IN THE SUPREME COURT OF THE STATE OF OREGON

ATHENA, LEILA BARBEAU, and AARON ST. PIERRE, Plaintiff-Appellant and Petitioner on Review, v. **PELICAN BREWING COMPANY and KIWANDA HOSPITALITY GROUP, LTD.,** Defendant-Respondent and Respondent on Review.	Oregon Supreme Court Case No. S072698 Tillamook County Circuit Court Case No. 20CV33103 Oregon Court of Appeals Case No. A179138

***AMICI CURIAE*'S BRIEF ON THE MERITS IN SUPPORT OF PELICAN BREWING COMPANY AND KIWANDA HOSPITALITY GROUP, LTD.**

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INTRODUCTION

The Court of Appeals' decision in *Athena* threatens to expose every Oregon employer to multimillion-dollar liability for meal-period shortfalls measured in minutes—even when an employer directed its employee to take a full 30-minute break. Pursuant to ORAP 8.15, *amici curiae* Oregon Business & Industry, the Oregon Restaurant & Lodging Association, and the National Federation of Independent Business Small Business Legal Center, Inc., and putative[1] *amicus curiae* Chamber of Commerce if the United States of America respectfully submit this brief in support of Pelican Brewing Company and Kiwanda Hospitality Group, Ltd.'s ("Petitioners") Brief on the Merits and in support of reversal of *Athena v. Pelican Brewing Company*, 345 Or App 172, 583 P3d 550 (2025), *reconsideration denied*, 347 Or App 80 (2026).

As it sits today, the Court of Appeals' decision in *Athena*, coupled with its prior decisions interpreting the Bureau of Labor and Industries' ("BOLI") meal-period rule, threatens the ability of Oregon businesses to gainfully employ Oregonians. Employees who periodically return from their meal breaks

[1] The Chamber of Commerce of the United States of America did not appear as *amicus curiae* in support of Pelican Brewing Company and Kiwanda Hospitality Group, Ltd.'s petition for review. Contemporaneously with this brief, the Chamber of Commerce of the United States of America is filing a motion for leave to appear as *amicus curiae* on the merits. Pending the Court's ruling on that motion, the Chamber of Commerce of the United States of America is referred to herein as a putative *amicus curiae*.

a minute early stand to create multimillion-dollar liabilities for their employers—even when the employer directed the employee to take, and provided the time needed for, a full 30-minute break. That is not a hypothetical risk. It is the direct and predictable result of a line of Court of Appeals decisions that strain, and ultimately break from, common sense and settled interpretive norms.

That most recent—and perhaps most significant—break from interpretive norms came in *Athena*. There, the Court of Appeals construed BOLI's authority under the meal-period enabling statute, ORS 653.261, to include the power to create a wage entitlement for a less-than-30-minute (i.e., "short") meal period, and it further concluded that BOLI had in fact created such an entitlement when it enacted OAR 839-020-0050(2)(b) (the "Rule"). To arrive at those conclusions, the Court of Appeals had to stretch the meaning of "wages" beyond its statutory definitions, ignore the structure of the Rule and relevant context, and misapply this Court's decision in *Gafur*, to name only a few errors. Under *Athena*, employees who receive less time to rest are worse off than those who suffer only technical violations of the Rule. Meanwhile, Oregon employers are exposed to crippling liability despite having clear policies requiring employees to take their meal periods, providing time to do so, and admonishing employees who do not.

The stakes of this "wage" versus penalty classification are enormous. If the Rule's payment is a "wage," then employees have a private right of action to recover it under ORS 653.055, subject to a six-year statute of limitations, civil penalties, prejudgment interest, and prevailing-party attorney fees. Plaintiffs here have seized on Court of Appeals' precedent that treats ***any*** meal period shy of a full 30-minutes—if even short by a minute—as a violation of the Rule and have recast what is plainly a fixed, remedial payment for such a violation into an open-ended damages vehicle. And although Plaintiffs in this case have voluntarily limited their claims to a single set of civil penalties per plaintiff (likely as an effort to artificially dampen the stakes and make their interpretation more palatable), that restraint is self-imposed and creates no precedent. Once Plaintiffs secure a holding that the "pay" under the Rule is considered "wages," future litigants will undoubtedly seek civil penalties for each pay period in which a shortened meal period occurred, compounding liability exponentially. This Court's resolution of this case will thus determine whether Oregon employers face measured consequences for meal-period shortfalls—or limitless exposure driven by the classification of a flat remedial payment as a "wage."

