

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 IN SUPPORT OF  
PELICAN BREWING COMPANY AND  
KIWANDA HOSPITALITY GROUP, LTD.'S  
PETITION FOR REVIEW***

---

Court of Appeals Opinion Filed: November 26, 2025  
Opinion on Reconsideration Filed: February 11, 2026  
Author of Opinion: Hellman, J.  
Panel: Ortega, Presiding Judge, Powers, Judge,  
and Hellman, Judge

---

Name and addresses of counsel on the following page.

Misha Isaak, OSB No. 086430  
misha.isaak@stoel.com  
John B. Dudrey, OSB No. 083085  
john.dudrey@stoel.com  
J. Alexander Bish, OSB No. 173060  
alexander.bish@stoel.com  
STOEL RIVES LLP  
760 SW Ninth Avenue, Suite 3000  
Portland, OR 97205  
Telephone: 503.224.3380

*Attorneys for Amici Curiae*

Michael T. Garone, OSB No. 802341  
Email: mgarone@schwabe.com  
Nicholas D. Lauren, OSB No. 172039  
Email: nlauren@schwabe.com  
SCHWABE, WILLIAMSON &  
WYATT, P.C.  
1211 SW Fifth Avenue, Suite 1800  
Portland, OR 97204  
Telephone: 503-222-9981

*Attorneys for Defendants-Appellants,  
Petitioners on Review Pelican Brewing  
Company and Kiwanda Hospitality  
Group, Ltd.*

Jon M. Egan, OSB No. 002467  
Email: jegan@eganlegalteam.com  
JON M. EGAN P.C.  
547 Fifth Street  
Lake Oswego, OR 97034  
Telephone: 503-697-3427

*Attorney for Plaintiffs-Respondents,  
Respondents on Review Athena, Leila  
Barbeau, and Aaron St. Pierre*

Douglas S. Parker, OSB No. 821017  
parkerd@lanepowell.com  
Heather St. Clair, OSB No. 154252  
stclairh@lanepowell.com  
Ian T. Maher, OSB No. 221585  
maheri@lanepowell.com  
BALLARD SPAHR LLP  
601 S.W. Second Avenue, Suite 2100  
Portland, Oregon 97204  
Telephone: 503.778.2100

David P.R. Symes, OSB No. 961350  
dsymes@symeslawoffice.com  
SYMES LAW OFFICE LLC  
39085 Pioneer Blvd., Suite 1003  
Sandy, OR 97055  
Telephone: 971.801.3320

*Attorneys for Putative Amicus Curiae  
Jack in the Box Inc.*

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
FACTS RELEVANT TO REVIEW .....	2
QUESTIONS PRESENTED .....	2
PROPOSED RULES OF LAW .....	2
INTERESTS OF AMICI CURIAE .....	2
REASONS FOR REVIEW .....	4
ARGUMENT .....	10
A.    The Court of Appeals erred in determining that the Rule entitles employees to “wages” for a short meal period.....	11
B.    The Court of Appeals’ textual analysis is flawed. ....	12
C.    The Court of Appeals failed to account for its decision in <i>Maza</i> in interpreting the Rule.....	14
D.    The Court of Appeals’ interpretation undermines other parts of the Rule. ....	15
E. <i>Gafur</i> concerned rest periods and further determined that employees do not have a claim for missed breaks, which is precisely what Plaintiffs here seek.....	17
F.    The Court of Appeals’ interpretation of the Rule is incongruent with its very purpose.....	19
CONCLUSION.....	21

## TABLE OF AUTHORITIES

### Cases

<i>Athena v. Pelican Brewing Company</i> , 345 Or App 172, 583 P3d 550 (2025), <i>reconsideration denied</i> , 347 Or App 80 (2026) .....	passim
<i>Gafur v. Legacy Good Samaritan Hosp. &amp; Med. Ctr.</i> , 344 Or 525, 185 P3d 446 (2008) .....	12, 17, 18, 19
<i>Jones v. Gen. Motors Corp.</i> , 325 Or 404, 939 P2d 608 (1997) .....	11
<i>Marshall v. Pollin Hotels II, LLC</i> , 170 F Supp 3d 1290 (D Or 2016) .....	5
<i>Maza v. Waterford Operations, LLC</i> , 300 Or App 471, 455 P3d 569 (2019) .....	passim
<i>Maza v. Waterford Operations, LLC</i> , No. A165030, 2018 WL 7890560 (Or App Jan 9, 2018) .....	20
<i>Migis v. Autozone, Inc.</i> , 282 Or App 774, 387 P3d 381 (2016) .....	13
<i>Taylor v. Werner Enters., Inc.</i> , 329 Or 461, 988 P2d 384 (1999) .....	14
<i>Weir v. Joly</i> , No. 3:10-CV-898-HZ, 2011 WL 6778764 (D Or Dec 23, 2011) .....	5, 6, 7, 8
<i>Wilson v. Smurfit Newsprint Corp.</i> , 197 Or App 648, 107 P3d 61 (2005) .....	9
<i>Wyatt v. Body Imaging, P.C.</i> , 163 Or App 526, 989 P2d 36 (1999) .....	13

