the breaks that the regulation requires when that regulation requires and ensure that their employees actually take those breaks.<sup>1</sup>

## II. ARGUMENT

### A. Furthering “Employee Choice” Does Not Excuse AutoZone from Fulfilling Its Legal Obligation to Provide Meal Breaks.

AutoZone spends much of its brief arguing that its lax and unlawful meal break practices benefit its employees because they enhance

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<sup>1</sup> AutoZone sprinkles ad hominem attacks on Mr. Brady’s character throughout its Answering Brief (“Ans. Br.”). These cheap shots are unworthy of a response as they have nothing to do with any of the issues before this Court. They do suggest, however, that AutoZone recognizes the weakness of its legal position and hopes to convince the Court to rule against Mr. Brady for other reasons.

“employee choice” and flexibility. As courts have recognized since the end of the *Lochner* era, “employee choice” is not a valid basis for discarding workplace standards promulgated to protect employee health and safety. Given the imbalance of workplace power and the economic incentives for employees to ignore their own health and safety for short-term economic gain, states often decide that “the public health demands that one party to the contract shall be protected against himself.” *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 394 (1937).

Both L&I and this Court have made clear that WAC 296-126-092 establishes minimum workplace standards designed to protect and promote employee health and safety. See *Meal and Rest Periods for Nonagricultural Workers Age 18 and Over*, Administrative Policy ES.C.6 § 15, at 5 (2005) (hereinafter “ES.C.6”); *Wingert*, 146 Wn.2d at 852. WAC 296-126-092 does not allow employers to provide an employee with economic incentives to skip rest breaks “at the expense of the employee’s health.” *Demetrio*, 355 Wn.2d at 658-59 (citing *WSNA* and *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 267 P.3d 383 (2011)). Meal breaks serve the same health and safety goals as rest breaks.<sup>2</sup> *White v. Salvation Army*,

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<sup>2</sup> AutoZone also suggests that Brady failed provide “evidence that [untimely] meal periods . . . compromise[] health and safety.” Ans. Br. at 46. While, as set forth below, L&I has decided that a valid meal break *waiver* (and not just the failure to take a meal break) does not unduly compromise employee health and safety, this does not negate the fundamental justification for meal breaks. There is no basis to AutoZone’s argument that because L&I allows meal periods to be waived they serve no health and safety purpose.

118 Wn. App. 272, 283, 75 P.3d 990 (2003).

Disregarding these important public policies, AutoZone wrongly suggests that WAC 296-126-092(1)-(3) is primarily intended to promote “employee choice.” Ans. Br. at 24, 38. AutoZone’s “employee freedom” argument assumes that *every* one of the 150,000 times in three-plus years that an employee did not take a timely meal break was at the instigation of, and therefore for the “benefit” of, the employee. Common sense and AutoZone’s own policies (which provide that “[m]anagement schedules breaks with considerations for work demands,” Open. Br. at 3) suggest the contrary. The demands of the workplace are exactly why states enact minimum workplace health and safety standards such as meal and rest breaks regulations.

AutoZone presents a parade of horrors that it claims will result from requiring employers to actually provide the meal breaks that WAC 296-126-092 mandates. AutoZone suggests employees won’t be able to care for their children, attend school meetings, or visit the doctor. Ans. Br. at 4. AutoZone’s argument is a red herring. Rejection of the district court’s interpretation of the regulation would not prevent an employee from validly waiving his/her meal period in accordance with ES.C.6 in order to attend to personal or family obligations. Moreover, if AutoZone’s employees have to choose between taking their meal breaks and attending

to their personal and family needs that is because of the company's work demands, not the requirements of WAC 296-126-092.<sup>3</sup> This Court should interpret WAC 296-126-092 so as to incentivize employers to implement policies that give their employees the flexibility to attend to their obligations outside the workplace without having to skip meal periods.

Over the years, employers have attacked everything from maximum hours legislation to minimum wage statutes on the grounds that such enactments restricted employee "freedom of choice." *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *Adkins v. Children's Hosp. of D.C.*, 261 U.S. 525 (1923). AutoZone rehashes these same discredited arguments in an effort to eviscerate the meal break mandates of WAC 296-126-092. This Court should reject AutoZone's arguments and not turn back the clock on employee health and safety.