Ultimately, BOLI may have the authority to create a mandatory meal period and to impose a cost (like a fine) upon employers who fail to provide one. But that cost cannot be a wage owed directly to, and enforceable by, employees. *Athena*'s holding to the contrary is unsupported by the text and context of the enabling statute pursuant to which the meal-period rule was created.

But even if BOLI had such authority, it did not exercise it. Rather, the consequence that BOLI's rule actually prescribes—and the only one its text and history support—is a flat 30-minute payment for the shortened meal period. That payment is not insignificant, and it is calibrated to deter noncompliance. Recasting that flat payment as a "wage," as *Athena* holds, goes well beyond what the Rule's text and purpose support. It converts what is meant to be a fixed, remedial payment into an open-ended damages award—complete with a six-year limitations period, civil penalties, prejudgment interest, and attorney fees—for employees who ignored their employer's clear instructions and clocked in early. Because that result finds no support in the Rule's text, structure, or purpose, this Court should reverse.

INTERESTS OF *AMICI CURIAE*

Oregon Business & Industry ("OBI") is Oregon's leading statewide business advocacy organization. Headquartered in Salem, OBI represents approximately 1,600 businesses of all sizes, across every region and virtually every industry in Oregon, which collectively employ over 250,000 Oregonians. OBI's mission is to promote policies that create a healthy, prosperous, and competitive economy through a thriving private sector, which in turn sustains family wage jobs, engages philanthropically, and generates tax revenue necessary for critical public services. Drawing on a legacy of business advocacy dating back to 1895, OBI is widely recognized for its policy expertise and regularly engages in issues of statewide significance affecting Oregon employers, giving it a strong interest in the statutory and regulatory frameworks governing the employee-employer relationship. Many of OBI's member companies are directly impacted by the relevant laws applicable to this proceeding.

The Oregon Restaurant & Lodging Association ("ORLA") is the leading trade association representing Oregon's hospitality industry. A nonprofit organization, ORLA represents nearly 3,000 members statewide and advocates on behalf of more than 11,000 food-service establishments and over 2,000 lodging properties across Oregon. The hospitality industry is the state's second-largest private-sector employer, providing more than 200,000 jobs and generating over $14 billion in annual economic activity. Based in Wilsonville, ORLA serves as a principal voice for restaurants, hotels, and related businesses on policy issues affecting workforce, operations, and economic vitality. Through advocacy, education, and industry collaboration, ORLA works to protect, improve, and promote Oregon's hospitality sector, giving it a strong institutional interest in legal issues that materially affect the regulatory and economic environment in which its members operate.

The National Federation of Independent Business Small Business Legal Center, Inc. is a nonprofit, public interest law firm established to provide legal resources and be the voice of small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. NFIB represents thousands of members in Oregon, many of which could be impacted by the Court of Appeals' decision at issue.

Putative *amicus curiae* the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business organization. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. Because the Court of Appeals' decision in *Athena* may have consequences for employers well beyond the parties to this case, the Chamber has a substantial interest in the issues presented in this proceeding.

Amici curiae OBI, ORLA, and NFIB, and putative *amicus curiae* the Chamber (together, "*Amici*") collectively promote their missions by appearing in this case in support of Petitioners and their request that the Court reverse the Court of Appeals' decision in *Athena*.

FACTUAL AND PROCEDURAL HISTORY

Amici adopt and incorporate by reference the Factual and Procedural History set forth in Petitioners' Brief on the Merits.

QUESTIONS PRESENTED

Amici adopt and incorporate by reference the Questions Presented set forth in Petitioners' Brief on the Merits.

PROPOSED RULES OF LAW

Amici adopt and incorporate by reference the Proposed Rules of Law set forth in Petitioners' Brief on the Merits.

SUMMARY OF ARGUMENT

This case presents two issues: first, whether BOLI has the authority under the meal-period enabling statute (ORS 653.261) to create a pay entitlement that qualifies as a "wage" enforceable by employees; and second, whether the Rule BOLI enacted pursuant to that statute created such a "wage." *Amici* join Petitioners' arguments on the first issue. This brief addresses only the second.

