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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.

AUTOZONE STORES, INC.'S ANSWER TO AMICUS BRIEFS FILED BY FAIR WORK CENTER AND WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION

The Fair Work Center ("FWC") asks this Court to assess whether matters are "meaningful or illusory." AutoZone agrees. In factual determinations that were not certified for review to this Court, Judge Jones found that there was no evidence of an environment that discouraged employees from taking timely one-hour meal periods and, instead, that AutoZone provided a meaningful opportunity for employees to take lunch. In fact, AutoZone had policies that required properly-timed one-hour meal periods, had a scheduling program that scheduled employees for timely meal periods, had posters reminding employees to take meal periods, and did not have work demands or a compensation structure that encouraged (or required) employees to miss meal periods. After carefully reviewing the facts and relevant law, Judge Jones found that there was no evidence that AutoZone denied its employees an opportunity for meaningful breaks.

In contrast, the arguments advanced by the FWC and Washington Employment Lawyers Association ("WELA") are illusory at best. The FWC and WELA ("Amici") briefs assume facts that are not supported by the record and make straw-man arguments that are not supported by the authority they cite. The clear purpose of the Amici arguments is to have this Court judicially modify WAC 296-126-092 to require not only that employers allow and provide timely meal periods, but that they also must

watch over and ensure that every worker actually takes the meal period at the time provided. The Department of Labor and Industries ("DLI") could have included such a requirement in the regulation, but did not. Why? Most likely because such a draconian requirement would deny employees needed flexibility, decrease employee satisfaction and health, and create an unrealistic burden on employers. Beyond this, the Amici policy arguments for judicial redrafting of the regulation ring hollow. The true focus appears to be an effort to advance the parochial interest of class action plaintiffs' attorneys who ask this Court to strip away the rights of employees to flexibly manage and balance their personal and work commitments to make class action certification easier.

II. ARGUMENT

A. FWC and WELA arguments are based on false assumptions

In this case, there is no evidence that employees were not provided with timely meal periods, or that employer demands, productivity pressures, or compensation systems encouraged employees to skip meal periods. Indeed, the undisputed evidence (including from Brady himself) shows that AutoZone employees were provided legally compliant breaks and AutoZone encouraged employees to take breaks:

- AutoZone policies state that employees working more than five hours are provided an initial one-hour unpaid meal period between the second and fifth hour of work, Dkt 46 at 6 (¶12);

- Managers use a computer program to create initial schedules that provide for timely one-hour meal periods, *id.* at 7-8 (¶14, 16);
- Managers make changes to the initial schedules based on specific scheduling requests from employees, *id.* at 7-8 (¶15, 17);
- Meal period schedules in most stores are posted, Dkt 46-1 at 67 ("schedule is…posted"); 72 ("posts a daily schedule");
- Posters in stores remind employees they "must take a 30 minute unpaid meal break to be given not less than 2 hours nor more than 5 hours from the beginning of your work shift," Dkt 46-4 at 25;
- Managers remind employees to take breaks, Dkt 46-19 at 3-4, 15;
- Some managers require employees to take meal breaks when scheduled; others try to be flexible and allow employees to take meal periods when the employee wants, Dkt 46 at 11 (¶21, 22);
- AutoZone's relaxed retail environment allows employees to take paid meal breaks and rest breaks when needed, *id.* at 15 (¶27).[1]

Amici seek to obscure the actual evidence in this case because other work environments (*e.g.*, piecework agricultural operations, vigilant security guards, or regimented production lines) lend themselves better to the argument that forcing meal periods is more important than employee flexibility. But the certified questions must be answered for this case, not for other, hypothetical cases. And in a small relaxed retail store, there is a balance between making sure breaks are taken and providing workers with flexibility. Judge Jones's standard provides the appropriate balance.

