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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-Appellant,

v.

AUTOZONE STORES, INC., and AUTOZONERS, LLC

Defendants-Appellees.

ANSWERING BRIEF OF AUTOZONE STORES, INC.

K&L GATES LLP
Patrick M Madden, WSBA #21356
Todd L Nunn, WSBA #23267
Stephanie Wright Pickett, WSBA # 28660
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Telephone: 206-623-7580
patrick.madden@klgates.com
todd.nunn@klgates.com

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I. INTRODUCTION

Despite efforts by Plaintiff Michael Brady (“Brady”) to paint a different picture, this case has nothing to do with the denial of meal breaks or other employee rights. Defendant AutoZone Stores, Inc. (“AutoZone”) regularly scheduled and provided timely 1-hour meal periods and the evidence (including Brady’s own testimony) shows that AutoZone encouraged its employees (“AutoZoners”) to take timely meal breaks. This case focuses on AutoZone’s one alleged flaw: some of its managers allowed AutoZoners the flexibility to skip or adjust the timing of meal periods to address their personal requests and needs.¹

Brady thus filed this class action, claiming that AutoZone failed to provide timely meal breaks in violation of WAC 296-126-092. In his motion for class certification, Brady argued that employers are strictly liable whenever an employee works more than 5 hours (even by a minute or less) without a meal period and relied on time clock data allegedly showing over 150,000 instances² where more than 5 hours passed before a meal period was taken. Dkt 62 at 5-6. In response, AutoZone presented extensive evidence that AutoZoners are regularly scheduled for and take

¹ The only possible denial of rights in this case is Brady’s attempt through this lawsuit to deny his co-workers the flexibility to take meal breaks when they want. No AutoZoners have supported Brady’s position, but many asked for flexibility and filed declarations supporting AutoZone. Dkt 46-1 at 72 (¶5), 125 (¶4); Dkt 46-1 to 46-2 (Ex A1-A54).

² Brady never identified the total possible meal periods during the 3.5 years from which this data was extracted, but the number was certainly well over a million (e.g., first and second meal periods x 800 employees x 5 days x 52 weeks x 3.5 years = 1,456,000).

1-hour meal breaks, and that more than 5 hours pass between time punches for reasons that have nothing to do with meal break violations (including employee requests and needs, over 500 waivers, unrecorded breaks, and paid breaks). Dkt 46 at 11-13 (¶¶22); Dkt 46-3 at 8-9 (¶10). Of consequence, Brady did not present “any evidence of an unwritten policy or practice of coercion by AutoZone supervisors encouraging or incentivizing employees to skip breaks.” Dkt 62 at 11; Dkt 73 at 4.

U.S. District Judge Richard Jones considered this evidence and, after a “thorough review” of agency interpretations and case law, rejected “the notion that Washington has adopted a strict liability approach to the taking of meal breaks” and “concluded that employers have met their obligation under the law if they ensure that employees have the opportunity for a meaningful meal break, free from coercion or any other impediment.” Dkt 73 at 1-2. Judge Jones thus denied Brady’s motion for class certification because of the “unique fact scenarios associated with each potential violation” reflected in the time clock data. *Id.* at 2.

Upon Brady’s request, Judge Jones certified two questions:³

(1) whether an employer is “strictly liable” under 296-126-092 whenever

³ Judge Jones decided to certify these issues because there was no case carrying “the voice of the Washington Supreme Court with regard to the specific issue in this matter.” Dkt 73 at 3. His decision to certify did not reflect any doubt that his thorough discussion of Washington’s meal break law was correct. Instead, Judge Jones explained that he “found several Washington state cases that decidedly determined this issue,” “is skeptical

an employee does not take a timely meal break; and (2) absent strict liability, whether an employee has “the burden to prove that his employer did not permit the employee an opportunity to take a meaningful break” under 296-126-092. Under RCW 2.60, this Court addresses these specific questions based on the facts in the certified record.

Rather than directly addressing these questions or accurately discussing the facts in this case, Brady spends most of his brief reciting platitudes about employee rights, discussing rest period cases that do not apply here,⁴ taking snippets of language from meal period cases out of context,⁵ and mischaracterizing the factual record (including Judge Jones’s decision)--all apparently in the hopes of prejudicing this Court and obscuring the facts and law that apply here. To be clear, this is not a case like *Pellino v. Brink’s, Inc.*, 164 Wn.App. 668, 267 P.3d 383 (2011), where armored car drivers with guns had to remain diligent, were always “engaged in active work duties and did not receive any meaningful break.” Dkt 62 at 7. AutoZone maintained a relaxed retail store environment and

that the Washington Supreme Court will issue an order adverse to” those decisions, and is “doubtful that the state supreme court would issue a ruling with such impractical consequences” (*i.e.*, where “unwieldy variables associated with punch card data showing breaks missed by one or two minutes would make a strict liability theory untenable”).

⁴ Brady relies heavily on three rest break cases (*Demetrio v. Sukuma Bros. Farms, Inc.*, 183 Wn.2d 649, 355 P.3d 258 (2015); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002); *Washington State Nurses Ass’n v. Sacred Heart Medical Center*, 175 Wn.2d 822, 287 P.3d 516 (2012) (“*WSNA*”)) that are inapposite. Rest breaks are distinct from meal breaks: rest breaks must be scheduled and cannot be waived.

⁵ Judge Jones expressed concern about Brady’s “selective quotes” from cases. Dkt 62 at 7. Brady repeats the same pattern of out-of-context citations in his brief here.

regularly scheduled and provided 1-hour meal periods. Instead, the only issue in this case is whether AutoZone violates 296-126-092 on a class basis by allowing some employees to skip meal periods or work more than 5 hours before taking meal breaks when (1) AutoZone policy and schedules provide for timely meal periods “free from coercion or any other impediment” but (2) AutoZone allows adjustment of schedules to meet the needs and desires of the AutoZoners in its stores. Dkt 62 at 9, 14.

In response to the first certified question, this Court should hold that 296-126-092 does not impose strict liability whenever an employee does not take a meal period that mirrors its timing and other requirements. Before Judge Jones and in his brief, Brady argued that an employer has a “mandatory obligation...to ensure that employees take meal breaks” and that the passage of more than five hours (by even a minute) between time clock punches proves a violation of 296-126-092. Dkt 62 at 5. Judge Jones rejected Brady’s position because it was contrary to all authority, and would lead to absurd results. Under Brady’s theory, an employer violates 296-126-092 if: it allows an employee to take a late lunch to attend a school meeting, care for a child, or fit in a doctor’s appointment;⁶ it allows an employee to skip lunch and go home early;⁷ it schedules a timely meal

⁶ Brady’s theory appears to conflict with the goal of accommodating employee needs under family medical leave, sick leave, disability, and similar laws.

⁷ Brady testified he asked to skip lunches so he could go home early. Dkt 46-19 at 80.

period, but the employee punches out at 5:01 without any explanation;⁸ it schedules an employee to close a store 4.5 hours after a meal period, but the employee waits to punch out after 5 hours;⁹ it allows an employee to take a paid meal break on the clock;¹⁰ or an employee does not record meal period punches for any reason.¹¹ This is simply not the law. As the Department of Labor and Industries (“DLI”) explains on its website:

Can a worker choose to give up his or her meal period?

Workers may give up their meal period if they prefer to work through it and if the employer agrees.

<http://www.lni.wa.gov/Workplacerrights/Wages/HoursBreaks/Breaks/>.

Similarly, DLI Administrative Policy ES.C.6 at 4 (Dkt 46-19 at 155-59) states that “[e]mployees may choose to waive the meal period requirements” and, as Judge Jones found, every court to address the issue has recognized that employees may choose to skip meal periods if they want.¹² Despite repeatedly arguing that employers must “ensure” that employees take meal breaks, Brady belatedly admits in his conclusion (at

⁸ After filing his lawsuit, Brady had many days where he punched out at 5:01 or minutes later despite being scheduled for and directed to take timely meal breaks. Brady could not say why he punched out late and admitted that no one told him to do so. Dkt 46-19 at 54-56, 64-65, 66, 81-82.

⁹ After filing his lawsuit, Brady (as a closing manager) punched out more than 5 hours after his meal period because he was printing materials his attorneys asked him to gather from company computers. Brady claims this as a “violation” of 296-126-092 even though he went beyond his scheduled closing time for personal reasons. Dkt 46-19 at 66-68.

¹⁰ Brady testified that, at times, he took paid meal breaks. Dkt 46-19 at 9-11. He also complained that co-workers took unauthorized, paid meal breaks. *Id.* at 41-43.

¹¹ Brady testified this happened to him on his first day of work. Dkt 46-19 at 52-54.

¹² In contrast, DLI and court decisions hold that rest periods may not be waived. *See* DLI Admin. Policy ES.C.6 at 4 (“Employees may not waive their right to a rest period.”). This distinction is why Brady’s heavy reliance on rest break cases is misleading.

45) that 296-126-092 “is not a strict liability regulation.” He should be held to that admission.

