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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/Appellees.

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APPELLANT MICHAEL BRADY'S ANSWER TO AMICI BRIEFS

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Frank Freed Subit & Thomas, LLP  
Michael C. Subit, WSBA # 29189  
705 Second Avenue  
Suite 1200  
Seattle, Washington 98104  
(206) 682-6711  
msubit@frankfreed.com

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## I. INTRODUCTION

The amici briefs filed by the Department of Labor and Industries (“L&I”), Washington Employment Lawyers Association (“WELA”), and Fair Work Center (“FWC”), show the importance of the Court’s decision in this case for all the workers of Washington. A ruling requiring only that employers provide an “opportunity” for meal breaks would open the door to the exploitation of workers and prevent workers from enforcing their rights through class actions. This Court should reaffirm the principles it established in *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015), *Wash. State Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 287 P.3d 516 (2012), and *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002), and answer the certified questions to make clear that employers have an obligation to provide meal breaks and the burden of proving waiver where a timely break is not taken.

## II. L&I INTERPRETS WAC 296-126-092 AS IMPOSING A MANDATORY OBLIGATION ON EMPLOYERS

### A. L&I’s Interpretation is Entitled to Deference.

L&I promulgated WAC 296-126-092 pursuant to RCW 49.12. An agency’s interpretation of its own regulations is entitled to “great deference . . . absent a compelling indication that the agency’s regulatory interpretation conflicts with legislative intent or is in excess of the

agency's authority." *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007) (internal quotation marks omitted); *see also D. W. Close Co. v. Dep't of Labor & Indus.*, 143 Wn. App. 118, 129, 177 P.3d 143 (2008) ("An agency acting within the ambit of its administrative functions normally is best qualified to interpret its own rules, and its interpretation is entitled to considerable deference by the courts." (internal quotations marks omitted)).

WAC 296-126-092 uses the language "shall be allowed" and "shall be required," "words that are not permissive in nature." L&I Br. at 9. *Accord Honeycutt v. Dep't of Labor & Indus.*, --- Wn. App. ---, --- P.3d --- 2017 WL 398687 \*4 (Jan. 30, 2017). As L&I explains in its amicus brief, WAC 296-126-092 "sets forth . . . an obligation to provide meal and rest breaks." L&I Br. at 6. That obligation is mandatory, and cannot be discharged by simply paying employees for their time. *Id.*; *see also* FWC Br. at 5-6; WELA Br. at 7-8. The possibility of a meal break waiver under certain circumstances in no way affects the employer's obligation to provide a meal break where a waiver has not occurred. L&I Br. at 7.

L&I also provides "carefully tailored guidance" regarding WAC 296-126-092 through its administrative policy. *See Meal and Rest Periods for Nonagricultural Workers Age 18 and Over*, Administrative Policy ES.C.6 (2005) (hereinafter "ES.C.6"). ES.C.6 repeatedly describes the

meal and rest break provisions of WAC 296-126-092 as “requirements.” ES.C.6 § 1, at 1; § 3, at 2; § 5, at 2; § 8, at 4; § 9, at 4; § 15, at 5. ES.C.6 leaves no doubt that employers must provide their employees with the meal and rest breaks set forth in WAC 296-126-092. Rather, ES.C.6 “recognizes that [WAC 296-126-092] affirmatively obligates the employer to provide meal breaks absent an express waiver.” L&I Br. at 11-12.<sup>1</sup>

Through both ES.C.6 and its amicus brief, L&I makes clear that it, like Brady, interprets WAC 296-126-092 to require employers to affirmatively provide meal and rest breaks. L&I’s interpretation of its own regulation is entitled to considerable weight.

Consistent with Brady’s arguments, L&I also expressly rejects the argument advanced by AutoZone that, because WAC 296-126-092 is directed at employers rather than employees, all the regulation requires is for employers to provide an “opportunity” for a meal break. As L&I explains, AutoZone is “simply wrong in asserting that WAC 296-126-092 does not mandate employers to require employees to take timely meal breaks absent an express waiver.” L&I Br. at 8.

Moreover, as all three amici recognize, the question of what an employer must do to satisfy its obligations under WAC 296-126-092

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<sup>1</sup> L&I’s amicus brief does not expressly consider the situation where an employer lacks actual or constructive knowledge of a missed meal break. Brady’s reply brief suggested that, where the employer lacks such knowledge, liability will not attach. Reply Br. at 22. That situation isn’t before the Court in this case.

should not be framed through the lens of “strict liability.” As WELA points out, “‘strict liability’ is a tort standard that carries no meaning in relation to wage and hour laws.” WELA Br. at 5-6. Rather, as all three amici assert, an employee may prove a violation of WAC 296-126-092 where she demonstrates that she did not receive a timely meal break. Amici agree with Brady that framing the issue as a question of “strict liability,” as the district court did, obscures the real question: whether an employer has a duty to provide a meal break to its employees.