### Statutes

ORS 12.080 .....	8
ORS 652 .....	12
ORS 652.150 .....	8, 9, 13, 14

ORS 653.....	12
ORS 653.040(3).....	10
ORS 653.055.....	9, 18
ORS 653.055(4).....	8
ORS 653.261.....	17
ORS 653.261(1)(a).....	10

### **Rules**

ORAP 8.15.....	1
ORAP 9.07(3).....	4

### **Regulations**

OAR 839-020-0050 .....	6, 15
OAR 839-020-0050(1).....	19
OAR 839-020-0050(2)(a) .....	5
OAR 839-020-0050(2)(b).....	5
OAR 839-020-0050(5).....	15
OAR 839-020-0050(5)(a) .....	15
OAR 839-020-0050(8).....	15
OAR 839-020-0050(8)(a)(F) .....	15
OAR 839-020-1010(1)(i).....	16
OAR 839-020-0040 .....	17
OAR 839-020-0050 .....	15

## INTRODUCTION

Pursuant to ORAP 8.15, Oregon Business & Industry, the Oregon Restaurant & Lodging Association, and the National Federation of Independent Business Small Business Legal Center, Inc. respectfully submit this brief as *amici curiae* in support of Pelican Brewing Company and Kiwanda Hospitality Group, Ltd.’s petition for review (“Petition”). The Petition identifies reasons the opinion issued by the Court of Appeals on February 11, 2026, in *Athena v. Pelican Brewing Company* and legal questions presented therein merit review by this Court.

As it sits today, the Court of Appeals’ decision in *Athena*, coupled with its prior decisions interpreting the Bureau of Labor and Industries’ meal-period rule, threatens the ability of Oregon businesses to gainfully employ Oregonians. Employees who periodically return from their lunch breaks a minute early stand to create multi-million-dollar liabilities for their employers, even when employers have directed employees to take, and have provided the time employees need to take, their required 30-minute meal break. That reality is the result of cascading Court of Appeals decisions that strain and stray from settled interpretative norms. This Court should grant review of the Court of Appeals’ latest decision interpreting the meal-period rule and correct the draconian system the Court of Appeals has thus far articulated.

## **FACTS RELEVANT TO REVIEW**

*Amici* adopt and incorporate by reference the Petition’s Statement of Historical and Procedural Facts.

## **QUESTIONS PRESENTED**

*Amici* adopt and incorporate by reference the Petition’s Questions Presented regarding the legal questions at issue.

## **PROPOSED RULES OF LAW**

*Amici* adopt and incorporate by reference the Petition’s Proposed Rules of Law.

## **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.

OBI, ORLA, and NFIB collectively promote their missions through their motion to appear as *amici curiae* in support of Pelican Brewing Company and Kiwanda Hospitality Group, Ltd., and their request that the Court grant review of the Court of Appeals' decision in *Athena v. Pelican Brewing Company*, 345 Or App 172, 583 P3d 550 (2025), *reconsideration denied*, 347 Or App 80 (2026).

### **REASONS FOR REVIEW**

As the Petition notes, this case satisfies several of the Court's discretionary review criteria. With respect to *amici* and their members, a ruling on the nature and validity of the Bureau of Labor and Industries' ("BOLI") meal-period rule ("Rule") will have broad and far-reaching consequences. Given its statewide importance, such issues are appropriately resolved by Oregon's highest court. *See* ORAP 9.07(3). To date, the Court of Appeals has been the sole arbiter of the Rule's meaning and requirements; in light of *Athena*, those decisions now pose an existential threat to Oregon businesses, both small and large, and, in turn, to the livelihoods of Oregon workers.