In response to the second certified question, this Court should hold that (as with any plaintiff asserting a claim) an employee carries the initial burden of proving a violation of 296-126-092 (*i.e.*, that the employee was not “allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift” or was “required to work more than five consecutive hours without a meal period”). The Court should further hold that, in the context of this case -- where Brady offered nothing but unexplained time punches and AutoZone provided evidence of a compliant meal period policy,¹³ a practice of regularly scheduling timely meal periods, and testimony and written waivers from over 500 employees who want a flexible approach to meal periods -- Brady has “the burden to prove that [AutoZone] did not permit [AutoZoners] an opportunity to take a meaningful break as required by” 296-126-092. Any other result would punish employee-focused employers (like AutoZone) that work to address employee needs and

¹³ Brady argues (at 3-4) that AutoZone’s policy for second meal breaks was inconsistent with 296-126-092; however, Judge Jones rejected Brady’s reading of the policy and did not certify that issue to this Court. Dkt 62 at 14; Dkt 73 at 5. Regardless, Brady’s argument depends on the assertion that AutoZoners received a second meal period “only after they worked more than 11 consecutive hours,” but the policy allows the second break “before or during the overtime” and the only evidence submitted establishes that second meal breaks were taken between the eighth and eleventh hours. Dkt 46-3 at 7.

requests in a flexible manner and allow a disgruntled employee (like Brady)¹⁴ to interfere with the interests of his co-workers.

II. STATEMENT OF THE CASE

A. AutoZone operates diverse and autonomous auto parts stores

AutoZone operates 81 auto parts stores with over 800 employees at one time. Dkt 46-3 at 2-3 (¶2). Each store is very different:

Some are small retail stores with 6-7 employees who work as a family; others have retail and commercial operations, with 10-15 employees (some who deliver parts to commercial accounts); and other HUB stores have 40-50 employees and include warehouse and supply operations in addition to retail and commercial operations.

Id. Brady offered no testimony from other employees, and has not talked to other AutoZoners about this case. Dkt 46-19 at 12. AutoZone, on the other hand, submitted extensive evidence from AutoZoners demonstrating that meal breaks are timely scheduled, allowed, and compliant with the regulations. Dkt 46 at 5-13 (¶11-23), Dkt 46-1 to 46-2 (Ex A1-A54).

Each AutoZone store is run by an exempt store manager. All other employees are non-exempt. Dkt 46-3 at 4-5 (¶4). Brady is a part sales manager (“PSM”). Dkt 46-19 at 21. PSMs act as assistant managers, and help store managers with supervision, scheduling, and opening and closing

¹⁴ Brady did not get along with his managers or co-workers. Dkt 45 at 2. He complained that other AutoZoners took too much break time, including unauthorized paid meal breaks. Dkt 46-19 at 41-43. And, his co-workers complained about “the toxic work environment with Mike” and explained that he “is not representative of” and “seems to hold views different than the other employees.” Dkt 46-2 at 40-41 (¶8).

of the stores.¹⁵ Dkt 46-19 at 26-27 (must have a manager or PSM in the store at all times).

AutoZone stores have unique characteristics and address issues differently depending on the manager and team.¹⁶ Dkt 46 at 5 (¶11). Store managers handle scheduling and meal breaks differently. *Id.*; Dkt 46-19 at 19, 51. Managers may or may not accommodate employee requests for specific schedules, to vary meal break times and length, to switch scheduled shifts or meal periods, to skip lunch, or to leave early. Brady's own experience demonstrates these differences. Brady testified: his Kennewick manager strictly adhered to company policies, scheduled timely meal breaks, instructed employees not to go over 5 hours without a break, reminded employees when to take breaks, and took over with customers to get employees out on time,¹⁷ Dkt 46-19 at 3-4, 15-16; the Monroe manager did not schedule meal breaks and allowed employees to take breaks whenever they wanted, *id.* at 28-29, 33; and Arlington employees were constantly eating and taking paid meal breaks in addition

¹⁵ Stores have customer service associates who handle retail sales, and some also have specialized employees: commercial sales managers in commercial stores; warehouse employees in hub stores that supply other AutoZone stores; and commercial and hub drivers who deliver parts. Dkt 46-3 at 4-5 (¶4). Brady does not know about non-retail jobs, including how they handle meal breaks. Dkt 46-19 at 22-24.

¹⁶ *E.g.*, Dkt 46-1 at 53 (¶4) ("AutoZone relies on its retail managers, many of whom manage small operations like mine, to carry out its corporate policies, and having a good team of employees makes all the difference."); Dkt 46-2 at 18 (¶4) ("How effectively Store 4122 operates depends on my leadership and the other team members....").

¹⁷ Brady nonetheless asserts claims in Kennewick for times when he punched out at 5:01.

to their unpaid breaks, *id.* at 41-43, 46-47.

B. AutoZone's policy and practice is to provide 1-hour meal periods in compliance with WAC 296-126-092

During all relevant times, AutoZone has maintained policies that comply with the meal period requirements in WAC 296-126-092. Dkt 46-3 at 6-8 (¶8). AutoZone's Store Handbook and Code of Conduct ("Handbook") provides general rules on scheduling and meal periods, references an "Exceptions" document for Washington, and emphasizes: "Note: AutoZone complies with applicable state and federal laws." *Id.* ¶8; Dkt 46-4 at 2-11 (Ex A). The Handbook further states:

Management schedules breaks with consideration for work demands and customer service. AutoZoners receive paid breaks and an unpaid lunch period based on the number of hours worked in a given day and **in accordance with any applicable state laws.**

Id. (emphasis added). This commitment is further reflected in a legal compliance section of the Handbook, which states:

AutoZone complies with applicable federal, state and local laws pertaining to its business and complies with applicable orders and regulations.... AutoZoners must adhere strictly to all applicable laws and regulations including all employment laws in effect where AutoZone does business. This requires adherence to both the letter and spirit of the law.

Id. AutoZoners are required to review the Handbook and acknowledge that they have read, understand, and will comply with its contents. *Id.*

This general commitment to provide meal periods in compliance

with state law has been further reflected in different versions of a Washington “Exceptions” document that have been in place since 2008, and that employees are also required to review and acknowledge. As the Regional HR Manager Laureen Iannucci explained,¹⁸ these AutoZone documents establish the following basic meal period expectations:

- “An AutoZoner who **works more than...5 consecutive hours** per day... **Is provided a meal period** of not less than...30 minutes,” which means AutoZone provides for a meal period (first, second, or third) every time an employee works five consecutive hours (which is what 296-126-092(1) and (2) provide).
- An initial meal period should “be given at a time not less than 2 hours nor more than 5 hours from the beginning of the shift” (which is what 296-126-092(1) states).
- “An AutoZoner who works more than...11 consecutive hours per day...Is provided a meal period of not less than...60 minutes, to be given **before or during the overtime**,” which means employees who anticipate working long enough to need a second meal break can take it after 8 hours of work even if they have not worked 5 consecutive hours (which is what 296-126-092(3) says).¹⁹

Dkt 46-3 at 5-7 (¶8), Dkt 46-4 at 12-23 (Exs B-E). Subsequent versions of the Exceptions document changed some language but did not alter the

¹⁸ Ms. Iannucci was deposed individually and under Rule 30(b)(6). Her testimony on the meaning of the Exceptions documents is of great importance because, as noted on each document, she was responsible for interpreting and addressing questions about them. Brady implies (at 6) that Ms. Iannucci ignored meal break issues. Not true. She worked to assure full compliance with the law. Dkt 46-3 at 9-12 (¶11).

¹⁹ Brady claims (at 4-5, 43) that AutoZone’s second meal period policy is based on the meal break regulation for agricultural workers. No evidence supports this assertion: it is pure fiction. The language that the meal period should be given “before or during the overtime” is from 296-126-092(3) and is not found in the agricultural regulation, WAC 296-131-020. The reference to 11 hours of work is not from the agricultural regulation, but simply the normal 8 hour shift at AutoZone with the “three or more hours longer than a normal work day” referenced in 296-126-092(3) added to it. Dkt 46-3 at 6-8.

basic expectations.²⁰ *Id.* Ms. Iannucci interpreted the policies consistently, instructing managers and employees to follow these basic expectations. *Id.*

Beyond the guidelines set forth in the Handbook and Exceptions documents, the Northwest Region established other expectations, including that unpaid meal periods should typically be 60 minutes rather than 30 minutes long and store managers may make exceptions to the meal period policy to meet the needs of their store employees. *Id.* at 8-9 (¶10).

Thus, if AutoZoners worked 5 hours at the start of a shift or after a meal period, AutoZone policy allowed for a meal period. *Id.* at 6-8 (¶8).²¹

C. As expressly allowed by DLI and the courts, AutoZone managers try to accommodate employee needs and requests

AutoZone uses computerized systems to help with scheduling, but schedules (including meal period schedules) are ultimately prepared and managed by store managers or PSMs (such as Brady). Dkt 46-3 at 3-4 (¶3). Before initial schedules are prepared each week, AutoZoners are allowed to and often make specific scheduling requests for days and/or

²⁰ AutoZoners were required to review and acknowledge the Handbook and Exceptions and had on-line access to those documents. Many stores posted a copy of the Exceptions or a summary meal period poster that reminded employees “It is YOUR responsibility to take a meal break,” explained when employees should take breaks, and referred them to the Handbook and Exceptions for details. Dkt 46-3 at 6-8 (¶8), 24-25 (Ex. F). Stores also displayed the State’s legal compliance poster that references meal periods. *Id.*

²¹ Brady knew this was the law in Washington before he came to AutoZone, understood that AutoZone policy required a meal period not more than 5 hours after starting a shift, and believed other employees knew this as well. Dkt 46-19 at 7-8.

hours off.²² *Id.* Store managers have discretion, and differ in how they handle these requests. *Id.* Initial schedules provide a 1-hour, unpaid meal period for every AutoZoner who is scheduled to work over 5 hours that is placed between the end of the second and fifth hours of work. *Id.* After the computer system prepares drafts, store managers review and modify the weekly schedules to address needs at their stores. *Id.* Based on these store-level changes, the schedule could at times provide for a meal break outside the 5-hour period, but at employee request. *Id.*

Even after weekly schedules are set, store managers often try to be flexible and allow AutoZoners to take meal periods when they want them, and to accommodate their needs.²³ *Id.* at 3-4 (¶3), 8-9 (¶10). This differs by store, which use different methods to track meal break times.²⁴ *Id.*

²² *E.g.*, Dkt 46-1 at 8 (¶6) (“employees ask to modify the timing of their meal periods depending on their personal circumstances”); *Id.* at 40 (¶4) (“I take into account employee requests for time off or other flexibility (such as appointments)”); *Id.* at 87 (¶5) (“Some employees have told me they do not want to take their meal period within the five-hour window and prefer flexibility in scheduling.”); *Id.* at 174 (¶9) (“managers work with employees to accommodate time off, or allow an early or late lunch, so that employees can attend appointments, pick up kids, and [do] other personal errands”).