BOLI enacted the Rule to serve a single purpose: preserving employee health by ensuring that employees actually receive an uninterrupted 30-minute meal period. ORS 653.261(1)(a); OAR 839-020-0050(1). Section (2)(a) of the Rule establishes the mandate; section (2)(b) prescribes what happens when the employer fails to deliver:

> "(2)(a) Except as otherwise provided in this rule, ***every employer shall provide to each employee***, for each work period of not less than six or more than eight hours, ***a meal period of not less than 30 continuous minutes*** during which the employee is relieved of all duties."
>
> "(b) Except as otherwise provided in this rule, ***if an employee is not relieved of all duties for 30 continuous minutes during the meal period***, ***the employer must pay the employee for the entire 30-minute meal period***."

OAR 839-020-0050(2)(a)-(b) (emphases added). Thus, the payment exists to enforce the mandate—not to create a freestanding compensation entitlement.

Two textual features confirm that the "pay" required under section (2)(b) is a fixed, remedial consequence—not a wage. First, the payment is triggered by the employer's failure to provide a compliant meal period, not by any service the employee performs—a hallmark of a penalty, not compensation. Second, the payment is fixed at "the entire 30-minute meal period" regardless of how much rest the employee *actually* received. For example, an employee who takes a one-minute meal period (say, from 12:00 p.m. to 12:01 p.m.) and an employee who takes a 29-minute meal period (say, from 12:00 p.m. to 12:29 p.m.) are each entitled to 30 minutes of pay. That flat structure is calibrated to deter noncompliance. The Court of Appeals' "wage" construction inverts this design: the employee who takes a 29-minute break recovers 30 minutes of pay for one minute of work, while the employee who receives only one minute of rest recovers almost nothing beyond the wages to which they were already entitled. A rule enacted to preserve employee health should not leave the employees who needed its protection most with the lesser remedy.

Context reinforces this reading. The Rule's exemption and waiver provisions treat certain meal-related time as paid "work time" where the employer has opted into an authorized alternative—such as demonstrating a custom for the industry that employees receive paid meal periods shorter than 30 minutes. OAR 839-020-0050(3)(b). The default payment under section (2)(b) must be something different—otherwise the exemption and waiver prerequisites would be superfluous. Yet the Court of Appeals collapsed that distinction, treating every shortened meal period as wage-earning work time regardless of whether the employer secured an exemption or the employee executed a waiver. *See Athena*, 345 Or App at 181. Under that reasoning, an employer that fully complies with the exemption requirements and one that does nothing at all face the same financial obligation—an outcome that undermines the Rule's structure.

The Rule's adoption history points in the same direction. The Rule in its present form traces to BOLI's 2010 amendment, which came after this Court's decision in *Gafur v. Legacy Good Samaritan Hospital & Medical Center*, 344 Or 525, 185 P3d 446 (2008). In *Gafur*, this Court held that employees who were denied rest periods but were paid for all time they worked had no wage claim under ORS 653.055—the failure to provide a break did not, without more, generate an additional wage obligation. 344 Or at 536, 538. Notably, BOLI appeared as *amicus curiae* in *Gafur* and expressly disagreed with that conclusion. 344 Or at 536-37. *Athena* treated BOLI's subsequent 2010 amendment as evidence that the Rule's "pay" provision was intended to create the very wage entitlement *Gafur* declined to recognize. But if the amendment were truly a response to *Gafur*—an effort to create the wage entitlement BOLI had urged this Court to adopt—one would expect BOLI to have amended the rest-period rule as well, conforming it to the interpretation for which BOLI advocated. It did not. Instead, BOLI amended only the meal-period rule and left the rest-period rule untouched—a selective choice that undercuts, rather than supports, the inference that the amendment was designed to extend *Gafur*'s "hours worked" analysis. Plaintiffs here likewise do not allege uncompensated services; they seek additional pay for time they did not work—precisely the theory *Gafur* forecloses.

Finally, the practical consequences confirm the need for reversal. Recasting the Rule's flat payment as a "wage" converts it into an open-ended damages vehicle—complete with a six-year limitations period, civil penalties, prejudgment interest, and attorney fees. Oregon employers have already felt the impact: Four recent class actions premised solely on shortened meal periods have produced settlements and judgments totaling approximately $38 million. That liability will only grow if the Court of Appeals' interpretation stands.

STANDARD OF REVIEW

This Court reviews the interpretation of a regulation for legal error using the same interpretative framework that it uses for interpreting statutes. *Gafur*, 344 Or at 532-33. This review includes an analysis of the regulation's text, context including other related provisions and case law, and any relevant history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009).

ARGUMENT

The central question for this Court is straightforward: When an employer fails to provide a full 30-minute meal period under the Rule, is the required payment that results a "wage" owed to the employee as compensation for services performed, or is it a remedial consequence designed to enforce the meal-period mandate? The text, context, and purpose of the Rule all point to the same answer: The payment is a remedial consequence to secure compliance.