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<sup>3</sup> AutoZone describes itself as an "employee-focused" employer. Ans. Br. at 6. In reality, AutoZone has a history of troubling employment practices. *See, e.g., Overtime Pay Laws Resource Center, AutoZone Settles Overtime Pay Lawsuit*, <http://www.overtimepaylaws.org/autozone-settles-overtime-pay-lawsuit/> (Jan. 28, 2015) (misclassification of managers as exempt); EEOC, *EEOC Sues AutoZone for Fourth Time for Violating Americans with Disabilities Act*, <https://www.eeoc.gov/eeoc/newsroom/release/5-9-14a.cfm> (May 9, 2014) (disability discrimination); Patrick Dorrian, *AutoZone Must Pay \$185 Million in Punitives For Pregnancy Bias, Retaliation, Judge Rules*, <https://www.bna.com/autozone-pay-185-n17179912162/> (Nov. 20, 2014) (pregnancy discrimination); Kimberly Mirando, *AutoZone Wage & Hour Overtime Class Action Settlement*, <https://topclassactions.com/lawsuit-settlements/lawsuit-news/1372-autozone-wage-a-hour-overtime-class-action-settlement/> (Sept. 19, 2011) (wage-and-hour claims). In 2009, employees rated AutoZone the fourth-worst place to work in the country. Glassdoor, *Glassdoor Reveals Lowest Rated Companies; United Stays Grounded as Gibson Guitar Strikes A Cord With Employees*, <https://www.glassdoor.com/blog/glassdoor-reveals-lowest-rated-companies-united-stays-grounded-gibson-guitar-strikes-cord-employees/> (Dec. 15, 2009).

**B. The Text and Purpose of WAC 296-126-092, as well as L&I Policy Statements, All Show that the Regulation Requires Employers to Provide Meal Breaks to their Employees.**

**1. AutoZone Misconstrues the Text of WAC 296-126-092 and L&I's Interpretation of it.**

L&I enacted meal and rest break requirements “to provide relief to employees from work or exertion,” *White*, 118 Wn. App. at 283 (internal quotation marks omitted). These mandates directly promote employee health. *See, e.g., Demetrio*, 183 Wn.2d at 657; *Iverson v. Snohomish Cty.*, 117 Wn. App. 618, 623, 72 P.3d 772 (2003) (observing that meal and rest periods are “minimum health and safety requirements”). Health and safety regulations such as WAC 296-126-092 must be interpreted liberally in favor of coverage. *Int’l Ass’n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002); *Wash. Cedar & Supply Co. v. State Dep’t of Labor & Indus.*, 137 Wn. App. 592, 600 154 P.3d 287 (2007). Instead of interpreting WAC 296-126-092 “liberally” and in conjunction with its purpose, AutoZone argues for a narrow definition of the phrases “shall be allowed” and “no employee shall be required” based on dictionary definitions of individual words in isolation. Ans. Br. at 23-24. AutoZone’s interpretation contravenes the regulation’s text and purpose.

As set forth in Brady’s Opening Brief, “[t]he plain language of WAC 296-126-092 imposes a mandatory obligation on the employer” to

ensure that their employees take the meal and rest breaks set forth in the regulation. *Pellino*, 164 Wn. App. at 688. A similarly worded meal break statute, RCW 28A.405.460—which provides that school district employees “*shall be allowed* a reasonable lunch period of not less than thirty continuous minutes per day”—requires that such employees “be given” a lunch break. Open. Brief at 27-28 (emphasis supplied). WAC 296-126-092’s linguistic forbearer is a far more valuable aid to construction than AutoZone’s resort to the dictionary.<sup>4</sup>

AutoZone asserts that when the regulation states that “[n]o employee shall be required to work more than five consecutive hours without a meal period” it does not mean employees must actually take a meal break. Ans. Br. at 23-24. If AutoZone’s premise is right, then when the regulation states that “[n]o employee shall be required to work more than three hours without a rest period” it also does not mean that employees must actually take a rest period. AutoZone is correct that the regulation doesn’t say employees “shall take” a meal period. The regulation also doesn’t say employees “shall take” a rest period. If “shall be allowed” and “shall be required” “do not restrict the freedom of employees to take meal periods if and when they want,” Ans. Br. at 24,

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<sup>4</sup> AutoZone claims that *Artis v. Rowland*, 64 Wn.2d 576, 392 P.2d 815 (1964), proves that “shall be allowed” does not establish a requirement. Ans. Br. at 25 n.32. If the reasoning of that case, which concerned jury demands, applied here, no employee would ever be “allowed” to take a meal or rest break unless she specifically asked to take one.

then the regulation also doesn't restrict the freedom of employees to take rest periods "if and when they want." That construction of the regulation, however, directly conflicts with this Court's precedents.