**B. Washington Precedent Confirms L&I’s Interpretation.**

As Brady has argued elsewhere, Washington precedent supports L&I’s interpretation of WAC 296-126-092. *Pellino v. Brink’s Inc.* squarely held that “[t]he plain language of WAC 296-126-092 imposes a mandatory obligation on the employer.” 164 Wn. App. 668, 688, 267 P.3d 383 (2011). The court further explained that the Superior Court “did not err in ruling that Brink’s had a duty to provide the [employees] with meal periods and break times.” *Id.* at 690. *Pellino* expressly considered, and rejected, the argument that the employer’s mandatory obligation could be satisfied by simply not ‘stand[ing] in the way of employees who choose to take breaks.’” *Id.* at 687, 688 (alteration in original).

This Court confirmed *Pellino*’s analysis in *Demetrio v. Sakuma Bros. Farms, Inc.*, 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.” 183 Wn.2d 649, 658, 355 P.3d 258 (2015). The Court explained 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 judicial interpretations of WAC 296-126-092 match L&I’s interpretation of the regulation. The congruence between L&I’s interpretation and Washington case law strongly supports Brady’s position that WAC 296-126-092 imposes a mandatory obligation on employers to provide meal breaks and ensure that they are taken.

**C. Requiring Employers to Provide Meal Breaks Furthers WAC 296-126-092’s Fundamental Purpose.**

The amici correctly identify the “fundamental purpose” underlying WAC 296-126-092 as protecting employee health and safety. L&I Br. at 2-3; FWC at 7; WELA Br. at 2; *see also* RCW 49.12.010 (“The welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health.”). Meal and rest breaks “are critical to the health and effectiveness of employees.” *Demetrio*, 183 Wn.2d at 658. As FWC points out, a wealth of research supports the proposition that denying employees rest and meal periods has

a negative effect on workers' health. FWC Br. at 7-10. Workers who do not take breaks are exposed to an increased risk of workplace accidents, injuries, and stress. *Id.*

As Brady has argued, and consistent with promoting employee health and safety, courts must liberally construe remedial statutes and regulations such as WAC 296-126-092 in favor of workers. *Int'l Ass'n of Fire Fighters v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002); *see also* FWC Br. at 11; WELA Br. at 12. Requiring employers to provide meal breaks, and allowing employees to forego breaks if at all only through a structured waiver process, furthers the underlying health and safety purpose of WAC 296-126-092.

AutoZone has previously suggested that “flexibility” is a critical purpose served by WAC 296-126-092 and ES.C.6. As L&I points out, however, flexibility is merely a “side-benefit of [L&I’s] policy.” L&I Br. at 13. Worker health and safety remains the primary goal of WAC 296-126-092, and the mantra of “employee flexibility” cannot be used to erode that purpose.

AutoZone has further argued that it would be unduly burdensome for employers to “police” lunch breaks. But, as WELA clearly explains, this argument is baseless. Employers already monitor employees to ensure that employees are appropriately paid, do not clock in early, do not work

unauthorized overtime, and complete assigned duties on shift. WELA Br. at 11. Allowing employers to evade their duties under workplace regulations because they should not be required to “police” compliance would eviscerate the health and safety purposes of those regulations.

### **III. WAC 296-126-092 REQUIRES MEAL BREAK WAIVERS TO BE “KNOWING AND VOLUNTARY”**

The amici correctly describe the proper framework through which an employee may forego a meal break: a knowing and voluntary waiver, given in advance, preferably in writing. An employee’s ability to waive a meal break does not alter the obligations of the employer.

“A waiver is the intentional and voluntary relinquishment of a known right.” *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998). To ensure that those conditions are met, ES.C.6 allows an *employee* to request a waiver of the meal break requirement in advance of the meal period. ES.C.6 § 8, at 4; L&I Br. at 12. The employer must then consent to the waiver. Only once those conditions are fulfilled may the employee forego a meal break; the employer cannot fulfill its obligations “by simply paying the employee for the time.” L&I Br. at 12.

As L&I explains in its brief, the waiver process set forth in ES.C.6 serves two fundamental purposes. First, it recognizes that employers have an obligation to provide meal breaks absent a waiver. Second, it ensures

that the waiver is knowing and voluntary. L&I Br. at 11-12. Allowing employees to forego meal breaks through any other process undermines the protections set out for employees in WAC 296-126-092.