The legislature delegated to BOLI the authority to enact rules setting the minimum conditions of employment "as may be necessary for the preservation of the health of employees," including minimum meal periods. ORS

653.261(1)(a). The legislature also authorized BOLI to adopt rules necessary to prevent "circumvention or evasion" of those requirements. ORS 653.040(3). The Rule is consistent with those delegations insofar as it requires employers to provide a minimum meal period and attaches a consequence for noncompliance.[2] But *Amici* part company with the Court of Appeals—and join Petitioners in their arguments—on the critical next step: whether the "pay" consequence BOLI provides for under the Rule qualifies as a "wage" under Oregon law. It does not. The Rule's text, context, and purpose all confirm that the "pay" required for failing to "provide" a full 30-minute meal period is a fixed, remedial consequence designed to secure employer compliance with the meal-period mandate—not compensation for services performed.

A. The text of the Rule demonstrates that the "pay" it requires is a remedial consequence to ensure meal-period compliance.

Two features of the Rule's text make clear that the "pay" required by section (2)(b) is not compensation for services performed but a remedial consequence imposed on employers who fail to provide a compliant meal period. First, the payment is triggered not by any service the employee

[2] *Amici* join Petitioners' argument that the Court of Appeals erred in holding that employees have a private claim for a shortened meal period because there is no clear and express legislative grant of authority for BOLI to create such an entitlement. *See generally* Petitioners' Brief on the Merits, Part I and II. *Amici* focuses its brief on the second issue presented on appeal, which is whether the "pay" required under the Rule is a wage.

performs but by the employer's failure to perform a duty—a hallmark of a penalty, not a wage. Second, the payment is fixed at "the entire 30-minute meal period" regardless of how much or how little of the break the employee actually took—a structure consistent with a deterrent purpose, not a wage calibrated to the value of services rendered.

1. "Pay" is triggered by the employer's failure, not by any action from the employee.

The Rule's "pay" obligation is triggered by the employer's failure to ensure a full meal period was taken. That trigger is fundamentally inconsistent with the concept of "wages," which compensate an employee for services performed. *See* ORS 653.010(10) (defining "wages" as "compensation due to an employee by reason of employment"); ORS 652.210(14) (defining "wages" to mean "all compensation for performance of service by an employee for an employer"); *see also, e.g.*, *Wyatt v. Body Imaging, P.C.*, 163 Or App 526, 530, 989 P2d 36 (1999) (noting common meaning of wages); *Kantor v. Boise Cascade Corp.*, 75 Or App 698, 709, 708 P2d 356 (1985) ("However, the Supreme Court and this court have broadly construed the term ['wages' in ORS 652.200] to mean any compensation for an employe's services."). A payment triggered by the *employer's* noncompliance is not compensation for the *employee's* performance of services—it is a remedial consequence. The facts of this case prove the point: The employees were not performing services during all—or nearly all—of the 30-minute period, yet they were deemed entitled to payment for the entire block of time. To call that payment a "wage" would stretch the statutory definition beyond recognition, because it would compensate employees for time spent off duty tending to personal business—not performing any services at all.

The Court of Appeals nonetheless concluded that the Rule's "pay" falls "comfortably" within the statutory definitions because a shortened meal period "can only arise 'by reason of employment.'" *Athena*, 345 Or App at 180. That analysis proves too much. If the test is merely whether something of value arises "by reason of employment," then virtually *anything* an employer provides in connection with the employment relationship—parking benefits, insurance coverage, employee-only discounts—would qualify as a "wage." Likewise, any penalty tied to the employment relationship would qualify as a "wage." No court has adopted such an expansive reading, and this Court should not be the first.

2. The phrase "entire 30-minute meal period" confirms that the required payment is a flat penalty and not a variable wage.

The second textual indicator that the Rule's "pay" is a remedial consequence lies in the phrase, "pay the employee for the entire 30-minute meal period." OAR 839-020-0050(2)(b). That phrase can be read in only one of two ways. Either it requires the employer to pay the employee for the specific time the employee was clocked out during the shortened meal period (i.e., a variable sum that changes depending on the length of the break), or it requires the employer to pay the employee a flat 30 minutes of pay regardless of how much of the break was taken. Only the latter reading serves the Rule's stated purpose of preserving employee health. *See* OAR 839-020-0050(1) (noting purpose of rule to preserve employee health); Brief of *Amicus Curiae* Bureau of Labor and Industries, *Maza v. Waterford Operations, LLC*, No. A165030, 2018 WL 7890560, at *5 (Or App Jan 9, 2018) ("The rule reflects that employees are healthier (and more productive) when, as a general rule, they *actually* take the minimum meal periods." (emphasis in original)).