AutoZone compounds its interpretive error by suggesting that there is "nothing in ES.C.6 [that] suggests any restriction on employee choice" whether to take meal breaks or not. Ans. Br. at 26. In fact, ES.C.6 *explicitly* restricts "employee choice." For example, ES.C.6 explains that "[t]he requirements of RCW 49.12 and WAC 296-126-092, establish a minimum standard for working conditions for covered employees" which cannot be diminished even if through the negotiated terms of a collective bargaining agreement. *Id.* § 15, at 5. Curiously, AutoZone asserts that even though ES.C.6 mandates that meal breaks "must be provided" and "must be given," the policy statement actually supports the district court's conclusion that employers have no obligation to "provide" or "give" meal periods. AutoZone's argument turns the language of ES.C.6 on its head.

AutoZone's own written meal break policies recognize Washington law requires employers to do more than just provide their employees with a "meaningful opportunity" to take a meal period if they so choose. Those policies explicitly state that any company employee who works more than five consecutive hours "is provided" with a meal break. Ans. Br. at 10. Logically and linguistically, an employer cannot satisfy its

legal obligation to provide *a meal period* merely by providing an *opportunity* for a meal period. Had AutoZone’s workplace practices complied with its own general meal break policy, it would not be facing liability for systematically violating Washington meal break law.<sup>5</sup>

**2. AutoZone Conflates a Violation of WAC 296-126-092 with a Waiver.**

AutoZone’s contention that “an employee does not have to waive a meal break to not take it,” Ans. Br. at 40, shows the fundamental error of its interpretation of WAC 296-126-092, and that of the district court. If an employee who has not validly waived his or her right to a meal period does not take a meal break after working for five consecutive hours *that* is a violation of WAC 296-126-092.

Waiver is an affirmative defense for which the *employer* bears the burden of proof. *Pellino*, 164 Wn. App. at 696. A meal break waiver—like any waiver—requires “the intentional and voluntary relinquishment of a known right.” *Id.* at 696-97; *see also Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013). AutoZone repeatedly suggests that, because employees may choose to forego a meal break for their own purposes, a waiver occurs whenever an employee has not taken a timely meal break. Ans. Br. at 39-41. That argument turns the *violation*

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<sup>5</sup> AutoZone mentions that it moved to strike Brady’s evidence of its systematic non-compliance with WAC 296-126-092. Ans. Br. at 14. AutoZone neglects to mention that the district court did not grant that motion.

of WAC 296-126-092—the employer’s failure to provide a timely meal break—into a *waiver* of the right to receive a meal break.

ES.C.6 does not allow a waiver of an employee’s right to a meal period through default. Rather, ES.C.6 makes clear that a “waiver” in the meal break context requires more than just skipping lunch on a particular day. L&I contemplates a process whereby an *employee* may request a waiver, to which the employer may or may not accede. The *employee* may choose to rescind that waiver. And ideally, that waiver should be in writing. ES.C.6 § 8, at 4. The process described by L&I strongly implies that “waivers” should be made in advance, which is consistent with the requirement that a “waiver” be knowing and voluntary. The waiver process set forth in ES.C.6 helps ensure that employees who do choose to forego meal breaks do so knowingly and voluntarily. AutoZone’s assertion that employees can “waive” their right to meal breaks simply by skipping meals on an ad hoc basis ignores both the protections contained in ES.C.6 and the realities of the power imbalance in the workplace.