²³ *E.g.*, Dkt 46-1 at 72 (¶5) (meal periods “are scheduled...between two and five hours,” but “[s]ometimes employees request their meal period earlier or later than scheduled”); *Id.* at 183 (¶4) (“flexibility if an employee needs to take their meal period earlier or later than scheduled to attend a doctor’s appointment or attend to other personal business”); *Id.* at 125 (¶4) (“I am a diabetic and need to take my meal periods on a regular basis..., I prefer having the flexibility to take a meal period earlier or later depending on the day and my personal circumstances.”).

²⁴ *E.g.*, Dkt 46-2 at 73-74 (¶9) (“At my store, meal periods are handled in a different way than any other AutoZone store where I have worked.... I create a graphic drawing using colors to reflect meal periods in a way that makes it easier to identify when each employee is scheduled to take a meal period and which employees are currently on their meal period.”); *Id.* at 133 (¶4) (“Each day, the manager-on-duty schedules one-hour meal periods for employees around rush times using the Captain’s Log.”).

AutoZoners in Washington State are not asked or required to work more than 5 hours without a meal period. *Id.* at 6-8 (¶8); Dkt 46 at 13 (¶23).

Over 500 AutoZoners have waived Washington meal period requirements in writing and many more have done so verbally.²⁵ Dkt 46-3 at 8-9 (¶10), Dkt 46-5 to 46-18 (Ex G). When Brady first started working at AutoZone, his store manager told everyone they could sign a waiver if they wanted to work through lunch. Dkt 46-19 at 13. Brady has heard of AutoZoners waiving meal period requirements, but has never signed a waiver himself and does not know whether co-workers have waived the requirements. *Id.* at 37. Brady testified that people trade shifts and take on extra parts of shifts, and that this can cause people to go over the 5-hour period. *Id.* at 38-39. But, he admitted this is fine as long as the people agree or waive the timing requirement in writing or verbally. *Id.* at 39-40.

D. Brady's "evidence" of "violations" does not prove anything

The primary evidence that Brady sought to admit in support of class certification was extracted from time records that were converted into Excel files and analyzed under a complex protocol with specially

²⁵ *E.g.*, Dkt 46-1 at 83-84 (¶8) (employees "have told me they wanted to waive the meal period timing (and even completed handwritten waivers) and that they would prefer to work through the second meal period...so they can clock out earlier at the end of their shift. These waivers were voluntarily given by employees who expressed this preference and I never put any pressure on or otherwise encouraged an employee to complete a waiver."); *Id.* at 96-97 (¶7) ("Two employees told me they understood their rights to take meal periods in a certain timeframe and that they wanted to waive those rights."); *Id.* at 134 (¶6) ("On multiple occasions, I have requested to waive my meal period and told my manager I just wanted to continue working until my shift ended.").

created software. Brady attempted to lay the foundation for, authenticate, and introduce the ultimate results of this process through the declaration of his attorney, Christie Fix. Dkt 31. Ms. Fix claimed proof of 150,000 meal period violations,²⁶ and was clearly trying to testify as an expert. It was improper, even if qualified, for her to be both expert witness and attorney in this case. AutoZone moved to strike this “evidence” of “violations,” Dkt 45 at 11-12, and Brady provided this explanation:

The reference in the Fix and other declarations filed by plaintiffs to “meal break violations” were not legal conclusions. They were rather a short-hand reference to times where AutoZone’s payroll records showed the employee as having more than five hours without any record of a meal break.

Dkt 49 at 7. In other words, “violations” is used loosely in Brady’s declarations and does not mean that any legal violation has occurred. Thus, the data created by Brady’s counsel (even if accurate and admissible) merely shows when over 5 hours (even by a minute) passed between an AutoZoner punching in and punching out. Nevertheless, in his current brief, Brady once again trumpets his proof of “150,000 meal break violations.” These are not violations at all!²⁷ Uncontroverted testimony establishes many reasons why the passage of 5+ hours on a time clock

²⁶ She declared “on the basis of personal knowledge” that a “meal break violation occurs when an AutoZone employee punches in to work, and punches out more than five hours later without an intervening unpaid meal break.” Fix Decl. ¶19. This is both an improper legal conclusion and utterly false. Dkt 46-3 at 9-11 (¶11).

²⁷ While focusing on 150,000 punches reflecting 5+ hours, Brady ignores that the vast majority of time punches (perhaps 90%) show less than 5 hours between punches. These timely punches evidence the validity of AutoZone’s meal period practices.

does not equal a meal period violation. Dkt 46-3 at 9-11 (¶11). In fact, Brady's own testimony demonstrates why his counsel's time punch data will not work as proof of "violations" on an individual or class basis:

- System adjustments for work categorized in different ways, such as inventory time, can appear as blocks of time even though unpaid meal breaks were taken. Brady admitted it would be unfair to count such adjustments as a "violation." Dkt 46-19 at 78-79.
- Lump amounts of time are put in to the system manually. On his first day at AutoZone, Brady did not have a code to enter his time so it was input manually. *Id.* at 52-54. The record shows a block of 7:45, but no violation occurred that day because Brady believes he took a timely meal period. *Id.*
- Brady received paid meal periods when he worked open to close without an off-the-clock break. *Id.* at 9-11. Because he did not punch in and out for lunch, he counts these as violations. *Id.*
- Brady sometimes requested to work through lunch to leave early. *Id.* at 80. His counsel counts these as violations.
- AutoZoners trade shifts, which can cause them to go over 5 hours and will register as a violation, but Brady agrees no violation occurs if they agreed to it. *Id.* at 38.
- AutoZoners who are scheduled for timely meal breaks, including Brady, go over 5 hours because they lose track of time, or get busy and forget to go. *Id.* at 38, 14. Ironically, Brady does not wear a watch. *Id.*
- Employees frequently eat on the clock and, at times, take full 30-minute breaks on the clock in addition to any unpaid meal break. So, even if their unpaid break is outside of the 5-hour period, there is no violation of the regulation.²⁸

²⁸ For example, Dave Rubbelke took meal and smoke breaks that added up to between 40 minutes and two hours a day. Dkt 46-19 at 41-43. He would eat noodles and pizza on the clock, which probably took 40 minutes just in the first part of his shift. *Id.* Another co-worker, Scott, would go out for long smoke breaks and eat when he was clocked in. *Id.* at

- Employees sometimes clock in a minute or two early and, when they leave on-time for a meal break scheduled at the 5-hour mark, their time punches go over 5 hours because they clocked in early. The early punches are subject to rounding under DLI Admin. Policy ES.D.1 at 4-6. Brady admits that he sometimes clocks in a few minutes early, *id.* at 25-26, and that coming in early can impact his scheduled lunch. *Id.* at 59-60. Indeed, Brady was written up for clocking in early. *Id.* at 58.

Put simply, the raw time differences Brady presented with his motion are meaningless without substantial additional individual information. Brady admitted there was “no way to know why [an AutoZoner] went five hours and five minutes before she finished her shift” or “why [she] stayed beyond the scheduled time,” just by looking at time punch information. Dkt 46-19 at 33-34. Indeed, even when reviewing his own time punches, Brady could not identify why he went over 5 hours. For example, he reviewed a number of entries showing he worked 1 minute over 5 hours (5:01) before his first meal period, but does not recall why he left 1 minute late, does not recall being asked to do so, and does not recall his manager telling him to work that extra minute. *E.g., id.* at 54-57. Similarly, Brady reviewed records showing he went over 5 hours at the end of the day (so-called “second lunch” instances), but admitted that he would not have exceeded 5 hours if he stopped working when his shift was scheduled to

44-45. This could have added up to 30 minutes. *Id.* at 45. Similarly, Karen would take regular half hour meal breaks, eating pizza and talking on the phone, while on the clock. *Id.* at 46-47. As Brady admitted, “I guess you can count that as a paid break, yeah.” *Id.*

end and could not say why he stayed well after closing until he passed the 5-hour mark.²⁹ *E.g., id.* 64-65 (worked 5:04, but left at 9:32 instead of 9:15), 65 (worked 5:12, but left at 9:42 instead of 9:15), 66 (worked 5:06, but left at 9:38 instead of 9:15). When reviewing another 5:01 entry at the end of a day, Brady admitted that AutoZone did not require him to work over 5 hours that day. *Id.* 81-82. As Brady ultimately concluded when reviewing raw time clock data during his deposition, you have to look at “more than just this document,” including “who you opened with, what was going on that day for sales,” and “what actually happened.” *Id.* at 57.