While perhaps a touch draconian, it can at least be said that a flat 30-minute penalty directly advances the Rule's purpose: It imposes a significant, uniform cost on every employer who fails to ensure that its employees take the full meal period, thereby incentivizing compliance regardless of how short the actual break was. The penalty is not scaled to the length of the break because the Rule's concern is binary—either the employer provided the required 30-minute period or it did not. A fixed consequence for the violation of a binary rule is the hallmark of a penalty, not a wage.

The Court of Appeals' interpretation produces a result that does not merely fail to further the Rule's purpose—it is *inversely* related to it. Under that construction, an employee who receives a 29-minute break and enjoyed nearly all of the rest the Rule was designed to ensure is entitled to payment for nearly the entire half hour, while an employee who receives only one minute of a meal period recovers only one minute of additional pay. The employees who needed the Rule's protection the most walk away with the least remedy. On the other side of the equation, an employer is actually better off the *less* it complies with the Rule because it faces the same cost (30 minutes of wages) for a one-minute meal period that as it does for a 29-minute meal period; at least with the one-minute meal period the employer obtains 29 minutes of service in return for the payment.

The Court of Appeals did not attempt to explain how this outcome advances employee health, and for good reason: It cannot. Under the court's reading, the compensation owed increases in direct proportion to the rest the employee actually received. A rule designed to ensure rest should not reward employees who rest longer with greater compensation than those who rest less. That perverse result confirms that the Rule's payment provision is what it reads as: a fixed, remedial consequence of noncompliance—not the creation of wage-earning work time.

The Court of Appeals' own characterization confirms the point. The court acknowledged that meal breaks exist "for employee health," and the "pay" exists "to prevent employers from circumventing that requirement." *Athena*, 345 Or App at 188. A payment designed to "prevent employers from circumventing" a health-protective mandate is, by the court's own description, a penalty for noncompliance—not compensation for services rendered. *See id.* at 181 (observing feature of penalties to be "protect[ing] employees from unscrupulous or careless employers who fail" to live up to their obligations (internal quotation marks and citation omitted)). That the Court of Appeals reached the opposite conclusion despite this characterization only underscores the error.

B. Relevant context confirms that meal-period "pay" is a penalty.

The Rule provides relevant context demonstrating that the "pay" required by the Rule is a remedial consequence and not a wage. Notably, section (2)(b) of the Rule opens with a limiting clause: "***Except as otherwise provided in this rule*** * * * the employer must pay the employee for the entire 30-minute meal period" when the employee receives a short meal period. OAR 839-020-0050(2)(b) (emphasis added). If that clause is to do any work, the "pay" it introduces must be something *different* from what the rest of the Rule "otherwise provide[s]." And indeed, the Rule does "otherwise provide[]"—through its exemption and waiver provisions—alternatives to the default 30-minute meal period. But those alternatives invariably require the employer to give the employee paid time to rest and consume a meal.

For example, where an employer secures an exemption under section (5), or where an employee properly waives a meal period under section (8), the

Rule converts certain meal-related time into "paid" time—that is, compensable work time. *See* OAR 839-020-0050(5)(a), (8)(a)(F). In those circumstances, the payment is properly understood as wages because the employer has lawfully opted into an alternative compliance framework authorized by the Rule itself. The "[e]xcept as otherwise provided" clause signals that the default payment required under section (2)(b) is *not* the same thing. Because the alternatives all provide for wages—paid work time—the default "pay" for a noncompliant shortened meal period must be something other than wages. It is, instead, a fixed, remedial consequence of the employer's failure to provide the required break or to opt into one of the authorized alternatives—not a conversion of break time into compensable work.

The Court of Appeals collapsed this distinction. *See Athena*, 345 Or App at 181 (relying on exemption and waiver provisions to support its conclusion that meal-period pay is a "wage"). Yet, treating every shortened meal period as wage-earning "work time" eliminates the distinction the Rule draws between authorized alternatives (exemptions and waivers) and unauthorized failures to provide a compliant meal period. If an employer must pay wages for a shortened meal period regardless of whether it obtained an exemption or the employee executed a waiver, then the regulatory prerequisites for those provisions serve at best a limited purpose.[3] Under the Court of Appeals' reasoning, an employer that fully complies with the exemption or waiver requirements and an employer that does nothing at all face the same financial obligation to pay the employee for the full meal period—an outcome that undermines, rather than harmonizes, the structure of the Rule, not to mention renders meaningless section (2)(b)'s opening limiting clause.