AutoZone claims it has obtained valid meal break waivers from hundreds of employees.<sup>6</sup> Even assuming they will excuse AutoZone from

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<sup>6</sup> 291 of the 303 written “waivers” produced by AutoZone in discovery were obtained *after* Brady filed this case. AutoZone’s *ex post facto* campaign to obtain written waivers from its employee shows that the company recognized that its meal break practices do not conform with WAC 296-126-092. Had AutoZone obtained 500 valid waivers dating back to each employee’s hire date (which are not the facts of this case), Ans. Br. at 2, the putative class would still comprise over 1,100 present and former employees.

liability for not providing those employees with timely meal breaks *after* the waivers were signed, the waivers are irrelevant to this Court’s interpretation of WAC 296-126-092. Whether a particular employee has validly waived his or her right to a meal break is a factual question, not a legal one. *See Pellino*, 164 Wn. App. at 696-97 (rejecting defendant’s waiver arguments after trial on the basis of factual findings). AutoZone bears the burden of proving the validity of each waiver—not Brady. In short, whether or not AutoZone has obtained valid meal break waivers has no impact on how this Court should interpret WAC 296-126-092.

**C. *Pellino* Held that WAC 296-126-092 Imposes an Affirmative Duty on Employers to Provide Meal Breaks to Employees.**

AutoZone argues the district court correctly concluded that *Pellino* does not hold that employers have a duty to ensure that meal breaks are provided and taken because *Pellino* concerned the sufficiency of paid meal breaks. Ans. Br. at 32-33. AutoZone ignores half of what *Pellino* says.

*Pellino* addresses two issues: (1) whether an employer has an obligation under WAC 296-126-092 to “make sure rest and meal breaks are provided and taken,” and (2) whether the meal breaks that were actually provided to the employees complied with WAC 296-126-092. *See id.* at 685 (internal quotation marks and alterations omitted). With respect to the first, the employer argued it did “not have a duty to ‘provide’ meal

and rest breaks but is only required allow employees to take meal periods and rest breaks by not standing in the way of employees who choose to take breaks.” *Id.* at 687 (internal quotation marks and alteration omitted).

In response to *that* specific argument, the court of appeals held: “The plain language of WAC 296-126-092 imposes a mandatory obligation on the employer. WAC 296-196-092(1) states that employees ‘shall be allowed a meal period of at least thirty minutes’ and when the employer requires the employee to remain ‘on duty,’ the ‘[m]eal periods shall be on the employer’s time.’” *Id.* The court further observed that ES.C.6 “makes it clear that employers have a duty to provide meal and rest breaks and to ensure that the breaks comply with the requirements of WAC 296-126-092.” *Id.* In context, the court’s description of the employer’s “mandatory obligation” clearly relates *both* to the obligation to actually provide meal breaks and to the obligation to pay employees for meal breaks where the employee remains on duty. *Pellino* does analyze whether the meal periods provided by the employer complied with WAC 296-126-092 because the employees were required to be on duty. *See id.* at 694 (analyzing the applicability of the “on-call” rule discussed in *White*, 118 Wn. App. at 283-84). But *Pellino* decides *two* issues, one of which was whether employers have a duty to ensure that their employees take the meal and rest breaks that the law requires.

AutoZone also argues that even under the district court’s “meaningful opportunity” interpretation of WAC 296-126-092 *Pellino* would have been certified as a class action because the meal breaks were inadequate. Ans. Br. at 34. But that argument puts the cart before the horse: that fact was only determined *after* a class-wide trial. The employer in *Pellino* specifically argued that court had improperly granted class certification *before* trial because each employee had the discretion to decide when to take breaks—the same argument that AutoZone advances here. 164 Wn. App. at 683. Unlike the district court, the *Pellino* trial court rejected that argument because the “principal factual and legal issues are whether class members are entitled to compensation for missed meal and rest breaks under Washington law.” *Id.* (internal quotations and alterations omitted). Thus, the very rationale for the *Pellino* trial court’s grant of class certification was that employers have a duty to provide timely meal and rest breaks—a conclusion that the court of appeals affirmed.