FWC (at 1) and WELA (at 14 n.9) erroneously assume that the

[1] When complaining about co-workers, Brady provided compelling testimony showing the frequency of breaks in AutoZone stores. *E.g.*, Dkt 46-19 at 103 ("I came back from lunch at 1:00, a pizza was delivered. Tina and Dave stood in the back eating the pizza…. Dave went to lunch at 3 pm and Tina went to lunch at 4 pm."); 105 ("Dave ate his pizza before his lunch as he usually does."); 106 ("Tina ordered pizza again and they ate it before their lunch."); 41-43 (co-worker had 40-120 minutes of paid break time per day).

time punch records submitted by Brady show "meal break violations." But Brady's own briefing debunks this assumption:

> 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 worked more than five hours without any record of a meal break.

Dkt 49 at 6. As Judge Jones found, undisputed facts (of, *e.g.*, paid meal periods, missed punches, and employee choices) established that the time punch records did not prove "violations."

In addition to obscuring the facts, Amici mischaracterize Judge Jones's interpretation of the law. For example, FWC (at 1) characterizes the district court's standard as one "that would allow employers to simply sit back and say workers have the 'opportunity' to take breaks if those workers so choose.'" Untrue. Judge Jones's robust standard tracks the language of the regulation and this Court's holdings, such as *Demetrio*:

> [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. There is nothing in this standard that allows an employer to "sit back" and merely "say" workers have an opportunity for a meal break. An employer must "relieve its employees of all duty," "relinquish control

over their activities," provide a "reasonable opportunity" to take an "uninterrupted break," and "ensure" the "opportunity is meaningful" and free from "coercion or any other impediment." *Id.*

FWC argues (at 11-12) that Judge Jones's standard is "illusory" and would violate Washington's "long and proud history of protecting worker rights." Not true. As Judge Jones explained, a meaningful opportunity for a meal break means that the employer cannot encourage employees to skip breaks -- this is not *Wingert* (where a CBA required non-compliant rest breaks), *WSNA* (where scheduling demands caused nurses to miss rest breaks), *Pellino* (where the nature of the work prevented breaks), or *Demetrio* (where the piece rate compensation system created an incentive to skip rest breaks). Here, AutoZone employees were paid by the hour, took compliant rest breaks, and were scheduled for and provided the opportunity to take compliant meal periods.

WELA also misstates (at 14) the court's ruling, asserting it "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." Not true. Judge Jones specifically refuted this assertion in his certification order:

> In its Order, the Court did not find that Mr. Brady's only way to prove a meal break violation was to explain each of his 133 missed meal breaks. Instead, the Court's more nuanced conclusion was

> that Mr. Brady "failed to meet his burden of identifying a common method of proving AutoZone's liability." Dkt # 62, at p. 11. Put another way, 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." *Id.* Moreover, Mr. Brady did not offer punch records that were consistent with his theory of meal break violations. *Id.* 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.

Dkt 73 at 3-4. Nothing in Judge Jones's ruling makes class certification impossible if a plaintiff presents appropriate class-wide proof. Brady just failed to present such evidence. Instead, he asked for strict liability.

B. The questions should be answered as certified by Judge Jones

This Court should reject the request by FWC (at 4 n.2) and WELA (at 5-6) to reformulate the certified questions. Although this Court has the discretion to reformulate questions to avoid unresolved factual issues that must be addressed by a district court,[2] 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). Judge Jones carefully crafted the questions to address the issues that were presented in this case. For example, a central premise of Brady's theory of meal period liability was "strict liability." Dkt 49 at 2, 8 (asserting "AutoZone is…strictly liable for failing to provide meal breaks after five hours of work"). Thus, Judge Jones posed that particular issue for a reason, and it should be answered.

[2] *See Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008).

Amici's requests[3] that this Court depart from the certified questions and make broad rulings on the basis of facts and issues not presented in this case are inappropriate. As this Court has stated:

> In answering federal certified questions, we do not seek to make broad statements outside of the narrow questions and record before us.