E. Judge Jones carefully analyzed Washington law and denied class certification because employers are not strictly liable and Brady could not prove liability on a class basis

In his Motion for Class Certification, Brady argued that he could prove liability on a class-wide basis with time clock data alone and that, if a time record showed a 5-hour period between an employee clocking in and clocking out, AutoZone was strictly liable for a “violation” of WAC 296-126-092. Dkt 49 at 8 (“AutoZone is, however, strictly liable for failing to provide meal breaks after five hours at work. It is therefore immaterial whether the employee’s work beyond five hours was ‘voluntary’ or ‘mandatory.’”). As Judge Jones explained Brady’s position:

²⁹ At least once, Brady stayed on the clock and exceeded 5 hours after his shift ended to print documents for his attorneys. Dkt 46-19 at 66-67. He claims this is a meal violation.

Brady argues that the WAC meal period provision imposes a mandatory obligation on the employer to both (1) provide meal breaks and (2) to *ensure* that employees take meal breaks... Thus, under Brady's interpretation of the law, it is not enough for an employer to make meal breaks available and to promote a workplace culture that encourages employees to take those breaks; rather an employer must police its employees and essentially force them to take meal breaks. The policing function proposed by Brady is very specific – if an employee punches out five hours and one minute after the start of his shift, Brady believes this court should hold the employer strictly liable for that meal break “violation.”

Dkt 62 at 5-6. Judge Jones rejected Brady's interpretation of the law:

The court disagrees with Brady's interpretation of the law. Determining whether an employer is responsible for (and legally liable for) a missed meal period is more complicated than what we can decipher from “punch-in/punch-out” data.

Id. at 6. The court found the time punches were not evidence of violations:

Brady offers punch records for AutoZone employees showing when potential meal break violations may have occurred. [] These records show a “violation” any time an employee clocked out one or two minutes after the five hour mark. [] The punch records, however, do not explain why the employee clocked out after the five-hour mark. They do not distinguish between meal breaks taken and not punched, meal breaks not taken at the employee's discretion, and meal breaks not taken because AutoZone denied the employee a meaningful opportunity to take the break.

Id. at 11. Judge Jones found that Brady had not “presented any evidence of an unwritten policy or practice of coercion by AutoZone supervisors encouraging or incentivizing employees to skip breaks.” *Id.* Instead, Judge Jones found that AutoZone provided meal breaks and sought to accommodate the particular needs of AutoZoners:

One of AutoZone's declarants testified: "The managers typically allow for flexibility if an employee needs an alternative time for their lunch. For example, one time I needed to go to a special meeting at my son's school and my meal period was adjusted so that I could do that."...Another...testified: "One of my employees occasionally takes her lunch after she has been working for five hours. She is a mother with an infant child, and occasionally she needs to take a late lunch to coordinate child care needs."³⁰

Id. The court also found substantial evidence that employees waived their meal periods in writing and verbally. *Id.* Judge Jones thus denied class certification, finding that "Brady has failed to meet his burden of identifying a common method of proving AutoZone's liability." *Id.*

Brady filed a Petition Seeking Permission to Appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit denied that Petition.

Brady then moved to certify questions to this Court. Judge Jones granted the motion in part and denied it in part. Dkt 73 at 5. Judge Jones noted that he had "analyzed the law of Washington" to resolve whether AutoZone was "strictly liable under WAC 296-126-092" and "found several Washington state cases that decidedly determined this issue" against Brady.³¹ *Id.* at 3. Judge Jones stated that, while he was "skeptical that the Washington Supreme Court will issue an order adverse to the

³⁰ Under Brady's theory of Washington law, such beneficial accommodations would not be possible and working conditions would become materially worse for employees.

³¹ Citing *Demetrio*, 183 Wn.2d 649; *Pellino*, 164 Wn.App. 668; *Frese v. Snohomish County*, 129 Wn.App. 659, 120 P.3d 89 (2005); *White v. Salvation Army*, 118 Wn.App. 272, 75 P.3d 990 (2003), *rev. den.* 151 Wn.2d 1028 (2004); *Brown v. Golden State Foods Corp.*, 186 Wn.App. 1004 (2015) (unpublished); *Eisenhauer v. Rite Aid Hdqtrs Corp.*, 2006 WL 1375064 (W.D.Wash. 2006).

many appellate courts below,” an issue of “considerable weight” under state law like this should be decided by the Supreme Court. *Id.* In his Order, Judge Jones was clear about Brady’s failure to present evidence of any meal break violations against AutoZone:

Mr. Brady did not present “any evidence of an unwritten policy or practice of coercion by AutoZone supervisors encouraging or incentivizing employees to skip breaks.” Moreover, Mr. Brady did not offer punch records that were consistent with his theory of meal break violations. The Court did not ask that Mr. Brady prove the reason that he did not receive each timely meal break, but the Court did ask that Mr. Brady proffer something more than conjecture or conclusion.

Id. at 4. Judge Jones then rejected Brady’s proposed certified questions and certified the two questions currently before the Court.

III. ARGUMENT

A. Standard of Review

The decision whether to answer certified questions of law pursuant to chapter 2.60 RCW is within the discretion of this Court; however, the court lacks jurisdiction to go beyond the questions certified. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000); RAP 16.16(a). Because the federal court retains jurisdiction over all matters except local questions that are certified, this Court should only address those arguments necessary to answer the certified questions. *Id.*

The Court “consider[s] the legal issues not in the abstract but based on the certified record provided by the federal court.” *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). Thus, this Court is charged with deciding whether “an employer [is] strictly liable under WAC 296-126-092” and whether an “employee carr[ies] 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,” not in the abstract, but based on the evidence provided by the parties here and based on the factual findings of the district court.

Judge Jones found no evidence that meal periods were discouraged or systemically denied. Indeed, the court recognized substantial evidence of AutoZone providing meal periods while accommodating the scheduling needs of its employees. The undisputed evidence shows that: AutoZone schedules and provides meal periods; AutoZoners are completely relieved of work duties; meal breaks last at least 30 minutes (the practice is for 60 minutes); and AutoZoners are not prevented or discouraged from taking breaks, but are actually encouraged to take them. Brady testified that his Kennewick manager scheduled timely meal breaks, reminded people to take their breaks, and took over helping customers to allow employees to go to lunch on time. Dkt 46-19 at 3-5, 15-16.

This Court should answer the certified questions in a way that preserves employees' ability to manage their personal needs by skipping or asking to adjust the timing of their meal periods, and preserves an employer's ability to accommodate those requests. Question one should be answered "no." Question two should be answered "yes."

B. Certified Question #1 should be answered: "No, there is no strict liability under WAC 296-126-092"

Despite Brady's repeated arguments that employers must "ensure" that employees take timely meal breaks, he abandons that position in the conclusion of his brief, where he admits (at 45) that "WAC 296-126-092 is not a strict liability regulation." That concession was unavoidable because there is no basis for imposing strict liability under 296-126-092.

1. The plain language of WAC 296-126-092 does not require employers to force employees to take timely meal breaks

WAC 296-126-092 provides in relevant part:

Meal periods—Rest periods.

(1) Employees shall be allowed a meal period of at least thirty minutes which commences no less than two hours nor more than five hours from the beginning of the shift. Meal periods shall be on the employer's time when the employee is required by the employer to remain on duty on the premises or at a prescribed work site in the interest of the employer.

(2) No employee shall be required to work more than five consecutive hours without a meal period.

(3) Employees working three or more hours longer than a normal work day shall be allowed at least one thirty-minute meal period prior to or during the overtime period.

(4) Employees shall be allowed a rest period of not less than ten minutes, on the employer's time, for each four hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

This Court interprets regulations using the same rules it uses to interpret statutes. *Demetrio*, 183 Wn.2d at 654. “First, [it] examine[s] the plain language of the regulation; if that language is unambiguous it controls.” *Id.* The plain language of the regulation does not support an interpretation that there is strict liability for varying the timing of a meal period. WAC 296-126-092 states that employees “shall be allowed a meal period” and that “[n]o employee shall be required to work more than five consecutive hours without a meal period.” Under a plain meaning analysis, “allowed” does not mean “ensure” or “forced to take.” Similarly, “[n]o employee shall be required to work more than five consecutive hours” does not mean that an employer must force employees to take a meal period within that time frame. This regulation could have easily stated that employees “shall take” a meal period rather than “be allowed,” and that employees “shall be required to take a meal period within five hours” rather than “shall not be required” to work longer without one.

If the plain meaning of this language is not clear, it is appropriate to consult a dictionary. *Zachman v. Whirlpool Financial Corp.*, 123 Wn.2d 667, 671, 869 P.2d 1078 (1994). The dictionary definition of “allow” is “1. To let do, happen, etc.; permit; let.” Webster’s New World College Dictionary (4th ed. 2001). The definition is not “force, compel, or ensure.” “Require” is defined as “1. To ask or insist upon, as by right or authority; demand; 2. To order; command.” *Id.* Thus, there can be no command to work longer than five hours without a meal period, but the regulation does not require a command to take a meal period.

As used for meal periods, “be allowed” and “not required” give clear direction to employers, but do not restrict the freedom of employees to take meal periods if and when they want. An interpretation that requires an employer to restrict the freedom of employees regarding the taking or timing of meal periods would contradict the language of the regulation and deny what many employees view as an important benefit (and right).