Under the district court’s erroneous “meaningful opportunity” standard a plaintiff must show—*prior* to class certification—that the reason employees did not take timely breaks was due to some illegal or coercive practice by the employer. That requirement would essentially preclude most, if not all, meal and rest break class actions. AutoZone’s own arguments prove this very point. AutoZone argues that Brady’s

personal timecard data showing he did not receive timely meal breaks is useless because he cannot remember *why* he did not clock out for a meal break on specific dates. Ans. Br. at 16. But the “meaningful opportunity” standard the district court adopted requires plaintiffs to prove why their meal breaks were untimely. This is a difficult task when dealing with an individual plaintiff attempting to remember specific events months or years later and a nearly impossible one in the context of a class action.<sup>7</sup>

In sum, both the express language of the court of appeals’ decision in *Pellino* and its affirmance of the superior court’s certification of the case as a class action refute the argument that the case held *only* that the breaks provided by the employer were inadequate. Contrary to what the district court concluded and what AutoZone continues to argue, *Pellino* directly holds that an untimely meal break violates WAC 296-126-092.

**D. How this Court Interprets WAC 296-126-092’s Meal Break Language Will Also Apply to Rest Breaks.**

AutoZone makes the striking argument that it is “[e]ntirely untrue” that this Court’s interpretation of WAC 296-126-092 with respect to meal breaks will apply to rest breaks. Ans. Br. at 35. AutoZone claims that rest

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<sup>7</sup> Meal break class actions are difficult to certify in California because some courts have misinterpreted *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), to mean the plaintiff must prove “*why* certain employees may have had a late, short or missed meal break during a given shift.” *Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS JCGX, 2013 WL 210223, at \*8 (C.D. Cal. Jan. 17, 2013) (emphasis in original). The district court followed the reasoning of *Ordonez*. AutoZone is wrong that adoption of the district court’s interpretation of WAC 296-126-092 would impact only this case and not meal and rest break class actions generally. See Ans. Br. at 48.

break cases are categorically inapplicable to meal break cases. *Id.* at 37. This argument defies basic principles of statutory interpretation.

The right-creating language of WAC 296-126-092 is identical for meal and rest breaks: WAC 296-126-092(1) states that “[e]mployees *shall be allowed*” a 30-minute meal period, and WAC 296-126-092(4) provides that “[e]mployees *shall be allowed*” a 10-minute rest period. Both provisions go on to state that “[n]o employee shall be required” to work more than a certain number of hours without a break. WAC 296-126-092(2), (4). “When the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning.” *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wn.2d 305, 313, 884 P.2d 920 (1994). Should this Court interpret the phrase “shall be allowed” to require employers to provide only an “opportunity” to take a meal break that interpretation would apply with equal force to WAC 296-126-092’s rest break requirements.

AutoZone makes the novel assertion that *Demetrio*, *Wingert*, and *WSNA* have no application to meal breaks because WAC 296-126-092(4) requires that “rest breaks shall be scheduled as near the midpoint of the work period” and the regulation does not contain similar language with respect to meal breaks. AutoZone is grasping at straws. Nothing in *Wingert*, *WSNA*, and *Demetrio* suggests that this Court’s determination

that rest breaks are “mandatory”—in the sense that the employer has a responsibility to ensure that they are taken—had anything to do with the rest break work-period midpoint scheduling provision. *See Wingert*, 104 Wn.2d at 847-48; *WSNA*, 175 Wn.2d at 832. Indeed, the regulatory requirement that rest breaks must be “scheduled” says *nothing* about whether those breaks are mandatory. *Demetrio* proves this very point by stating 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.” 183 Wn.2d at 658 (emphasis added). This Court’s rest break precedents simply do not rely on the “scheduling” language of WAC 296-126-092(4) as the basis for the conclusion that breaks are mandatory.

AutoZone claims that meal break cases such as *White*, 118 Wn. App. at 280, *Iverson*, 117 Wn. App. at 623, and *Frese v. Snohomish Cty.*, 129 Wn. App. 659, 670, 120 P.3d 59 (2005), show that this Court’s rest break cases have no application here because those court of appeals’ decisions “distinguish[] rest break cases like *Wingert*.” Ans. Br. at 37. Again, AutoZone is wrong. *White* rejected the workers’ reliance on *Wingert* because their argument that “an employer cannot require an employee to work during paid time when that employee was supposed to be on a paid break” was beyond the scope of *Wingert*’s holdings, not because *Wingert* was a rest break case. *See White*, 118 Wn. App. at 280.