In considering whether to accept review, the Court should consider practical consequences of the state’s present legal regime for meal periods, a regime that is the product of the text of the Rule, a series of appellate decisions (some of them concerning the Rule, some of them of more general application), and related wage-and-hour statutes.

The Rule states that employers must “provide to each [non-exempt] 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.” OAR 839-020-0050(2)(a). The Rule further states that, 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)(b). The Rule applies equally to all Oregon employers, both public and private, regardless of size, industry, location or any other variable.

In several cases, the United States District Court for the District of Oregon interpreted the term “provide” to mean that the employer’s obligation under the Rule was (essentially) to create the conditions by which an employee could complete a 30-minute uninterrupted meal period. *See, e.g., Weir v. Joly*, No. 3:10-CV-898-HZ, 2011 WL 6778764, at \*6–\*7 (D Or Dec 23, 2011); *Marshall v. Pollin Hotels II, LLC*, 170 F Supp 3d 1290, 1300 (D Or 2016).

These courts rejected any notion that the Rule imposed a strict-liability

obligation to ensure that employees actually took the full 30 minutes for their meals. As Judge Hernández thoughtfully described it:

“[Plaintiff] also seems to take the position that an employer must pay an employee for a break of less than 30 minutes, no matter the reason. For instance, if the employee took a 29-minute meal break and happened to clock in a minute before 30 minutes had passed, the employer must pay the employee for the entire 30 minutes. Although Oregon courts have not spoken on this issue, I do not agree with [plaintiff]’s interpretation of the rule. The rule requires that employers “provide” a meal break of 30 continuous minutes during which the employee is relieved of all duties. OAR 839-020-0050. To require an employer to police when an employee clocks in and out would be an unreasonable burden on the employer. The outcome would be an employee who could take a proper meal break, but then demand that it [be] paid simply by clocking in early. I grant defendants’ motion for summary judgment on [plaintiff]’s claims that [the employer] wrongfully deducted for meal breaks.”

*Weir*, 2011 WL 6778764, at \*7. Thus, these decisions concluded, if an employee voluntarily returned to work from a meal after less than 30 minutes, the employer had nevertheless “provide[d]” the employee with a compliant meal period and (critically) the employee was simply entitled to the wages associated with the time after they returned to work, not the full 30 minutes (which necessarily includes the time the employees spent eating their meals) under the Rule.

The Oregon Court of Appeals rejected that approach in *Maza v. Waterford Operations, LLC*, 300 Or App 471, 455 P3d 569 (2019). The *Maza* court interpreted the term “provide” to mean that an employer has an absolute duty to ensure that its employees complete required 30-minute meal periods

under the Rule or pay them for the full 30-minute period. Read together, the Rule and *Maza* mean that even if an employer maintains a clear policy requiring employees to take 30-minute uninterrupted meal periods, and even if an employee returns to work early in violation of the employer's instructions, the employee is entitled to 30 minutes of pay.

Critically, this remains true no matter how much of the meal period the employee completes prior to returning to work. For example, assume that Employee A and Employee B are each directed to take unpaid, uninterrupted meal periods between 12:00 p.m. and 12:30 p.m. If Employee A voluntarily returns to work at 12:05 p.m., and Employee B voluntarily returns to work at 12:29 p.m., the employer owes each of them their full pay for the period between 12:00 p.m. and 12:30 p.m. This is so because, in the language of the Rule as interpreted by *Maza*, the employer did not “provide” either Employee A or Employee B with “a meal period of not less than 30 continuous minutes during which the employee [was] relieved of all duties” and, as a consequence, “must pay [Employee A and Employee B] for the entire 30-minute meal period” as set out in in the Rule.

As Judge Hernández predicted in *Weir*, *Maza* creates a scenario in which Oregon employers must “police when an employee clocks in and out” for meal periods without regard to whether doing so is “an unreasonable burden on the

employer.” *Weir*, 2011 WL 6778764, at \*7. If they do not, they are on the hook to their employees for 30 minutes of pay.

*Athena* tightens the *Maza* screws further. The decision begins with the conclusion that the 30 minutes of pay the employer owes under the Rule qualifies as “wages” under Oregon law. *Athena*, 345 Or App at 183–84. Armed with that determination, *Athena* then concludes that employees have a private right of action to recover the wages associated with a less-than-30-minute meal period, one that is subject to the six-year statute of limitations under ORS 12.080 and that authorizes the employee to collect a 30-day penalty wage under ORS 652.150. *Id.* at 189–91.