Ruiz-Guzman v. Amvac Chemical Corp., 141 Wn.2d 493, 508, 7 P.3d 795 (2000) ("not appropriate for us to use this case to accept the [amici's] invitation" for a broad ruling); *see also Crossler v. Hille*, 136 Wn.2d 287, 289, 961 P.2d 327 (1998) ("The certified question is very narrow in scope and limited by the record before us. We do not seek to make a broad statement concerning the law [discussed in this case]"). Ironically, FWC's brief (at 6-7) cites *Ruiz-Guzman* and agrees this Court should not "make broad statements outside of the narrow questions and record before us."

C. FWC and WELA admit that strict liability is not appropriate

FWC (at 6) and WELA (at 5-6) argue that strict liability is not an appropriate standard here. Judge Jones agreed, but wanted confirmation from this Court. The FWC and WELA arguments should be taken as admissions that the first question should be answered "No."

However, FWC's argument (at 6) that employers must "ensure" that employees take meal periods is identical to Brady's argument and is

[3] WELA (at 15) asks this Court to enunciate a standard for rest breaks, which are not at issue in this case and to which no certified question could even arguably apply.

effectively an argument for strict liability. As discussed in AutoZone's Answering Brief, there is no basis for this requirement under the language of the regulation or the case law. Allowing or providing a meal period is not the same as forcing an employee to take a meal period.[4] *See Watson-Smith v. Spherion Pacific Workforce, LLC*, 2008 WL 5221084, *3 (N.D. Cal. Dec. 12, 2008) (holding that "employers have an obligation to *provide* meal breaks, but are not strictly liable for any employee who fails to take a meal break"). Moreover, strict liability is inherently inconsistent with the concept of waiver and DLI's long-standing guidance that employees may waive meal periods.[5] DLI Admin. Policy ES.C.6 at 4. Likewise, requiring employer control over meal periods is inconsistent with an employer's obligation to relinquish control during such breaks.[6]

D. FWC and WELA admit that employees bear an initial burden of proving a meal period violation, but they propose standards that are not supported by the regulation language or case law

FWC (at 6) asserts: "An employee seeking to prove a violation of

[4] The difference should be evident. For example, providing someone with food is very different than forcing them to eat it. Unpaid meal periods are, by definition, not subject to employer control and how employees want to use meal period time is solely up to them.

[5] WELA (at 16 n.10) asks this Court to strike down DLI's long-standing guidance on waiver because it "conflicts with a statutory mandate" and "the Legislature's intention." Of course, meal period requirements are not in a statute adopted by the Legislature. Instead, they are in a regulation adopted by DLI, and DLI's long-standing, formal interpretation of that regulation is entitled to deference. *See Pellino v. Brink's Inc.*, 164 Wn.App. 668, 688, 267 P.3d 383 (2011).

[6] The inconsistency between Amici's argument for employer control and an employer's obligation to relinquish control during meal periods was one of the key points identified by the California Supreme Court when it adopted a standard similar to Judge Jones's in *Brinker Rest. Corp. v. Sup. Ct.*, 53 Cal.4th 1004, 1038-39, 273 P.3d 513, 535 (2012).

WAC 296-126-092 shows fault by establishing the employer did not affirmatively provide **and** ensure the employee received a meal break within five hours of starting work." This standard recognizes an employee bears a burden of proof, but adds criteria beyond "to provide" a meal period that have no basis in WAC 296-126-092. FWC's proposal is essentially identical to the standard Brady argued, imposes the equivalent of strict liability, and is based on a misreading of *Pellino*. This erroneous standard is addressed in arguments made in AutoZone's Answering Brief. However, it is worth noting that if DLI had intended this standard, it could have phrased the regulation to state that employees "must take a meal period," or that employers "must require (or ensure) that employees take a meal period." Instead, DLI used "allow" and "provide."