The amici also correctly note that the burden of proving waiver falls on employers. First, because WAC 296-126-092 “inures to the benefit of an employee,” the burden is on the employer to justify the absence of a meal break by showing that a waiver occurred. L&I Br. at 15. Additionally, as a practical matter, the burden should fall to the employer who has a non-delegable duty to ensure that employees are paid properly. That duty requires the employer to keep adequate waiver records. L&I Br. at 16-17. Because the employer is already required to keep records of meal break waivers, the employer—not the employee—is in a better position to produce evidence of waiver.

As WELA explains, the burden of proving “waiver” is not met simply by showing that an employee did not take a meal break. WELA Br. at 17. “The intention to relinquish the right or advantage must be proved and the burden is on the party claiming waiver.” *Jones*, 134 Wn.2d at 241-42. That burden is satisfied only where there are “unequivocal acts or conduct evidencing an intent to waive.” *Id.* at 241. The “knowing and voluntary” standard is not satisfied by a rule that treats missed meal breaks as “implied waiver.” As L&I further explains: “The district court’s

conclusion that when an employee does not take a meal break, this means the employee impliedly waived the requirement, contravenes the rule's plain language and the rule drafters' intent." L&I Br. at 13.

Brady agrees with the amici that the burden of proving waiver is on the employer, and that the burden cannot be satisfied simply by showing that employees failed to take timely meal breaks.

**IV. WHETHER CONSTRUED AS "BURDEN SHIFTING" OR AN AFFIRMATIVE DEFENSE, BRADY AND L&I DESCRIBE THE SAME STANDARD**

Brady argued in his briefing that an employee may show a violation of WAC 296-126-092 through evidence demonstrating that the employee did not receive a timely meal break. Brady further argued that "waiver" is an affirmative defense for which the employer bears the burden of proof. Under Brady's formulation, an employer is liable where employees did not receive a timely meal break and there is no valid waiver.

Although L&I describes the process of proving employer liability as "burden shifting," L&I adopts that same framework. As L&I explains, the plaintiff has the initial burden of proving a violation of WAC 296-126-092 by providing evidence that he or she did not receive a timely meal break. The burden would then "shift to the employer to rebut this by showing waiver." L&I Br. at 19. The employer may meet this burden with

written waiver agreements, or through credible testimony. *Id.* Both L&I and Brady agree that the plaintiff must produce evidence that he or she did not receive a timely meal break. The employer bears the burden of proving any waiver of a meal break. That process is identical regardless of the terminology used to describe it.

**V. REQUIRING THAT EMPLOYERS PROVIDE ONLY A “MEANINGFUL OPPORTUNITY” FOR A BREAK WOULD ALLOW WORKERS TO BE EXPLOITED**

As the amici clearly explain, allowing employers to satisfy their obligations under WAC 296-126-092 by merely “providing” an opportunity for a break raises the possibility that employers could exploit workers. FWC points out that “[t]he ‘opportunity’ to take breaks is often illusory for workers,” as “workers are often ‘incentivize[d]’ to miss breaks ‘at the expense of the[ir]health.’” FWC Br. at 12 (quoting *Demetrio*, 183 Wn.2d at 658-59); *see also* WELA Br. at 17. Some employees might “choose” to skip breaks in order to please their employer. WELA Br. at 17 (“Workplace pressures are generally omnipresent and will often lead employees to accept conditions against their own interest.”). And workplaces that reward “productivity” will implicitly encourage employees to skip breaks.

Furthermore, even where employers do not discourage employees from taking breaks, adopting the district court’s standard for liability

“would reduce an employer’s incentive to ensure that its employees take regular meal breaks.” L&I Br. at 13. Allowing employers to satisfy WAC 296-126-092 by merely providing opportunities for breaks “would impermissibly create a culture of noncompliance,” and “would undermine the Legislature’s intent that employees receive healthful working conditions.” L&I Br. at 14.

**VI. EMPLOYEES WILL BE FURTHER EXPLOITED IF THEY CANNOT ENFORCE THEIR RIGHTS THROUGH CLASS ACTIONS**

The possibility for employee exploitation is further exacerbated by the fact that the district court’s standard for liability would preclude most, if not all, meal and rest break class actions. As WELA points out, class actions play a significant role in vindicating rights. WELA Br. at 13. Class actions “establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits.” *Darling v. Champion Home Builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982). “Indeed, when claims are small but numerous, ‘a class-based remedy is the only effective method to vindicate the public’s rights.’” WELA Br. at 13 (quoting *Scott v. Cingular Wireless*, 160 Wn.2d 843, 852, 161 P.3d 1000 (2007)). Class actions also improve access to the courts and deter similar wrongful conduct. WELA Br. at 13. Thus, “Washington favors the use of the class action device.” *Id.*

Meal and rest break violations result in very limited damages for the injured employee. Few, if any, employees would be able to vindicate rights through individual lawsuits. Absent class actions, there would be no effective method of enforcing WAC 296-126-092. WELA Br. at 14.