Similarly, *Iverson*—which predated *White* and this Court’s holding in *WSNA*—merely observed that *Wingert* did not support the proposition that a worker must have a “lessening” of on-call duties during a meal break or that an employee must be paid time-and-a-half for a paid meal period. *Id.* at 622-23. *Frese* did note that *Wingert* involved “rest breaks, not meal breaks,” but went on to observe that “*Wingert* . . . may be instructive on a more fully developed factual record.” *Frese*, 129 Wn. App. at 670. And, of course, AutoZone’s argument overlooks the fact that *Pellino*, the one published court of appeals decision to consider the precise issue before this Court, holds that that right-creating language of WAC 296-126-092 applies equally to meal breaks and rest breaks. 164 Wn. App. at 690.

In short, as the district court’s certified questions recognize, this Court’s interpretation of the meaning of WAC 296-126-092 with respect to this meal break case will apply with equal force to rest break cases.

**E. Washington Has Not Determined that Employers Have No Obligation to Ensure that Meal Breaks Are Taken.**

AutoZone asserts that *White, Eisenhauer v. Rite Aid Hdqtrs.*, No. C04-5783RBL, 2006 WL 1375064 (W.D. Wash. May 18, 2006), and *Demetrio* all support the district court’s interpretation of WAC 296-126-092. AutoZone is correct only with respect to *Eisenhauer* and that case directly conflicts with Washington precedent.

AutoZone contends *White v. Salvation Army* held that employers have no affirmative duty to provide meal breaks. *White* did nothing of the sort. *White* addressed meal breaks in a specific context: where employees were always on-call, but were able to take rest and meal breaks throughout the course of the work day. The court of appeals observed that: “The employer cannot prevent an employee from taking their meal period, but there is no affirmative duty on the employer to *schedule* meal periods for a specific time. The lack of any *scheduled* meal period is not a violation of WAC 296-126-092(1).” *White*, 118 Wn. App. at 279 (emphasis added). The court held that: “So long as the employer . . . *otherwise complies* with the provisions of WAC 296-126-092, there is no violation . . . . To make the Salvation Army [liable] simply because it did not *schedule* [a meal break] is not supported by the regulation or administrative policy.” *Id.* at 280 (emphasis added).

The court in *White* was addressing a specific issue: whether WAC 296-126-092 is violated when an employer *otherwise complied* with WAC 296-126-092’s provisions, but did not “schedule” a meal period and required employees to remain on call. As AutoZone recognizes, while the regulation requires that rest breaks “be scheduled near the mid-point of the work period,” there is no corresponding “scheduling” requirement for meal breaks. As the *Pellino* court correctly observed, by holding that

WAC 296-126-092 does not require that meal breaks be “scheduled,” *White* said nothing about whether the employer had a duty to provide meal periods when the regulation requires. 164 Wn. App. at 691.<sup>8</sup>

AutoZone relies heavily on *Eisenhauer* for the proposition that WAC 296-126-092(1) does not impose an affirmative obligation on employers to actually provide meal breaks to employees. *Eisenhauer*—an unpublished federal district court opinion—was decided before *WSNA*, *Demetrio*, or *Pellino*. Consistent with district court’s decision in this case, *Eisenhauer* concluded that employees may “implicitly waive” a meal break by choosing not to take it. *Eisenhauer*, 2006 WL 1375064 at \*2-3. But *Eisenhauer* directly conflicts with ES.C.6 § 8, at 4.<sup>9</sup> In a vain effort to smooth out this contradiction, AutoZone argues that *Eisenhauer*’s “implicit waiver” holding is consistent with *Pellino*. *Pellino* observed that a waiver may be “implied” where there are “unequivocal acts or conduct evidencing an intent to waive.” *Pellino*, 164 Wn. App. at 697. But AutoZone confuses *Eisenhauer*’s concept of “implicit waiver”—which

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<sup>8</sup> AutoZone incorrectly claims that employees in *White* were not given timely meal breaks. Ans. Br. at 29. AutoZone ignores the court’s explanation that employees received breaks that “otherwise compl[ied]” with WAC 296-126-092, which by definition would include compliance with the regulation’s timing requirements.