WELA (at 15) asserts "employees establish a prima facie case for rest and meal break violations when they prove they failed to receive the breaks to which they were entitled within the time frames required."[7] Like FWC, WELA admits that employees have the burden to prove a prima facie case. The proposed standard is different because WELA focuses on what employees receive, rather than on what the employer provides.

But WELA's standard for meal period violations is unclear. What does it mean for an employee to prove they failed to "receive" a break? If

[7] This Court should not rule on any rest break standard as that question is not certified to this Court and this case only involved meal period issues.

employees take meal periods on the clock, is that receiving meal breaks under this standard? If employees are scheduled for timely meal periods, have nothing stopping them from taking the breaks, are encouraged to take the breaks, but choose not to take the meal periods, is that "receiving" a timely meal break? If an hourly manager who runs a store and could take a timely second meal period chooses instead to continue working after the store is closed so he can go home earlier, did he "receive" a timely meal period? If an employee working from home (telecommuter) is told to take compliant meal periods, sets her own schedule, has no work that dictates when she takes breaks, and elects to take an early or late lunch, did she "receive" a timely meal period? Finally, if an employee is scheduled for a timely meal break but requests and receives a waiver of that break (or its timing), did that employee "receive" a timely meal break? As these questions show, a standard based on what is received is less clear than a standard based on what the employer must do, and WELA's proposed standard is neither clearer nor more protective of employees than the district court's "meaningful opportunity" standard.

Phrasing these standards as requiring proof of what the employee "received" is clearly tailored to fit the evidence that FWC and WELA believe Brady presented: time records purportedly showing employees did not "receive" timely meal breaks. But, as Brady admitted and Judge Jones

found, Brady's time punch records did not show violations, and Brady's classwide proof would fail under these standards as well. Dkt 62 at 12.

E. Judge Jones's standard protects worker health and well-being

Amici spend inordinate time arguing that workplace health is important and then asserting that Judge Jones's standard threatens health and safety. Amici's arguments are unfounded. Moreover, Amici's authorities focus on rest breaks, state that regular breaks address accident risk, and generally indicate flexible breaks increase health and safety.

FWC (at 8) cites *Murphy v. Kenneth Cole Prod.* (2007), a California Supreme Court decision that discusses the impact of "denied" rest and meal periods when performing "manual labor" and does not suggest that allowing employees flexibility to take meal periods when they prefer has any negative health effect. Also, the same court subsequently considered Amici's safety arguments and held, consistent with *Murphy*, that employers only need provide a meaningful opportunity for employees to take a meal break.[8] *Brinker*, 273 P.3d at 532-37.

[8] Moreover, the authorities *Murphy* cites do not suggest that allowing employees to take meal breaks when they prefer has negative health effects. The Tucker article evaluated "continuous, repetitive, and largely machine-paced work" and concluded that "[r]egular rest breaks seem to be an effective way to control accumulation of risk during industrial shift-work." The Dababneh article evaluated the impact of short rest breaks on well-being, concluding that employees preferred nine-minute rest breaks rather than more frequent three-minute breaks. And, the Kenner article tried "to reconcile the protection of the health and safety of workers with the need for flexibility." They all suggest that regular rest breaks address health concerns -- and the evidence in this case is that AutoZone employees received legal rest breaks. Dkt 46 at 15 (¶27).

FWC (at 8) cites *The Changing Organization of Work and the Safety and Health of Working People*, which suggests that increased workloads and pace of work may increase the risk of stress, illness, and injury. But this case has nothing to do with workloads or the pace of work. Regardless, that article suggests that these risks can be minimized by giving employees more flexibility to control their own schedule. It states:

- (at vi) "the increased flexibility, responsibility, and learning opportunities seen in many of today's jobs may hold potential for improved satisfaction and well-being in the workforce"
- (at 1) "increased flexibility…may offer workers greater potential for self-direction, …leading to reduced stress and increased satisfaction and well-being"
- (at 12) "the number of telecommuters has increased dramatically"
- (at 15) "Increased worker control…[is] recognized in the job stress literature as [a] powerful antidote[] to stress and illness"