The more coherent reading is that the Rule treats meal-period pay as wages only where the employer has affirmatively availed itself of an authorized alternative to the default meal-period requirement. Where no exemption or waiver exists, the obligation to "pay" for a shortened meal period is more naturally understood as a remedial consequence—or penalty—for failing to provide a compliant meal period in the first place or to secure the necessary waivers for the alternative framework. The Court of Appeals' contextual analysis, by collapsing these distinct regulatory paths, stretches the concept of "paid work time" beyond its text and function and ignores why the exemption and waiver provisions exist at all.[4]

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[3] Securing the waiver or exemption could preclude BOLI from assessing civil penalties for violations of the meal period rule, OAR 839-020-1010(1)(i), but as a practical matter BOLI enforcement is less likely than a private lawsuit for unpaid wages.

[4] The Court of Appeals attempted to distinguish wages from penalties on the basis of mental state, reasoning that penalties require willfulness while wages do not. *Athena*, 345 Or App at 180-81. But that distinction does not survive *Maza v. Waterford Operations, LLC*, 300 Or App 471, 455 P3d 569 (2019).

C. The Rule's adoption history—including this Court's decision in *Gafur*—does not support a "wage" construction.

The Rule in its present form can be traced to BOLI's 2010 amendment, which followed this Court's decision in *Gafur*. The Court of Appeals treated that sequence as evidence that BOLI intended the Rule's "pay" provision to create a wage entitlement—reasoning that the 2010 amendment extended *Gafur*'s "hours worked" analysis to meal periods. *See Athena*, 345 Or App at 184. That reasoning fails for two independent reasons: *Gafur* itself supports the opposite conclusion, and BOLI's selective amendment of the meal-period rule—but not the rest-period rule—refutes the inference the Court of Appeals drew.

Start with *Gafur* itself. In *Gafur*, this Court addressed whether employees who were denied 10-minute rest periods could state a wage claim under ORS 653.055, even though they had already been paid for all time they worked. This Court held that they could not: The failure to provide a rest break did not mean that employees had performed uncompensated labor or were

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Once *Maza* defined the employer's obligation as an absolute duty to ensure the full meal period is taken, any failure to "provide" the meal period necessarily reflects the employer's awareness of its obligation and its failure to meet it—essentially the standard for willfulness. *See Taylor v. Werner Enters., Inc.*, 329 Or 461, 469, 988 P2d 384 (1999). Under *Maza*'s own absolute-duty standard, every violation is arguably "willful," which collapses the very distinction the Court of Appeals drew.

entitled to additional wages. *See Gafur*, 344 Or at 536 (holding that "employees who were not provided rest breaks during a four-hour shift but were paid for four hours of work" have no wage claim). Far from supporting the Court of Appeals' "wage" construction, *Gafur* established the very principle that forecloses it: An employer's failure to provide a break does not, without more, generate an additional wage obligation when the employee has already been paid for time worked.

That principle applies with equal force here. It is worth repeating that Plaintiffs do not allege that they performed compensable services during their meal periods without pay. To the contrary, most of the meal periods at issue involved employees who received nearly the full 30-minute break and then clocked in early on their own initiative, contrary to Petitioners' policy. When those employees clocked in early from their meals, they were paid for the time that followed. Plaintiffs thus seek not wages for uncompensated work, but additional pay for time they did not work—precisely the theory *Gafur* forecloses.

The Court of Appeals nonetheless relied on *Gafur* to support its contrary conclusion, reasoning that *Gafur*'s rest-period analysis extends to meal periods. *Athena*, 345 Or App at 182-84. But that reasoning depends on a failure to appreciate the material distinction between the two types of breaks. *Gafur* concerned 10-minute rest periods, which the Rule has always treated as paid time and which are too brief to allow employees to disengage from work or use the time for their own purposes. *See Gafur*, 344 Or at 535 (noting rest break "too short" for employee to use for "his or her own purposes"). Meal periods are categorically different. They are substantially longer, are expressly defined as unpaid when provided in compliance with the Rule, and are intended to allow employees to disengage from work entirely. If employees who were denied rest periods *entirely* have no wage claim because they were already paid for their work time, then employees who received nearly the full 30-minute meal break and clocked in early—receiving pay for the minutes they actually worked—likewise have no claim for additional "wages" for time they spent resting. *Gafur*'s reasoning is stronger here, not weaker, because the plaintiffs in *Gafur* at least had a colorable argument that they worked continuously without a break, whereas most of the Plaintiffs here took nearly all of the rest that the Rule was designed to provide and then voluntarily returned to work early. Under *Gafur*'s logic, neither group has an ORS 653.055 wage claim for time they did not work.