Another fundamental principle of statutory construction is that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of the statute. *In re Dependency of K.D.S.*, 176 Wn.2d 644, 656, 294 P.3d 695 (2013). WAC 296-126-092 discusses both rest and meal periods. Both types of breaks must “be allowed,” but the regulation also states that rest breaks “shall be

scheduled” within a particular time frame. There is no parallel requirement for meal periods. The lack of scheduling for meal periods is consistent with the permissive nature of these breaks, and inconsistent with a requirement that employers ensure the timing of meal periods. This language also explains why meal and rest breaks are treated differently.

Rather than address the meaning of “allow,” Brady focuses (at 24) on the meaning of “shall,” arguing at length that the requirements of WAC 296-126-092 are mandatory. It is true that “shall” is mandatory; however, the more relevant question is what is mandatory. 296-126-092 makes it mandatory for an employer to “allow” an employee (“shall be allowed”) to have a timely meal break, but does not limit the choice of employees to take, not take, or change the timing of a break, or forbid employers from accommodating the scheduling requests and needs of their employees.³² Thus, the plain language of 296-126-092 does not impose strict liability.

³² Brady argues (at 24) “shall be allowed” is “mandatory,” citing two cases. Neither supports his position. *Harris v. Harris*, 10 Wash. 555, 39 P. 148 (1895), found that one witness was insufficient to prove a lost will because of a “mandatory” requirement that “no will shall be allowed to be proved as a lost will unless its provisions shall be clearly and distinctly proved by at least two credible witnesses.” Two witnesses was the mandatory issue there. *Noble v. Whitten*, 38 Wash. 262, 80 P. 451 (1905), found that “shall be allowed commission” means they are “entitled to it,” not that they must take it. It later states these amounts may be waived. The absurdity of Brady’s position is revealed by other cases discussing “shall be allowed.” For example, *Artis v. Rowland*, 64 Wn.2d 576, 392 P.2d 815 (1964), found a requirement that “a jury trial shall be allowed” means the defendant “is entitled to a jury trial, upon a demand therefor.” Jury trials are not required.

2. DLI does not interpret WAC 296-126-092 as requiring employers to force employees to take timely meal breaks

The plain-language analysis of WAC 296-126-092 is supported by DLI's administrative policy interpreting that regulation. Administrative Policy ES.C.6 repeats the language of the regulation that employees must be "allowed a meal period." *Id.* at 2-3. The only variances from the use of "allow" are in statements that initial meal periods "must be provided between the second and fifth working hour" and second meal periods "must be given within five hours from the end of the first meal period." *Id.* at 3. "Provided" and "given" are both consistent with the use of "allow" in the regulation and throughout ES.C.6. The definition of "provide" is "to make available, supply," and the definition of "given" is "bestowed, presented." Webster's New World College Dictionary. Making the meal period available to an employee is the same as allowing the employee to take the meal period. None of this language supports strict liability.

Indeed, nothing in ES.C.6 suggests any restriction on employee choice. It does not state that employees are required to take meal periods or that employees cannot choose to vary the timing of meal periods for their own convenience. There is simply no support for Brady's assertion that the regulation requires employers to force employees to take meal

periods or that employers violate the regulation if they accommodate employee requests for meal periods outside of the 5-hour time frame.

Instead, ES.C.6 states employees do not have to take meal periods:

Employees may choose to waive the meal period requirements. The regulation states employees "shall be allowed," and "no employee shall be required to work more than five hours without a meal period." The department interprets this to mean that an employer may not require more than five consecutive hours of work and must allow a 30-minute meal period when employees work five hours or longer.

ES.C.6 at 4. The DLI website puts it in layman's terms: "[w]orkers may give up their meal period if they prefer to work through it." Thus, DLI does not interpret 296-126-092 as imposing strict liability.

3. Washington courts have never held that employers are required to force employees to take timely meal breaks

Judge Jones carefully analyzed Washington law and found several cases that "decidedly determined the issue" of strict liability, concluding that Brady's theory was "untenable." Dkt 73 at 3 & n.1 (discussing *Demetrio, Pellino, Brown, Frese, White, and Eisenhower*).

Initially, *White*, 118 Wn.App. at 279, is directly on point and addresses the interpretation of "shall be allowed" in WAC 296-126-092:

WAC 296-126-092 does not require an employer to schedule meal periods for its employees. Rather, it states that "[e]mployees shall be allowed a meal period of at least 30 minutes which commences no less than two hours nor more than five hours from the beginning of the shift." 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). (emphasis in original)

It cannot be clearer than this. “Allowed” means “allowed,” nothing more and nothing less. If there is “no affirmative duty on the employer to schedule meal periods for a specific time,” then there can certainly be no duty to force employees to take meal periods and clock out at a particular time. Instead, *White* holds that employers must make meal periods available and “cannot prevent” employees from taking them.

White’s holding does not detract in any way from an employer’s obligation to comply with the meal period regulation. This was recognized by *Pellino*, 164 Wn.App. at 691, when it (in discussing *White*) stated that “while an employer does not have an obligation to schedule meal periods...the employer must provide breaks that comply with the requirements of ‘relief from work or exertion.’” Brady argues (at 28) this statement by *Pellino* “directly rejected the [district court’s] interpretation of *White*.” But the section quoted from *Pellino* merely distinguishes *White* from the facts in *Pellino* and shows that the *Pellino* court recognized that the issue in *White* was scheduling (relevant here) and the issue in *Pellino* was ensuring “relief from work or exertion” (not relevant here). *Id.*

No court, including *Pellino*, has disagreed with how *White* interpreted “allow” in the regulation or its holding that meal periods need

not be scheduled. *Id.* This Court denied review of *White*, and its interpretation has been consistently upheld for 13 years.

Brady asserts (at 29) that *White* is distinguishable from this case because that employer provided employees with timely meal periods. Not true. In *White*, 118 Wn.App. at 275, the employees worked full shifts without any recorded breaks, but had unscheduled “time during which they could rest, eat, or attend to personal matters.” Under Brady’s theory of strict liability, every Salvation Army employee would have had daily meal period “violations” because they worked more than 8 hours between punching in and punching out each day. Despite such alleged “violations,” *White* held that the employer fully complied with 296-126-092.

Eisenhauer, 2006 WL 1375064 *2, followed *White* and supports its interpretation. That case held that “WAC 296-126-092 does not require an employee to take a meal break. Instead, the language of the statute is permissive... [t]hus, there is no affirmative duty either for the employer to schedule a meal period, or for the employee to take a lunch break.”

Eisenhauer shows that Brady’s theory of the law is wrong. It held that an employee who chose to eat at a time that did not comply with the regulation implicitly waived any claim, and his employer was not

responsible for forcing him to go to lunch at a particular time.³³ *Id.* at *2-3.

Eisenhauer focused on employee choice:

Plaintiff was simply required to attend to his pharmacological duties while he would “grab a bite here [and] grab a bite there” and take his formal meal break at 3:00 p.m. [citations omitted]. Mr. Eisenhauer chose not to take a lunch break at the traditional noon hour but to instead cut his day in half. Viewed objectively, he waived his right to go back and seek additional compensation for the breaks he chose not to take.

Id. at *3. Brady criticizes (at 35) *Eisenhauer* for accepting that an employee may implicitly waive a meal period, claiming that ES.C.6 contradicts implicit waiver. But nothing in ES.C.6 is inconsistent with implicit waiver. In fact, *Pellino*, 164 Wn.App. at 697, recognized “implied waiver” of meal periods as long as there are “unequivocal acts or conduct evidencing an intent to waive.”

Similarly, *Brown* follows *White* and further supports its interpretation of 296-126-092. Judge Jones reviewed this case and found that it “distinguished *Pellino* based upon the facts...and reaffirmed that employers have no duty to police the taking of breaks.”³⁴ Dkt 62 at 8.

³³ Interestingly, in *Eisenhauer*, 2006 WL 1375064 at *2, plaintiff was a non-exempt manager (like Brady) who “was aware of the state requirements for breaks (and was in fact responsible for ensuring that the pharmacy’s operations complied with these and other regulations) [and] [who] admits that he was not ever told not to take these breaks.” Similarly, Brady was often in charge of the store (especially at closing) when his alleged meal period violations occurred and testified he does not know why he exceeded 5 hours.

³⁴ Although Brady claims (at 34) Judge Jones inappropriately “heavily relied” on this unpublished decision, the court only included a short paragraph on *Brown* that simply confirms the interpretation articulated in published opinions like *White*. Regardless, it was perfectly appropriate for the court to consider *Brown*. The Washington rule barring

As Judge Jones noted, this Court's decision in *Demetrio* further dispels Brady's argument that employers must police breaks and force employees to take them. Dkt 52 at 8-9. This Court, in deciding an agricultural rest break payment issue, thoughtfully discussed the regulation, administrative policy, and case law, including a statement that *Pellino* held that "the regulation' imposes a mandatory obligation on the employer' to provide a paid rest break' 'on the employer's time.'" 183 Wn.2d at 658 (quoting *Pellino*, 164 Wn.App. at 688). This Court did not state that "to allow" or "to provide" breaks means that employers must stand over and force employees to take rest breaks, rather the Court stated:

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."

Id. This states a clear obligation for employers: schedule (not required for meal periods), affirmatively promote, and do not interfere with rest breaks.