FWC (at 8) cites *Illinois Hotel & Lodging Ass'n v. Ludwig* (2007), which involved a challenge to a special break statute for hotel room attendants. The court noted that attendants had pressure to skip breaks because of piece rate quotas, most had skipped or shortened lunch or rest breaks, and this resulted in increased neck and back pain. Nothing in the case suggests that retail workers who receive full rest breaks and want to change the timing of their meal period suffer in any way.[9]

[9] FWC also cites other materials on safety that have no relationship to the timing of meal periods or the facts here. The Levin & Plungis article (cited at 8) discusses how a truck driver who had been awake for 28 hours and working for almost 14 hours caused an accident because of fatigue. The article does not mention meal breaks or their timing. The

FWC (at 9-10) cites Tucker, who states "regular rest breaks" can help employees maintain performance, manage fatigue, and control risks, but says nothing about meal periods or their timing. Tucker further states:

- (at 8) "Optimum rest schedules are likely to be specific to the nature of the work activity being undertaken…as well as differences in both the individual's state…and trait."
- (at 11) "The requirement for pre-determined rest schedules means that rest periods will not necessarily coincide with the individual's perceived need for a break (i.e. at times of heightened fatigue). By contrast, self-paced work allows the individual a degree of autonomy in determining their optimum rest strategy."
- (at 12) "the greater the discretion given to a worker to control the pace of their work, the better able they will be to regulate both the effects of fatigue on their performance, and the experience of stress, by taking microbreaks."

FWC (at 10) cites an Arlinghaus article, which found that "rest breaks may have an important effect on injury risk," but says nothing about meal periods or their timing. And, the injury-risk relationship it found focused on the question whether an employee received at least one rest break during the work day. Here, the uncontroverted evidence is that AutoZone employees took all required rest breaks. Dkt 46 at 15 (¶27).

Finally, FWC (at 12) and WELA (at 1-2) cite *Broken Laws, Unprotected Workers*, which dealt with low-wage workers in three non-Washington cities. The report defined a meal period violation as a missed

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CDC and Marsh & Johnson articles (cited at 9) discuss heat stress for agricultural workers. They do not discuss retail workers who receive all required rest breaks and merely alter the timing of meal periods. The Schwartz article (cited at 9) addresses professional work loads and the impact of too many continuous hours. It does not address hourly, retail workers who take rest breaks, nor mention meal periods or their timing.

or shortened break, not a change in timing, and also states (at 4-5) that "[v]iolation rates varied significantly by industry" and "by occupation," and that "[n]ot all employers violate the law." Although this report dealt with Los Angeles and was available in *Brinker*, the California Supreme Court adopted a standard like Judge Jones articulated, a standard that does not allow pressure or coercion by employers but allows flexibility.

As this Court considers the standard for determining compliance with the meal period regulation and its impact on the health and safety of workers, it should consider the substantial evidence that flexibility is beneficial to the health and well-being of workers. For example, the Legislature has recognized the importance of flexibility and has factored it into recent legislation. *E.g.*, RCW 49.12.270; RCW 49.46.005 & .200; DLI Admin. Policy ES.C.10. Moreover, "study after study has shown that employees with flexible work arrangements tend to be healthier, happier, and more productive."[10] President Obama established the White House Workplace Flexibility Forum in 2010 "to consider how private and public enterprises could best meet the challenge of more flexible workplaces."

[10] Jena McGregor, More Proof that Flexibility Programs Work, The Washington Post at 1 (May 9, 2014), *see also* Jessica Howington, The Benefits of Allowing Employees a Flexible Schedule, FlexJobs Employer Blog at 2 (July 1, 2015) ("Flexible schedules… provide employees with job satisfaction, better health, increased work-life balance, and less stress"); Bridget Miller, Flexible Scheduling: The Key to Employee Satisfaction?, HR Daily Advisor at 1 (Aug. 22, 2014) ("flexible scheduling can improve work-life balance" and "employee satisfaction," and "allow an employee to accommodate a major life change, such as the need to care for an ill family member or the arrival of a child").