Turn next to the 2010 amendment. The Court of Appeals reasoned that BOLI's amendment extended *Gafur*'s analysis to meal periods, effectively implementing *Gafur*'s "hours worked" framework as a wage entitlement. *See Athena*, 345 Or App at 184. But the rulemaking history tells a different story. In *Gafur*, BOLI appeared as *amicus curiae* and expressly disagreed with this

Court's determination that the rest-period rule did not entitle employees to wages for missed rest periods. 344 Or at 536-37. If the 2010 rulemaking were intended as a response to *Gafur*—an effort to create the wage entitlement this Court had declined to recognize—one would expect BOLI to have amended the rest-period provisions to conform to the interpretation it urged the Court to adopt. It did not. Instead, BOLI left the rest-period rule (the rule at issue in *Gafur*) untouched and amended only the meal-period rule. That selective choice is a strong indication that the amendment reflected an independent policy decision regarding enforcement of meal-period compliance—not an effort to extend *Gafur*'s "hours worked" analysis to an entirely different form of break. The adoption history thus undercuts, rather than supports, any argument that the meal-period payment was designed to function as wages. If it were, BOLI would have acted on the rest-period provisions too.

D. The practical consequences of the Court of Appeals' interpretation confirm the need for reversal.

By classifying the Rule's payment as "wages," the Court of Appeals in *Athena* opened the door to a private right of action under ORS 653.055, subject to a six-year statute of limitations under ORS 12.080 and a 30-day penalty wage under ORS 652.150. *Athena*, 345 Or App at 183-84, 189-91. A simple hypothetical illustrates the scale of that exposure.

Assume Employee A and Employee B are each directed to take an unpaid, uninterrupted meal period from 12:00 p.m. to 12:30 p.m. Employee A voluntarily returns at 12:05 p.m.; Employee B returns at 12:29 p.m. Under *Maza*'s absolute-duty standard, the employer failed to "provide" a compliant meal period in both cases and must pay each employee for the full 30 minutes between 12:00 p.m. and 12:30 p.m.[5] Post-*Athena*, each employee then has six years to sue for that pay, plus a 30-day penalty wage (assuming willfulness), prevailing-party attorney fees, and prejudgment interest. *See* ORS 653.055(4); *Wilson v. Smurfit Newsprint Corp.*, 197 Or App 648, 673-74, 107 P3d 61 (2005). At the Oregon minimum wage for non-urban counties of $14.55 per hour, a single violation could yield $3,499.53 per employee in wages and penalties—all because the employee ignored the employer's clear instructions and (in Employee B's case) returned one minute early from a meal break.[6]

[5] *Amici* disagree with the Court of Appeals' interpretation of the Rule in *Maza* and its creation of what amounts to a strict-liability standard that is unworkable in practice. This Court is not bound by that interpretation and may reach a different conclusion as part of its interpretation of whether the Rule creates a wage entitlement. *See Jones v. Gen. Motors Corp.*, 325 Or 404, 416, 939 P2d 608 (1997) ("[T]he decisions of this court describe the law of this state authoritatively and prevail over conflicting decisions of the Court of Appeals.").

[6] Employees' incentives to return to work early are especially acute in the hospitality industry, where many employees receive a significant portion of their pay from customer tips and gratuities. For employees in these roles, it is to their economic benefit to return to work as quickly as possible in order to receive more tips, even if that means flouting their employer's instructions by taking a meal period that is less than 30 minutes.

And those consequences reflect only a single meal-period violation. Although the plaintiffs in *Athena* voluntarily limited their claims to a single set of civil penalties per plaintiff, nothing requires future plaintiffs to do the same. *See Athena*, 345 Or App at 191 n 8 ("Because plaintiffs seek only one 30-day penalty per plaintiff, we express no opinion as to whether ORS 653.055 and ORS 652.150 permit an employee to seek a 30-day penalty for each pay period in which an employer fails to pay for shortened meal periods."). To the contrary, employees who experience multiple meal-period "violations" across multiple pay periods may seek multiple sets of penalty wages. As a result, even a small number of shortened meal periods, dispersed across a class of employees, could rapidly escalate into millions of dollars in liability—potentially forcing well-intentioned employers to close their doors.