Ironically, although the Court established these higher standards for

citation of unpublished opinions does not apply to judges or federal courts. Washington courts addressing this issue rely on GR 14.1, which states that "[a] party may not cite as an authority an unpublished opinion of the Court of Appeals." (emphasis added). The rule is limited by its plain language to parties. It says nothing about federal courts (or state judges) citing unpublished opinions as persuasive precedent when deciding an issue of state law. Moreover, the Ninth Circuit expressly holds that federal courts may consider unpublished state court decisions. *E.g.*, *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) ("we may consider unpublished state court decisions"). Judge Jones cited this Ninth Circuit precedent. Dkt 52 at 8.

agricultural rest breaks, AutoZone satisfies all three criteria: it scheduled timely meal periods, promoted them, and Brady offered no evidence that AutoZone interfered with them. Regardless, if Brady's strict liability theory was correct, this Court could have simply stated in *Demetrio* that employers must force employees to take rest breaks when scheduled. It did not do so. Instead, it discussed affirmatively promoting them.

4. Brady's interpretation of *Pellino* is wrong: it does not require employers to force employees to take timely meal breaks

As he did in briefing to Judge Jones, Brady attempts to expand and contort the *Pellino* decision far beyond its facts. *Pellino* involved constant vigilance, unending work, and no effort to allow paid or unpaid meal breaks. What the *Pellino* court stated in that context hardly translates here, thus Brady's *Pellino* arguments are baseless.

Initially, Brady claims (at 18) that *Pellino* "directly answered whether an employer must ensure its employees take their meal breaks at the times mandated by WAC 296-126-092." Not true. The timing of breaks was not at issue in *Pellino* and it has no such holding.

Next, Brady argues (at 18-19) that *Pellino* holds that employers have a duty to police their employees and force them to take meal breaks. Not true. This is based on an out-of-context quote: "ES.C.6 makes clear that employers have a duty to provide meal periods and rest breaks and to

ensure the breaks comply with the requirements of WAC 296-126-092.” *Pellino*, 164 Wn.App. at 688. But *Pellino* was discussing the sufficiency of paid meal breaks, not the timing of unpaid meal breaks. *Id.* at 680. The language Brady quotes and on which he bases his argument does not refer to the timing of meal breaks, instead it refers to Section 7 of ES.C.6 that addresses employer efforts when “an employee is required to remain on duty during meal periods.” *Id.* *Pellino* then concluded, based on “unchallenged findings of fact,” that because drivers “were always engaged in work duties, they did not receive lawful breaks that complied with WAC 296-126-092.” *Id.* at 690-91. As Judge Jones discussed:

[T]he [*Pellino*] court found that drivers were always “engaged in active work duties” and did not receive any meaningful break “from mental and physical exertion and no opportunity for personal relaxation, activities or choice.” *Id.* at 680. Although the court stated that the WAC meal period provision “imposes a mandatory obligation on the employer,” the court did not state that obligation was to police the taking of breaks. Rather, the “mandatory obligation” is properly read to mean that employers must ensure that employees are given a meaningful opportunity to take breaks (i.e., free from coercion by a supervisor to “eat on the go” and free from a culture that encourages skipping breaks) and to ensure that those breaks comply with the statute (i.e., no active work can be performed and the employees must be able to engage in personal activities and rest during these breaks).

Dkt 52 at 7-8. Brady asserts (at 20) that the court’s reasoning is “untenable” because *Pellino* disapproved of this “very interpretation of WAC 296-126-092.” Again, not true. As discussed above, *Pellino* dealt

exclusively with on-duty meal periods for drivers who “were always engaged in work.” 164 Wn.App. at 691. The issue of “allowing” unpaid meal periods is irrelevant under those conditions and *Pellino* never discussed unpaid meal period requirements or scheduling.³⁵

Brady also makes a perplexing argument (at 20-21) that the fact that *Pellino* affirmed certification of a class action means that it “did not interpret WAC 296-126-092 to require only that employers must provide a ‘meaningful opportunity’ to take meal and rest breaks.” This makes no sense. *Pellino* found that drivers could not take compliant breaks because “unchallenged findings of fact” after trial showed they “were always engaged in work,” and so there was no “meaningful opportunity.” *Pellino* thus provides an example of a class action that would have been certified under the “meaningful opportunity” analysis provided by Judge Jones.

Unlike Brady, Judge Jones conducted a thoughtful review of *Pellino* and the other Division One meal period cases that reach different conclusions on liability based on whether the employees had a meaningful opportunity to take a compliant break. *Pellino* was on one extreme, with

³⁵ Brady also misrepresents (at 25) the Ninth Circuit Court of Appeals’ holding in *Alvarez v. IBP, Inc.*, 339 F.3d 894, 913 (9th Cir. 2003), by claiming that *Alvarez*’s statement that WAC 296-126-092 “evinces a clear, bright-line standard” regarding meal breaks supports Brady’s argument for strict liability. *Alvarez* was merely quoting an amicus brief when it referenced a “bright-line standard,” and the issue in *Alvarez* was whether an unpaid meal break could be under 30 minutes, not the timing or voluntary waiver of those breaks. *Id.* It is undisputed that AutoZone allowed for meal breaks over 30 minutes, and paid for them when employees took them in the store for work purposes. *Id.*

no opportunity (finding liability). *White* allowed freedom for employees, and thus a meaningful opportunity (no liability). *Frese*, 129 Wn.App. at 661 (denying summary judgment to both sides), and *Iverson v. Snohomish County*, 117 Wn.App. 618, 620, 72 P.3d 772 (2003) (affirming summary judgment for employer), fell into the middle ground, with the court finding that the *Iverson* plaintiff had a meaningful opportunity for a meal break but that the evidence in relation to the *Frese* plaintiffs was unclear. When looking at these four cases on a spectrum, it is clear that *Pellino* is not instructive for this case. *Pellino* simply did not address the issue of whether an employer's accommodation of an employee's preferred meal time is a violation of the regulation.

5. This case is not about rest breaks and Brady's extensive citation to rest break cases is not persuasive

Brady argues (at 23-24) that “[a]lthough this case nominally involves only meal breaks, what the Court decides here will apply equally to rest breaks.” Entirely untrue. This case does not involve rest breaks at all. Brady admitted this in his motion to certify questions to this Court. Dkt 68 at 5 (“The instant case involves meal breaks not rest breaks”). Moreover, the focus of the class certification motion (and the motivation behind the certified questions) was the use of time clock data as the sole proof of “violations” of the meal break regulation. Rest breaks are taken

on the “employer’s time” and employees do not clock out for these breaks. So, the issue of proof through time punches is irrelevant to rest breaks. Additionally, there are other fundamental differences between meal breaks and rest breaks. Rest breaks “shall be scheduled,” WAC 296-126-092(4), while there is no scheduling requirement for meal periods, WAC 296-126-092(1). Moreover, meal periods can be waived, but “[e]mployees may not waive their right to a rest period.” ES.C.6 at 4.

Brady misrepresents Judge Jones’s ruling by claiming (at 26) that “according to the district court, employees may effectively waive their right to mandatory rest periods simply by not taking advantage of the meaningful break opportunities that their employer provides them.” Not true. Judge Jones did not make any ruling as to rest breaks, much less that employees have a right to waive rest breaks.

Brady argues (at 23-24) that the similar wording of the meal period provisions of WAC 296-126-092(1)-(3) and the rest break provisions of WAC 296-126-092(4)-(5) means that they should be interpreted the same way. However, Brady ignores the different language regarding scheduled rest (but not meal) breaks. He then argues (at 24) that this Court “has already held that an employer violated WAC 296-126-092 ‘[w]hen the employees are not provided with their mandated rest period,’” (*quoting Wingert*, 146 Wn.2d at 849) and that *WSNA*, 175 Wn.2d at 832, held “that

the employer's duty to 'provide' rest breaks is 'mandatory.'" But none of these authorities support the argument that employers are strictly liable if employees choose to change the timing of, or not take, a meal break, regardless of the circumstance. As discussed above, "provide" means make available, not "ensure" or "force."

Brady's discussions (at 30-31) of *Demetrio*, *Wingert*, and *WSNA* are not relevant because those cases all dealt with rest breaks and not meal breaks. Meal period cases like *White*, 118 Wn.App. at 280, *Frese*, 129 Wn.App. at 670, and *Iverson*, 117 Wn.App. at 623 all distinguished rest break cases like *Wingert*. In any event, the rest break cases do not support Brady's arguments.

Brady asserts (at 30) that "[i]n *Wingert* the employees were provided rest breaks, just not at the times mandated by WAC 296-126-092." In fact, the employees were not allowed compliant rest breaks. They were required by their collective bargaining agreement to wait more than 3 hours before taking an overtime rest break in direct violation of 296-126-092(4). *Wingert*, 146 Wn.2d at 845-46. This rest period case offers no guidance regarding employees who ask to skip or change the timing of their unpaid meal breaks and does not support Brady's argument.

Brady misrepresents (at 30-31) the holding of *WSNA*, arguing it supports strict liability because it ruled that the hospital violated WAC

296-126-092 “by not providing its employees with rest breaks when the regulation requires.” Not true. In *WSNA*, it was undisputed that the employer often required nurses to work through breaks. 175 Wn.2d at 825-26. The only issue was the computation of overtime damages owed due to those skipped breaks. *Id.* There was no issue of timing or employee choice because employees were forced to work through the rest breaks.