Matos & Galinsky, Workplace Flexibility in the United States: A Status Report (Families and Work Institute 2011). This study found that 81% of all employees (and 83% of retail employees) use "short-notice schedule flexibility" if it is available, and that "higher overall flexibility is associated with…high job satisfaction" and "[b]etter self-assessments of physical health." *Id.* at 6, 17, 19. Indeed, employees view flexible scheduling as a valuable benefit.[11] This Court should not adopt a standard that would limit or eliminate flexibility in meal period timing.

F. Amici's proposed standard is impractical, unreasonably burdens employers, and adversely impacts employees

Amici assert that employers should be required to ensure that employees actually take (as compared to having a meaningful opportunity to take) meal periods. Such a standard is impractical and would unreasonably burden employers and adversely impact employees.

Indeed, WELA (at 10-11) suggests that employers should police every aspect of employee behavior and punish deviations, asserting:

> Employers closely monitor the work of their employees on a daily basis, ensuring among other things that employees are not paid for

[11] University of Southern California & London Business School, PwC's NextGen: A global generational study at 8 (PWC 2013) ("a significant number of employees from all generations feel so strongly about wanting a flexible work schedule that they would be willing to give up pay and delay promotions in order to get it"); Kyra Cavanaugh, et al., National Workplace Flexibility Study at 14-15 (Boston College Center for Work & Family) (employees reported that flexibility "has made balancing my home-life and work-life bearable" and "has been a major factor in my job satisfaction"); Millennials at Work: Reshaping the Workplace at 8 (PWC 2011) ("95% of respondents saying the work/life balance is important to them and 70% saying it's very important").

> work they do not perform; that employees are on time but do not clock in early; that employees work their scheduled hours but not beyond; and that employees complete their assigned duties….

WELA provides no evidence of such control by any employer. In fact, this description of control ignores a broad spectrum of non-exempt employees who are not subject to immediate supervision, including non-exempt managers and employees who work on their own or are allowed to telecommute for personal reasons. Moreover, as DLI recognizes, such precision is not required or practical in the workplace:

> Time clocks are not required. When employer's use the time clock method, minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged….

DLI Admin. Policy ES.D.1 at 4. Indeed, DLI allows time entries to be rounded to the nearest quarter hour. *Id.* at 5. In this case, although it made sure that it had appropriate policies, scheduled timely meal periods, reminded employees to take meal periods, relieved employees of duty, and paid whatever time employees reported, AutoZone did not (and could not) exercise the level of control WELA suggests. Brady (and others) punched in early and worked beyond scheduled hours. Dkt 46-19 at 25-26, 59-60. Indeed, Brady stayed on the clock after he closed his store while he gathered documents about other employees for his attorneys. *Id.* at 66-68. And, after this lawsuit was filed, Brady repeatedly failed to take his

scheduled meal period (often set well before the five-hour mark) and punched out at 5:01 or a few minutes later and agreed no one required this. *Id.* at 54-56, 64-66, 81-82. In fact, he was often in charge of the store. Thus, Amici's "ensure it is taken" standard is impractical in the real world and would allow employees like Brady to abuse the rule "to generate… liability."[12] *Brinker*, 273 P.3d at 536.

Such an approach is also patently unreasonable, and conflicts with the purpose of meal periods. Unlike work hours (which WELA states should be policed by employers), Washington law requires that, during meal periods, employees must be "completely relieved from duty and free to spend [the time] as they please." DLI Admin. Policy ES.C.6 at 3. Requiring employers to monitor employees during meal periods to ensure breaks are taken is "inconsistent with the fundamental employer obligations associated with a meal break: to relieve the employee of all duty and relinquish any employer control." *Brinker*, 273 P.3d at 535.