Returning to Employee A and Employee B, assume that the employer was ignorant of its obligations under the Rule and *Maza* to pay them for the full 30-minute period between 12:00 p.m. and 12:30 p.m. (Perhaps that ignorance was understandable given the employer’s instructions to Employees A and B to take the full 30 minutes and its meal period policy, and the Rule’s text that the employer need only “provide” a meal period.) Post-*Athena*, Employee A and Employee B have six full years to file lawsuits to recover up to 30 minutes of pay, in addition to a 30-day penalty wage (assuming the violation was willful) along with prevailing-party attorney fees and pre- and post-judgment interest. See ORS 653.055(4) (“The court may award reasonable attorney fees to the prevailing party in any action brought by an employee

under this section.”); *Wilson v. Smurfit Newsprint Corp.*, 197 Or App 648, 673–74, 107 P3d 61 (2005) (discussing generally the standard for finding that a violation of Oregon wage-and-hour law is willful and recognizing employee’s right to recover prejudgment interest on ORS 652.150 penalty wages).

Even assuming that Employee A and Employee B earn the Oregon minimum wage for non-urban counties of \$14.05 per hour, that means each of them could receive \$3,379.03 in wages and penalties on account of their short meal periods, all because they ignored their employer’s clear instructions and returned to work from a meal period early (just one minute early, in Employee B’s case).<sup>1</sup>

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

---

<sup>1</sup> 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 taking a meal period that is less than 30 minutes.

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 consequences underscore why review is warranted. The Court of Appeals’ interpretation of the Rule—and its expansion in *Athena*—raises issues of exceptional importance affecting employers and employees across the state, exposes Oregon businesses to sweeping and potentially ruinous liability, and implicates the scope of an agency’s delegated authority. Review is therefore necessary to provide authoritative guidance of the meaning, validity, and permissible reach of the Rule—matters appropriately resolved, and urgently needed, by this Court.

## ARGUMENT

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.” ORS 653.261(1)(a). Those rules can include minimum meal periods. *Id.* In addition to the authority to prescribe minimum meal periods, the legislature delegated authority to BOLI to enact rules necessary to prevent “circumvention or evasion” of rules that BOLI enacts. ORS 653.040(3). The Rule is arguably consistent with these delegations of

authority insofar as it requires employers to provide a minimum meal period to preserve employee health and attaches a penalty for its evasion—here, 30 minutes of “pay”—for an employer’s failure to provide that minimum period.<sup>2</sup>

The Rule goes astray and exceeds BOLI’s delegated authority,<sup>3</sup> however, if it is understood to provide employees *wages* for a short meal period and a cause of action to sue their employers for those wages. Given that the Court of Appeals adopted that interpretation of the Rule, it erred and did so in a way that will have grave financial consequences for Oregonians.

**A. The Court of Appeals erred in determining that the Rule entitles employees to “wages” for a short meal period.**

The Court of Appeals concluded that the “pay” required by the Rule is “wages,” as all the Rule does is make a shortened meal period compensable

---

<sup>2</sup> *Amici* disagree with the Court of Appeals’ interpretation of the Rule in *Maza* that an employer “provides” a 30-minute meal period when it polices the employee’s break to ensure the full 30-minute period is taken. *Maza*, 300 Or App at 480. Among other issues, *Maza* strains the meaning of “provides” and creates 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.”).

<sup>3</sup> *Amici* joins Petitioners’ argument that the Court of Appeals erred in holding that employees have a private wage claim for a shortened meal period because there is no clear and express legislative grant of authority for BOLI to create such a claim. Petition at 11-18. *Amici* focuses its brief on the second issue presented in *Athena*, which is whether the “pay” required under the Rule is a wage or a penalty.

work time. *Athena*, 345 Or App at 183–84. That conclusion rests on a series of compounding errors: a superficial analysis of “wages” as defined by the legislature; a failure to account for *Maza*’s absolute-duty framework; a disregard of the Rule’s internal structure and the broader Hours Worked regulations; an unwarranted extension of *Gafur* to the Rule; and an interpretation that defeats the Rule’s stated purpose.