Brady’s discussion (at 31-32) of *Pellino* and *Demetrio* also do not support his position. *Pellino*, as discussed above, dealt with the quality of paid on-duty meal periods rather than an employee’s ability to change the timing of or waive unpaid meal periods. *Demetrio* dealt with the meaning of “on the employer’s time” in WAC 296-131-020(2) and whether piece rate pay could compensate for rest periods, and its ultimate holding does not support Brady’s argument that employers must force employees to take a meal period within the 5-hour time frame. Moreover, *Demetrio*, 183 Wn.2d at 658, based its ruling in part on the “purpose” that rest breaks serve in light of how the breaks were used by the employees. The purpose of unpaid meal periods is to completely relieve employees from duty so that they are “free to spend” the time “as they please.” DLI Admin. Policy ES.C.6 at 3. Allowing employees to schedule (or reschedule, or skip) meal periods to accommodate their life needs furthers this purpose. Brady’s request to eliminate flexibility and employee choice will impair that

purpose. As Judge Jones noted, there was undisputed evidence that employees did not just appreciate, but depended on these scheduling accommodations. Dkt 62 at 11 (referencing testimony regarding employees with child care needs).

Put simply, the issues presented here are meal period issues, including time clock issues that have no impact on rest period matters. Similarly, the rest period cases Brady cites are inapposite on the issues addressed here.

6. Strict liability is inconsistent with the right of employees to waive their meal breaks

In true doublespeak, Brady argues that employers must “ensure” that employees take timely meal breaks, while admitting (at 26) that employees can waive their meal period and the timing of their break. Despite his admission, Brady continues to argue that time punches show “violations” despite the fact that (among other flaws) hundreds of AutoZone employees signed written waivers and entered into verbal waivers. Dkt 46 at 11-13 (¶ 22); Dkt 46-3 at 8-9 (¶ 10). Thus, time punches from employees who waived meal periods are being misconstrued as “violations” by Brady.

Moreover, to further his strict liability argument, Brady dramatically overstates the requirements for a meal period waiver. Brady

argues (at 27) that an employee may not “unilaterally ‘waive’ his/her right to a meal period simply by declining to take a meal break on any given day.”³⁶ Brady is wrong.

Initially, as discussed above, an employee does not have to waive a meal break to not take it. The regulation is directed at the employer and requires that the employer allow an employee to take the meal break. There is no obligation imposed on the employee by the regulation.

Second, the discussion of waiver in ES.C.6 contradicts Brady’s formalistic view of waiver:

8. May an employee waive the meal period?

Employees may choose to waive the meal period requirements...

If an employee wishes to waive that meal period, the employer may agree to it. The employee may at any time request the meal period. While it is not required, the department recommends obtaining a written request from the employee(s) who chooses to waive the meal period.

If, at some later date, the employee(s) wishes to receive a meal period, any agreement would no longer be in effect. Employees must still receive a rest period of at least ten minutes for each four hours of work.

An employer can refuse to allow the employee to waive the meal period and require that an employee take a meal period.

ES.C.6 at 4. This provision undeniably allows employees to waive their meal period, and employers are allowed to agree to waivers. Written

³⁶ This does not answer the issue of AutoZone’s hundreds of mutually agreed waivers.

requests are recommended, but “not required.” This necessarily means that verbal waivers are allowed, and employers are allowed to agree to them. Moreover, ES.C.6 states that an “employee may at any time request the meal period,” which suggests a fluid process where employees can enter into waivers, written or verbal, that can be modified as needed for the employee.³⁷ This concept of informal and fluid waivers is entirely consistent with *Eisenhauer*’s finding (and *Pellino*’s endorsement) of implicit waivers if supported by the facts.

C. Certified Question #2 should be answered: “Yes, Brady bears the burden to prove AutoZone did not permit him a meaningful opportunity to take a compliant break”

1. Employees bear the burden to prove meal period violations under Washington law

The answer to the second certified question is obviously yes. As a general matter, plaintiffs bear the burden to prove their claims. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 135, 769 P.2d 298 (1989) (“general burden of proof rules requir[e] the plaintiff to prove all elements of the cause of action”); *Briglio v. Holt & Jeffery*, 85 Wash. 155, 161, 147 P. 877 (1915). Nothing in the language of WAC 296-126-092 or ES.C.6, or in the cases addressing meal period requirements, changes the

³⁷ ES.C.6 also states that an employer “can refuse to allow” the waiver and “require that an employee take a meal period.” For Brady’s strict liability view of the law to prevail, this provision would have to be ignored, or the word “can” read as meaning “must” so that employers must “refuse to allow” waivers and require employees to take breaks.

usual burden of proof for plaintiffs alleging meal period violations.

More specifically, Brady is pursuing an implied cause of action under RCW 49.12 for violations of WAC 296-126-092. With such implied claims, the regulation “prohibits certain types of employer conduct [that] provide the basis for a cause of action” and “if plaintiffs can prove that defendant [engaged in the prohibited conduct], they will have established a clear violation.” *Bennett v. Hardy*, 113 Wn.2d 912, 923, 784 P.2d 1258 (1990) (relied on by *Wingert* in finding an implied cause of action under WAC 296-126-092). Thus, Brady has the burden to prove that AutoZone engaged in conduct prohibited by 296-126-092. This approach to the burden of proof has been repeatedly applied in meal period cases. *E.g.*, *Iverson*, 117 Wn.App. at 622-623; *Frese*, 129 Wn.App. at 670.

For example, in *Iverson*, 117 Wn.App. at 623, the plaintiff brought meal period claims for violation of WAC 296-126-092. The trial court dismissed his claims on summary judgment because he “failed to show any legal reason why he should be paid more for his 30 minute [paid] meal period.” *Id.* at 620. On appeal, *Iverson* claimed that he was entitled to more compensation for his paid meal period because the duties he was required to perform were so extensive that he was actually “on duty” rather than just “on call.” *Id.* at 621. The court of appeals affirmed the judgment because *Iverson* “provided no evidence...regarding the amount

of time he is asked to spend performing these duties during his lunch.” *Id.* at 622. Thus, both the trial court and the court of appeals found that plaintiff had the burden of proof (which he failed to fulfill).

In *Frese*, 129 Wn.App. at 662, the court of appeals affirmed the trial court’s denial of summary judgment to both parties. In distinguishing *Iverson*, the court noted that “Iverson claimed that he did not have time to eat lunch, but failed to prove it,” but *Frese*, “on the other hand, submitted substantial evidence indicating that their lunch period exists in name only.” *Id.* at 664. The court nevertheless found that summary judgment was not appropriate for *Frese* either, because “plaintiffs have not conclusively proved that they never have time to eat.” *Id.* at 670.

The Court of Appeals has thus consistently held that plaintiffs bear the burden to prove meal period violations under WAC 296-126-092. The next question is what do employees need to prove to establish a violation? As discussed above regarding strict liability, the text of 296-126-092, ES.C.6, and the case law all state that employees need to prove that their employer did not “allow” the employees to take a compliant meal period. Judge Jones surveyed the relevant authority and concluded:

[T]he statutory language, when read together with the case law, suggests that an employer’s obligation is to relieve its employees of all duty, relinquish control over their activities and permit them a reasonable opportunity to take an uninterrupted break. The employer’s ‘affirmative obligation’ is to ensure that this

opportunity is meaningful and free from coercion or any other impediment.

Dkt 62 at 9. This Court should adopt this well reasoned standard, and hold that employees have the burden of proving the standard was violated.

2. Brady introduced no evidence of systemic violations

Although Brady may claim that he submitted substantial evidence of “violations,” his alleged evidence is a façade. As admitted by Brady, when his attorney-witness (Ms. Fix) used the term “violation,” she used that term as a short-hand factual description and not as evidence of legal violations. Dkt 49 at 6. As Judge Jones explained, time clock data cannot show legal violations without additional evidence addressing whether and, if so, why 5+ hours passed before a meal break was taken.³⁸ Dkt 73 at 4.

3. California cases on meal break timing are persuasive authority on the burden of proof issue

Court decisions addressing class certification of California meal period claims should be considered as persuasive authority because the states have similar standards. WAC 296-126-092 provides that employees “shall be allowed” meal breaks, and must not “be required” to work more than 5 hours, so “the language is permissive.” *White*, 118 Wn.App. at 280-81. Similarly, in California, an employer’s obligation is to provide a meal period to its employees by offering them a “reasonable opportunity” to

³⁸ Brady testified that some “violations” identified by Ms. Fix were the result of paid meal breaks and his voluntary actions, and did not reflect violations. Dkt 46-19 at 66-67.

take it.³⁹ *Ordonez v. Radio Shack, Inc.*, 2013 WL 210223, *6 (C.D.Cal. 2013) (*citing Brinker*). California cases may provide useful insight on the issues here because, unlike Washington meal period cases other than Judge Jones's ruling, they have analyzed the burden of proof in cases involving meal period claims in relation to the same types of raw time clock data Brady relies upon here. In *Ordonez*, for example:

[P]laintiff contends meal break violations can be "easily identified" from RadioShack's time records, without individualized inquiries, because any missing meal break in the records leads inexorably to the conclusion that RadioShack failed to provide a meal break.