The district court's decision required an employee to show not just a noncompliant meal break, but the reason for the noncompliant meal break to establish employer liability. "In other words, the court denied certification on the ground that AutoZone's liability turns not on whether employees failed to receive their minimum required breaks but on the nebulous question of *why* any such breaks were missed—an individualized question that precludes class treatment." WELA Br. at 14 (emphasis in original). Despite AutoZone's protestations to the contrary, a liability standard that requires inquiry into why a meal break was missed will preclude class actions in all but the most egregious of circumstances.

Adopting the district court's standard of liability for violations of WAC 296-126-092 puts employees at risk in multiple ways. Not only would it incentivize a culture of noncompliance where employees are encouraged to skip breaks, but it would preclude employees from redressing violations through class actions—the only realistic means of enforcement. Such a ruling would drastically undermine the effectiveness of WAC 296-126-092 in protecting employee health and safety.

## VII. WHETHER L&I COULD AUTHORIZE A WAIVER THROUGH ES.C.6 IS NOT BEFORE THIS COURT

WELA and FWC both suggest the text of WAC 296-126-092 does not permit meal break waivers and L&I erred in issuing a policy statement allowing them. WELA Br. at 16 n.10; FWC Br. at 6-7. L&I argues that the text of the regulation supports the possibility a waiver for meal breaks but precludes the possibility of a waiver for rest breaks. L&I Br. at 6-7. Whether WAC 296-126-092 gave L&I the regulatory authority to permit employee meal break waivers via a policy statement (as opposed to doing so by amending the regulation itself) is an interesting legal question, but one that all parties and amici agree is not before this Court.

Indeed, there is no need for the Court to reach that issue to decide this case. Brady, WELA, and FWC all agree with L&I that any meal break waiver must comply with the strict requirements set forth in ES.C.6. Amici agree with Brady that the district court misinterpreted ES.C.6's strict meal break waiver requirements by, among other errors, allowing for implied waivers.<sup>2</sup> Other issues can be left for another day.

## VIII. CONCLUSION

This Court should adopt the analysis of WAC 296-126-092 set forth in the amicus briefs. All three amici briefs are fully consistent with

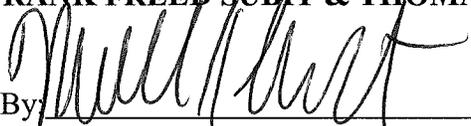
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<sup>2</sup> If it turns out that WAC 296-126-092 doesn't allow meal break waivers, the district court erred *a fortiori*.

the arguments Brady has set forth and further demonstrate that the district court's interpretation of the regulation is erroneous.

RESPECTFULLY SUBMITTED this 1st day of March 2017.

**FRANK FREED SUBIT & THOMAS LLP**

By 

Michael C. Subit, WSBA No. 29189

705 Second Avenue, Suite 1200

Seattle, WA 98104

(206) 682-6711

[msubit@frankfreed.com](mailto:msubit@frankfreed.com)

Attorneys for Plaintiff-Appellant

Michael Brady

**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2017, I emailed a copy of  
Appellant Michael Brady's Answer to Amici Briefs to:

Patrick M. Madden  
Stephanie Wright Pickett  
K&L Gates LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104-1158  
[patrick.madden@klgates.com](mailto:patrick.madden@klgates.com)  
[stephanie.pickett@klgates.com](mailto:stephanie.pickett@klgates.com)

Elizabeth Ford  
Fair Work Center  
5308 Martin Luther King Jr. Way S.  
Seattle, WA 98118  
[liz@fairworkcenter.org](mailto:liz@fairworkcenter.org)

Marc C. Cote  
Terrell Marshall Law Group PLLC  
936 North 34<sup>th</sup> Street, Suite 300  
Seattle, WA 98103  
[mcote@terrellmarshall.com](mailto:mcote@terrellmarshall.com)

Toby J. Marshall  
Terrell Marshall Law Group PLLC  
936 North 34<sup>th</sup> Street, Suite 300  
Seattle, WA 98103  
[tmarshall@terrellmarshall.com](mailto:tmarshall@terrellmarshall.com)

Jeffrey L. Needle  
Law Office of Jeffrey L. Needle  
119 First Avenue South, Suite 200  
Seattle, WA 98104  
[jneedlel@wolfenet.com](mailto:jneedlel@wolfenet.com)

James P. Mills  
Assistant Attorney General  
Office of the Attorney General  
1250 Pacific Avenue, Suite 105  
Tacoma, WA 98402  
JamesM7@atg.wa.gov

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 1st day of March 2017.

  
\_\_\_\_\_  
Janet Francisco