These concerns are not merely hypothetical. Oregon employers are already paying dearly for the interpretation of the Rule that *Athena* endorses. *Amici*'s members and the broader Oregon business community have tracked a series of recent wage-and-hour class actions in which employers were compelled to pay multimillion-dollar settlements or judgments arising from shortened or missed meal periods. These cases illustrate, in concrete dollar terms, the scale of liability that the Court of Appeals' "wages" holding invites for every Oregon employer whose meal-period recordkeeping falls even a minute short of the required 30 minutes.

In *Maza v. Waterford Operations, LLC*, employees alleged that their employer failed to provide an uninterrupted meal period and, where the period was interrupted, failed to pay the full 30 minutes in wages to the affected employees; the case ultimately settled for approximately $4 million, with final approval entered nearly 10 years after the case was filed. *See Maza v. Waterford Operations, LLC*, Jackson County Circuit Court, Case No. 14CV03147, Stipulation and Settlement of Class Action Claims (Nov 26, 2024); *Maza*, 300 Or App at 473 (noting facts of case). In *Palmateer v. Les Schwab*, employees alleged that their meal periods were shorter than 30 minutes and that they were not fully paid for those short meal periods; that claim resulted in a settlement of $16,007,218. *See Palmateer v. Les Schwab*, Multnomah County Circuit, Court Case No. 17CV22189, 21 Or Lit Arb Rpts 8, 2020 WL 8714086. In *Hunter v. Legacy Health*, employees alleged they were denied pay for meal breaks, and the resulting settlement totaled $14.5 million. *See Hunter et al. v. Legacy Health et al.*, Case No. 3:18-CV-002219-AC, 2025 WL 5025324 (Jan 23, 2025). And in *South v. Armstrong, UTB Enterprises*, employees alleged that the company failed to pay employees for meal periods shorter than 30 minutes during a six-hour shift; the parties reached a $3.55 million settlement in December 2025. *See South v. Armstrong*, Multnomah County Circuit Court, Case No. 20CV29671, Complaint (Aug 26, 2020); *South v. Armstrong*, Multnomah County Circuit Court, Case No. 20CV29671, Pls'

Unopposed Motion for Preliminary Class Action Settlement Approval (Oct 4, 2025).

These four cases account for approximately $38 million in settlements and judgments, and are attributable to claims that employees' meal periods fell shy of the Rule's 30-continuous-minute requirement. And still more class-action cases are built on similar short-meal-period claims, in conjunction with other wage-and-hour theories. If this Court affirms the Court of Appeals' interpretation, Oregon businesses, large and small alike, can expect this pattern to accelerate. The combination of prevailing-party attorney fees, penalty wages, prejudgment interest, and a six-year limitations period creates powerful incentives to bring claims of this kind against every Oregon employer that provides a shortened meal period, regardless of the employer's policies, instructions, or good-faith efforts at compliance.

CONCLUSION

For the reasons stated above and in Pelican Brewing Company and Kiwanda Hospitality Group, Ltd.'s Brief on the Merits, and in light of the multimillion-dollar settlements and judgments the Court of Appeals' interpretation has already produced, the Court should reverse the Court of Appeals' decision in *Athena*.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS UNDER ORAP 5.05

I certify that: (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b); and (2) the word-count of this brief as described in ORAP 5.05(2)(d)(i) is 5,922. I further certify that the size of the type in this brief is not smaller than 14 point for the text of the brief and footnotes as required by ORAP 5.05(2)(d)(ii).

/s/ J. Alexander Bish
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CERTIFICATE OF FILING AND SERVICE

I certify that on August 20, 2026, I filed *AMICI CURIAE*'S BRIEF ON THE MERITS IN SUPPORT OF PELICAN BREWING COMPANY AND KIWANDA HOSPITALITY GROUP, LTD. with the State Court Administrator via the Oregon Judicial Department's efiling system. I further certify that on August 20, 2026, I caused true copies of *AMICI CURIAE*'S BRIEF ON THE MERITS IN SUPPORT OF PELICAN BREWING COMPANY AND KIWANDA HOSPITALITY GROUP, LTD. to be served on the following addresses via the Oregon Judicial Department's efiling system, with a courtesy copy via U.S. first-class mail.

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