Id. at *7. The court rejected this evidence, stating "plaintiff's expert repeatedly mischaracterizes any late, short, or missed meal periods as 'violations'—in fact, there is no way of determining on a classwide basis whether these were violations, a legal conclusion, or whether individual class members voluntarily opted to start their meal break late, cut it short,

³⁹ Brady is incorrect in his assertion (at 37) that the California Supreme Court's decision in *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 273 P.3d 513 (2012), states a different meal period standard than under Washington law. After an extensive discussion of the text and history of both Labor Code §512(a) and Wage Order No. 5 (Brady ignores the Wage Order), *Brinker* held, consistent with prior federal district court decisions, that these provisions require employers to "provide" meal breaks (just like Washington law), and that an employer satisfies its duty with respect to meal breaks "if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." 273 P.3d at 536-37. The court elaborated on this standard stating "the wage orders and governing statute do not countenance an employer's exerting coercion against the taking of, creating incentive to forgo, or otherwise encouraging the skipping of legally protected breaks." *Id.* at 536. This language mirrors this Court's holding in *Demetrio* (albeit for rest breaks) that "[a] workplace culture that encourages employees to skip breaks violates WAC 296-126-092." 183 Wn.2d at 658.

or not take a break at all.”⁴⁰ *Id.*

D. Brady’s proposed interpretation will hurt, not help employees

Brady’s proposed interpretation is not just contrary to the regulation’s language and long-standing case law, but is also bad policy that would restrict employee choice, put employers in the position of forcing employees to take meal breaks as scheduled, and would invite fraud and abuse. Brady is not trying to help employees.⁴¹ Instead, he appears to be focused on advancing class action litigation regardless of the facts or relevant circumstances.

A ruling that there is strict liability or a reversed burden of proof for meal break cases will necessarily limit employee choice and make working conditions worse. Employers will not be able to accommodate requests for non-standard schedules for child care or health issues, or to just go home early. Employees will have to conform to rigid schedules, forced to clock out and leave work regardless of their preferences.⁴²

⁴⁰ See also *Taylor v. West Marine Products, Inc.*, 2014 WL 4683926, *11 (N.D.Cal. 2014); *Gonzalez v. OfficeMax North America*, 2012 WL 5473764, *5 (C.D.Cal. 2012) (“The fact that a single meal period is not documented by the punch records is by no means conclusive proof that it was missed in violation of the statute.”); *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 646 (N.D.Cal. 2008).

⁴¹ Brady talks about health and safety, but provides no evidence that allowing employees to take meal periods when they want them (whether to care for children, see a doctor, or watch the Seahawks) compromises health and safety. In fact, the agency charged with protecting health and safety, DLI, states that employees are free to skip meal periods.

⁴² For example, an employee working a 6-hour shift will be required to take an unpaid 30-minute meal period even if she would prefer to work without one. And, at the end of a shift, an employee who hits 5 hours will be required to take an unpaid 30-minute break

Employers will become lunch police, not just scheduling and encouraging timely lunches, but sternly monitoring time and disciplining employees who clock out for lunch even a few seconds late.⁴³

There is no question Brady seeks to eliminate employee choice in taking and scheduling meal breaks. Brady expressly argues (at 27) against a standard that allows employees to “unilaterally ‘waive’ his/her right to a meal period simply be declining to take a meal break on any given day.” Instead, Brady wants employers to force employees to take meal breaks within the 5-hour time frame, arguing (at 39) that the employer “can impose disciplinary sanctions up to and including termination against employees who refuse to take...breaks required by law and/or company policy.” So, in Brady’s world, employees should be forced to take the meal breaks when scheduled or fear losing their job.⁴⁴ You want to take a

even if he only has 15 minutes of additional work before he goes home. As demonstrated by the extensive evidence AutoZone submitted, this is not in the interest of employees.

⁴³ Brady relies (at 40) on 29 CFR § 785.13 (a regulation forbidding off-the-clock work) and U.S. Dept. of Labor, Opinion Letter FLSA 2008-7NA (May 15, 2008), as supporting his argument that employers must force employees to take unpaid meal breaks within the 5-hour time frame. These authorities say nothing about the timing of meal breaks. The regulation and the opinion letter stand for nothing more than the self-evident proposition that if an employee works instead of taking an unpaid meal break, that employee must be paid for the work. *White* disposed of similar misleading arguments years ago, 118 Wn.App. at 285 (“The workers direct our attention to federal Department of Labor regulations to support their position. None assist to clarify the precise issue before us. The regulations cited pertain to the question of what constitutes compensable work time, not what is an acceptable rest period.”) These provisions address hours worked and there are no allegations that AutoZone did not pay for hours of work.

⁴⁴ Brady has not articulated how this rigid strict liability approach to meal periods will work with the Family Medical Leave Act, disability laws, or similar provisions that may require accommodations for employees in their meal period schedules.

late lunch to see little Billy's play? You're fired.

In addition to limiting employee freedom and making working conditions worse for employees, Brady's proposed standard will invite fraud. For example, an employee who is scheduled for a meal break that is within the 5-hour period can simply wait until 5:01 to clock out, creating a violation and qualifying the employee for compensation.⁴⁵ Brady often went past 5 hours despite being scheduled for a timely meal break, and has no explanation for his actions.⁴⁶ Dkt 46-19 at 64-65. In fact, despite knowing the law and AutoZone's policy and having brought this lawsuit, Brady continues to work past 5 hours (by a minute or so) and (under his theory) create new violations. *Id.* at 6. He has not informed his store manager of this because his attorneys told him not to. *Id.* at 17-18.

Brady argues (at 41) that failing to hold that WAC 296-126-092 imposes strict liability will "eviscerate" meal break class actions in Washington. But the truth is that only Brady's class action will fail. Other class actions supported by "something more than conjecture or conclusion," Dkt 73 at 4, may be more successful. Brady did not "present[] any evidence of an unwritten policy or practice of coercion by

⁴⁵ See *White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1089 (N.D.Cal. 2007) ("[E]mployees would be able to manipulate the process and manufacture claims by skipping breaks [or waiting an extra minute], entitling them to compensation...for each violation. This cannot have been the intent of the...Legislature and the court declines to find a rule that would create such perverse and incoherent incentives.").

⁴⁶ Additionally, Brady admits requesting to work through lunch at times. Dkt 46-19 at 80. Under his theory, this would qualify as a "violation" and entitle him to compensation.

AutoZone supervisors encouraging or incentivizing employees to skip breaks.” Dkt 62 at 11. He was unable to obtain the testimony of any other AutoZoners to support his claim that meal periods were being handled improperly. In fact, most of his own testimony showed that the company provided compliant meal periods in an atmosphere of encouraging breaks.

Because Brady lacked any real evidence, his attorneys decided to introduce their own testimony that Excel spreadsheets with raw time clock data showed “violations.” But, as it turned out, these “violations” were merely instances where employees clocked out more than 5 hours after clocking in. That is literally all that evidence shows. Nevertheless, in order for his class action to succeed, Brady asks this Court to rewrite Washington law so that these time records can count as “violations” despite the reality that they do not prove any violation of the law. The standard articulated by Judge Jones is a correct interpretation of Washington law, will protect workers, and will not adversely impact meritorious class action litigation. Indeed, as discussed above, the California courts have addressed this very issue and rejected raw time records, on their own, as evidence of “violations” sufficient to establish liability on a class basis. Have meal period class actions ended in California? Of course not. Brady’s arguments should be rejected in the interest of both employees and employers in Washington.

IV. CONCLUSION

For the reasons given above, this Court should answer the certified questions as follows:

1. "Is an employer strictly liable under WAC 296-126-092?"

NO. WAC 296-126-092 does not establish strict liability. More particularly, employees may voluntarily skip or adjust the timing of their meal breaks, and employers are not liable if they so agree.

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?"

YES. Employees have the burden of proving violations of the meal period requirements in WAC 296-126-092. More particularly, they must prove that their employer did not allow them a meaningful opportunity to take a break as required by WAC 296-126-092.

RESPECTFULLY SUBMITTED this 9th day of December, 2016.

K&L GATES LLP

By 

Patrick M Madden, WSBA #21356

Todd L Nunn, WSBA #23267

925 Fourth Avenue, Suite 2900

Seattle, WA 98104-1158

Telephone: 206-623-7580

patrick.madden@klgates.com

todd.nunn@klgates.com

Attorneys for Defendants-Appellees

Autozone Stores, Inc., and Autozoners, LLC

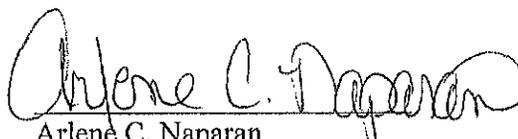
CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2016, I emailed a copy of the Answering Brief of Autozone Stores, Inc. to the following counsel:

Michael C. Subit
Steven Burt Frank
Christie J. Fix
Frank Freed Subit & Thomas, LLP
705 Second Avenue, Suite 1200
Seattle, WA 98104
msubit@frankfreed.com
sfrank@frankfreed.com
cfix@frankfreed.com

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

DATED at Seattle, Washington on this 9th day of December, 2016.


Arlene C. Naparan
Practice Assistant to Patrick Madden

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Cc: msubmit@frankfreed.com; sfrank@frankfreed.com; cfix@frankfreed.com; Nunn, Todd <todd.nunn@klgates.com>; Madden, Patrick <patrick.madden@klgates.com>; Pickett, Stephanie Wright <stephanie.pickett@klgates.com>
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Supreme Court Case No: 93564-5

Filer: Patrick M. Madden, WSBA No. 21356
(206) 623-7580
Patrick.madden@klgates.com

K&L GATES

Arlene C. Naparan

Practice Assistant to Suzanne J. Thomas,
Patrick M. Madden, Todd L. Nunn,
and Ryan D. Redekopp
K&L Gates LLP
925 4th Ave., Suite 2900
Seattle, WA 98104
Phone: 206 370-5916
arlene.naparan@klgates.com
www.klgates.com

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