<sup>9</sup> The *Eisenhauer* court also appears not to have fully understood WAC 296-126-092. In *Eisenhauer*, the employee usually worked 11- or 12-hour shifts, generally from 9 a.m. to 9 p.m. *Id.* at \*1-2. The court concluded that the employee voluntarily “chose” to take his *only* meal break at 3:00 p.m. rather than noon to “cut his day in half,” *id.* at \*2-3, without recognizing that an employee working twelve hours per day is entitled to *two* meal breaks under WAC 296-126-092(3) and should never have been forced to make that “choice.”

requires only that the employee not take a meal break—with *Pellino's* concept of “implied waiver,” which requires “unequivocal” evidence of the employee’s intent to *waive* a right, *i.e.*, knowingly and voluntarily forego it. Under *Pellino*, not taking a meal break is insufficient to establish “implied waiver.” *Eisenhauer* thus conflicts with both *Pellino* and ES.C.6.

Like the district court, AutoZone relies on *Demetrio* in support of the idea that an employer has no affirmative duty to ensure employee compliance with WAC 296-126-092. To the contrary, *Demetrio* shows that the district court’s interpretation of the regulation is incorrect:

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*. Instead, employers must *affirmatively promote* meaningful break time. A workplace culture that encourages employees to skip breaks violates WAC 296-126-092 because it deprives employees of the benefit of a rest break on the employer’s time.

*Demetrio*, 183 Wn. 2d at 658 (emphasis added) (internal quotation marks and citations omitted). Purportedly relying on *Demetrio*, AutoZone claims that an employer’s obligation to its employees under WAC 296-126-092 ends once it provides an “opportunity” to take a meal break; the rest is up to the employee. *Demetrio* necessarily rejected that claim by holding it is not enough for an employer to schedule breaks. An employer who affirmatively schedules breaks for its employees *has* provided its employees with a meaningful opportunity to take breaks if the employees

so choose. This Court, however, held that employers must do more.<sup>10</sup> In the context of WAC 296-126-092(1)-(3), that means that employers must ensure that employees who have not waived meal breaks actually take those breaks.

**F. AutoZone and the District Court Confuse “Strict Liability” with an Affirmative Obligation to Ensure Compliance with WAC 296-126-092.**

AutoZone repeatedly argues that Brady seeks a ruling from this Court that WAC 296-126-092 imposes “strict liability” on employers for every untimely meal break. In making this argument, AutoZone—like the district court—conflates Brady’s argument that employers have an affirmative obligation to ensure that employees take required meal breaks with an argument for “strict liability” as that term is used in tort law.

Strict liability means that a defendant may be held liable whenever a violation occurs *regardless of fault*. See *Helling v. Carey*, 83 Wn.2d 514, 520, 519 P.2d 981 (1974) (Utter, J., concurring). Brady has never argued that WAC 296-126-092 imposes a liability on employers for failing to provide timely meal breaks regardless of the employer’s fault or

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<sup>10</sup> AutoZone suggests that the obligation to “affirmatively promote break time”—which is just another way of saying that employers have a duty to ensure that their employees take breaks—only applies to agricultural rest breaks. Ans. Br. at 31-32. But this passage appears in the Court’s discussion of rest break requirements for employees generally.

knowledge of untimely employee meal breaks.<sup>11</sup> Instead, Brady has argued all along, consistent with *Pellino*, that WAC 296-126-092 imposes an affirmative duty on employers to provide timely meal breaks to their employees. A class action plaintiff proves a violation of that regulation by showing that he and a sufficient number of other employees did not receive meal breaks when WAC 296-126-092 requires.<sup>12</sup>

As the court of appeals suggested in *Pellino*, an employer will not be held liable for meal break violations where the employer lacks actual or constructive knowledge that employees were not receiving timely breaks. *See Pellino*, 164 Wn. App at 687 (quoting the trial court's conclusions of law). Employer liability based on actual or constructive knowledge of untimely employee meal breaks is consistent with other wage-and-hour statutes. For example, under the FLSA an employer owes wages if it has "suffered or permitted" an employee to work. 29 C.F.R. § 785.11. The employer must have actual or constructive knowledge of the work to be liable for a violation of the regulation. *See id.*; *Forrester v. Roth's I. G. A.*

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<sup>11</sup> In his reply brief on his motion for class certification, Brady did use the term "strict liability" in connection with a discussion of *Pellino* and AutoZone's liability under the facts of this case. Pl. Class Cert. Reply Br. at 3, 9. Where, as here and in *Pellino*, an employer knows that employees are not receiving timely meal breaks there is in effect "strict liability" for failing to provide timely breaks. That does not mean WAC 296-126-092 is in of itself a "strict liability" regulation.