**B. The Court of Appeals’ textual analysis is flawed.**

The Court of Appeals decision starts with addressing whether “pay” for a short meal period falls within the statutory definitions of “wages” in Chapters 652 and 653. *See Athena*, 345 Or App at 180 (noting that “wages” are defined in Chapter 653 as “compensation due to an employee by reason of employment” and in Chapter 652 as “all compensation for performance of service by an employee for an employer”). Although the court answered that question in the affirmative, it did so without engaging in any meaningful analysis beyond restating the statutory definitions themselves. *See id.* (“Certainly, the ‘pay’ described in the rule falls comfortably within that definition—a shortened meal period can only arise ‘by reason of employment.’”). That cursory approach proves too much. Under the Court of Appeals’ reasoning, virtually anything of value that arises out of the employment relationship—such as parking benefits, insurance coverage, or

access to employee-only discounts—would qualify as “wages,” simply because it exists “by reason of employment.”

Even the way the Court of Appeals identifies the role that the “pay” required for a short meal period serves undermines its interpretation that such “pay” is “wages.” As explained by the court, the requirement of “meal breaks [is] for employee health” and the “pay” is there “to prevent employers from circumventing that requirement.” *Athena*, 345 Or App at 188. That is a fundamentally different role than “wages”—which are there to compensate employees for services performed—and serves to “protect employees from unscrupulous or careless employers who fail to” provide their employees with continuous, uninterrupted 30-minute meal periods. *Id.* at 181 (discussing purpose of civil penalties under ORS 652.150 and quoting *Migis v. Autozone, Inc.*, 282 Or App 774, 802, 387 P3d 381 (2016)).

Ultimately, the court’s interpretation gives insufficient weight to the operative concept common to both chapters: that “wages” are compensation for services performed. *See, e.g., Wyatt v. Body Imaging, P.C.*, 163 Or App 526, 530, 989 P2d 36 (1999) (noting common meaning of wages). The “pay” mandated by the Rule does not fit within that concept. In most of the shortened meal periods at issue in *Athena*, the employees were not performing services for their employers for all—or nearly all—of the 30-minute period yet were nonetheless deemed entitled to payment for the entire block of time. Treating

such compensation as “wages” stretches the statutory definitions beyond their text and requires a more probing analysis than that applied by the Court of Appeals.

**C. The Court of Appeals failed to account for its decision in *Maza* in interpreting the Rule.**

The Court of Appeals next bolsters its interpretation that the “pay” required by the Rule must qualify as “wages” with the argument that, if it were instead a penalty for noncompliance, it would require proof of a mental state akin to that required by ORS 652.150. *Athena*, 345 Or App at 180–81. But that reasoning overlooks the consequences of the court’s own construction of the Rule in *Maza*. Under *Maza*, every violation of the Rule is effectively treated as willful because employers are charged with an absolute duty to ensure that employees take full 30-minute meal periods. *See Maza*, 300 Or App at 480 (“It is the employer’s duty to monitor employees’ work and meal periods to ensure that full meal periods are taken.”).

In other words, once *Maza* defines the employer’s obligation as an affirmative and continuous duty of enforcement, any failure to “provide” the meal period presumably reflects the employer’s awareness of that obligation and its failure to meet it. That is, essentially, the standard for willfulness articulated by this Court. *See Taylor v. Werner Enters., Inc.*, 329 Or 461, 469, 988 P2d 384 (1999) (an employer “willfully fail[s] to pay” wages when it fails

to compensate employees despite being “fully aware of [its] obligation to do so” (citation omitted)). The Court of Appeals’ attempt to distinguish wages from penalties on the basis of mental state therefore collapses under its own reasoning.

**D. The Court of Appeals’ interpretation undermines other parts of the Rule.**

The Court of Appeals’ reliance on surrounding provisions of OAR 839-020-0050 also does not support its conclusion that a shortened meal period necessarily results in “wages.” The provisions the court cites—those governing exemptions and employee waivers in OAR 839-020-0050—are expressly conditioned on affirmative acts that alter the default requirement of a 30-minute, duty-free meal period. *See Athena*, 345 Or App at 181 (discussing provisions). 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. *See* OAR 839-020-0050(5)(a), (8)(a)(F). In those circumstances, payment is properly understood as wages because the employer has lawfully opted into an alternative compliance framework authorized by the rule itself.

But it does not follow that payment required as a consequence of noncompliance likewise constitutes “wages.” To the contrary, 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.<sup>4</sup> 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.