Amici's "ensure it is taken" standard would also have an adverse impact on employees in the workplace. This approach would discourage employers from allowing flexibility, and WELA's argument to eliminate simple waiver arrangements or to prohibit waivers altogether will ultimately harm employees who need the flexibility to manage life issues.

[12] In a related matter, a DLI investigator found that Brady engaged in "fraudulent behavior" so he could make an "unfounded" complaint. Dkt 46-19 at 176-77.

In addition, this approach would force employers into limiting telecommuting and other unsupervised work, and disciplining employees for "one-minute offenses." *E.g.*, *White v. Starbucks Corp.*, 497 F.Supp.2d 1080, 1089 (N.D. Cal. 2007).

G. Judge Jones's standard does not doom class actions

Amici's purpose is not to protect employees, but to assist plaintiff's class action attorneys (who drafted the Amici briefs). The proposed "ensure it is taken" standard is not based on the language or purpose of the regulation or on related case law; instead, WELA (at 13-15) candidly admits its goal: "[t]his Court should adopt a standard that…facilitates the ability of employees to pursue rest and meal break claims through the class action procedure." WELA wants this Court to redraft substantive law to assist its members in the use of a procedural rule. This request is improper, and the Court should reject it.

First, Judge Jones certified two questions relating to an employee's burden of proof under the regulation whether pursuing individual or class claims. No class action issues have been certified to this Court. The district court decided the class issues based on its findings of fact regarding the validity of Brady's evidence under the Federal Rules of Civil Procedure, all of which is within the sole jurisdiction of that court.

Second, this Court "interpret[s] regulations using the same rules [it] use[s] to interpret statutes." *Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 655, 355 P.3d 258 (2016). If "the plain language of the regulation…is unambiguous it controls." *Id.* It is this Court's duty to evaluate the standard based on the language of the regulations, their purpose, and the case law, not based on a desire to favor or promote one type of procedure.

Third, interpreting substantive law to work better with a procedural rule would violate the separation of powers. *Waples v. Yi*, 169 Wn.2d 152, 158, 234 P.3d 187 (2010). "'The doctrine of separation of powers divides power into three coequal branches of government: executive, legislative, and judicial.'" *Id.* (*quoting Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009)). If the activity of one branch threatens the independence or integrity or invades the prerogatives of another it violates the separation of powers. *Id.* "'If a statute appears to conflict with a court rule, this court will first attempt to harmonize them…, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.'" *Id.* Inviting this Court to change the interpretation of a substantive regulation like WAC 296-126-092 based on a procedural rule, like Rule 23, is improper, and accepting that invitation would be unconstitutional. *Id.*

Regardless, WELA's extreme proposal is also unnecessary because Judge Jones's standard does not make class actions impossible. Judge Jones was clear that, in this case, there was no evidence of a written or unwritten policy or practice that would deny compliant breaks to workers. Nor was there evidence of a compensation system (or anything else) that encouraged employees to skip breaks. Indeed, the undisputed evidence, including from Brady, was just the opposite. And Brady's own testimony made the time punch records unusable as proof of class-wide violations. In contrast, in cases like *Demetrio*, *Pellino*, *WSNA*, and *Wingert*, plaintiffs provided evidence of improper policies or practices (or other systematic issues). Judge Jones's standard would not have altered the outcome in such cases. Here, it was Brady's lack of evidence, not the court's standard, that made the class uncertifiable. Thus, class actions will survive.

III. CONCLUSION

For the reasons above, this Court should answer the first certified question, "no," and the second certified question, "yes."

RESPECTFULLY SUBMITTED this 1st day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on March 1, 2017, the above and foregoing Answer to Amicus Briefs Filed by Fair Work Center and Washington Employment Lawyers Association was filed with the Washington Supreme Court and copies were served to the following counsel of record by the methods indicated:

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