<sup>12</sup> Brady does not understand AutoZone's argument that because its time records show it failed to provide its employees with timely meal periods only about 10% of the time, this shows "the validity of AutoZone's meal period practices." Ans. Br. at 14 n.27. Under AutoZone's logic, an employer who fails to pay its employees legally required overtime pay only 10% of the time should be deemed a model employer.

*Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). AutoZone knew that its employees were not taking meal breaks when WAC 296-126-092 requires.

In mistakenly describing Brady's argument as one for "strict liability," AutoZone obscures the real question before this Court: whether employers satisfy WAC 296-126-092 merely by providing "meaningful opportunities" for meal breaks, as the district court held in this case. As the text of the statute, L&I's guidance, and controlling precedent all demonstrate, that interpretation of the regulation is incorrect.

**G. AutoZone May Not Evade Its Responsibilities under the Law Because They Impose a Burden on Employers**

AutoZone argues that this Court should reject Brady's interpretation of WAC 296-126-092 because it would turn employers into the "lunch police" who must monitor an employee's time. Ans. Br. at 47. As Brady noted in his Opening Brief, this case has nothing to do with employer monitoring of employees *during* their meal periods. Open. Br. at 37. The question here is whether employers have an affirmative duty to ensure that employees take timely meal breaks.

Employers are regularly required to enforce wage-and-hour laws and workplace health and safety standards, even where those rules impose a "burden" on the employer and an employee might otherwise "choose" not to comply with those rules. For example, WAC 206-800-160, requires

that employers ensure that employees “have, use, and care for” personal protective equipment. WAC 206-800-160(4) flatly states that employers “must require . . . employees to use necessary” protective equipment. If an employer learns that an employee has chosen not to use protective equipment, the employer has an affirmative duty to enforce the relevant standards. And, as courts have recognized in the federal wage-and-hour context, it is the duty of *employers* to ensure that employees comply with workplace policies if employers do not want to pay wages for unauthorized work. 29 C.F.R. § 785.13.<sup>13</sup> No court has suggested that the employer’s obligation to ensure compliance safety standards, or wage and hour laws, somehow means that the employer must “stand over” and “police” employees. Ans. Br. at 31, 47.

AutoZone suggests that it would be unfair to find a violation of WAC 296-126-092 when an employee does not take a meal break at the required time because an employer will be liable if the employee clocks out “even a few seconds late.” Ans. Br. at 47. That argument, however, ignores the fact that WAC 296-192-092 gives employees a several-hour window in which their meal period may commence. An employer can make sure that its employees receive timely meal breaks by adopting a

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<sup>13</sup> AutoZone points out that the FLSA says nothing about the timing of meal breaks. Ans. Br. at 47 n.43. That is true but irrelevant. These cited regulations show the law holds employers responsible for ensuring that their employees comply with health and safety standards, and that it is not a defense that the employee “chooses” not to comply.

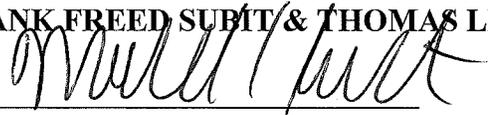
policy requiring its employees to start their meal breaks well-before they have worked five hours on a given day. If an employer allows employees to wait until the last minute to start their meal breaks, the employer creates the risk its employees won't always meet the deadline.

### III. CONCLUSION

AutoZone couldn't be more wrong in claiming "this case has nothing to do with the denial of meal breaks or other employee rights." Ans. Br. at 1. Washington State has a "long and proud history of being a pioneer in the protection of employee rights." *Int'l Ass'n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 35, 42 P.3d 1265 (2002). *Wingert*, *WSNA*, *Demetrio*, and *Pellino* all advanced the cause of employee rights. This Court should answer the certified questions so as to carry forward that long and proud tradition.

RESPECTFULLY SUBMITTED this 21st day of December 2016.

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I hereby declare under the penalty of perjury of the laws of the  
State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 21st day of December  
2016.

  
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Janet Francisco