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. 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.

---

<sup>4</sup> 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.

And those are not the only contextual clues in BOLI's regulations that undermine the Court of Appeals' conclusion. Although the court held that the Rule was intended to define a short meal period "as work time during which an employee is owed a wage," *Athena*, 345 Or App at 181, it overlooked a critical regulatory structure: BOLI has a separate, comprehensive set of regulations—its "Hours Worked" rules—that expressly govern "what constitutes working time" under ORS 653.261, the enabling statute pursuant to which the Rule was promulgated. OAR 839-020-0040 (identifying the scope of the Hours Worked rules). Significantly, the Rule does not appear within that regulatory series.

**E. *Gafur* concerned rest periods and further determined that employees do not have a claim for missed breaks, which is precisely what Plaintiffs here seek.**

The Court of Appeals' reliance on *Gafur* does not help its analysis and rests on a fundamental failure to appreciate the material distinction between rest periods and meal periods. *Athena*, 345 Or App at 182–84. *Gafur* concerned 10-minute rest periods, which the rule has always treated as paid time and which, by their very nature, are too brief to allow employees to disengage from work or use the time effectively for their own purposes. *See Gafur v. Legacy Good Samaritan Hosp. & Med. Ctr.*, 344 Or 525, 535, 185 P3d 446 (2008) (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. *Gafur* did not concern these periods. Treating *Gafur* as controlling authority on meal periods therefore extends that decision beyond both its holding and its rationale that an employee does not stop working for purposes of 10-minute rest periods.

*Gafur* is a poor comparator for meal periods for other reasons, too. The central issue in *Gafur* was whether employees who were denied rest periods could state a wage claim under ORS 653.055 for wages associated with *missed* rest periods, even though they had already been paid for all time they were suffered or permitted to work. 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 entitled to additional wages. *See Gafur*, 344 Or at 536 (holding “employees who were not provided rest breaks during a four-hour shift but were paid for four hours of work” have no wage claim).

Plaintiffs here seek precisely what *Gafur* rejected. Similar to the plaintiffs in that case, they 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 employees clocked in early, they were paid for that time. Plaintiffs thus seek wages not for uncompensated work performed, but

for time they did not work—effectively seeking to recover wages for a missed meal period. *Gafur* forecloses that theory with respect to rest periods.

Nor does BOLI’s 2010 amendment to the Rule support the Court of Appeals’ conclusion that BOLI was merely implementing *Gafur*. In *Gafur*, BOLI appeared as *amicus curiae* and expressly disagreed with the Supreme Court’s determination that the rest-period rule did not entitle employees to wages for missed rest periods. *Gafur*, 344 Or at 536–37. If the 2010 rulemaking were intended as a response to *Gafur*, 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 do so. Instead, BOLI left the rest-period rule untouched and amended only the meal-period rule—a strong indication that the amendment reflected an independent policy choice regarding enforcement of meal-period compliance, not an effort to extend *Gafur*’s “hours worked” analysis to an entirely different form of break.

**F. The Court of Appeals’ interpretation of the Rule is incongruent with its very purpose.**

Finally, and perhaps most significantly, the Court of Appeals’ interpretation fails to account for the Rule’s practical operation and stated purpose. The meal-period rule exists to protect employee health by ensuring meaningful rest during the workday. *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.”). Under *Athena*’s construction, the Rule produces results that bear little relationship to that purpose. An employee who receives only one minute of a meal period is entitled to only one minute of pay (because the employee is paid for the remaining 29 minutes of the period after clocking in), while an employee who receives a 29-minute meal period is entitled to payment for nearly the entire half hour. The Court of Appeals did not attempt to explain how this outcome advances employee health—or why the amount of compensation owed increases in direct proportion to the amount of rest the employee actually received.

That disconnect suggests a fundamental misreading of the Rule. Properly understood, the Rule is designed to require employers to provide rest, not to award compensation as a substitute for it. The Court of Appeals’ interpretation elevates “pay” into the operative safeguard of employee health, even though the Rule’s central concern is the meal period itself. Under that logic, employees who rest longer receive greater economic benefit than those who rest less, a result that is difficult to reconcile with the Rule’s protective purpose. This internal inconsistency further underscores why the Rule’s payment provision is

more sensibly understood as a remedial consequence of noncompliance—not as the creation of wage-earning work time.

### CONCLUSION

For the reasons stated above and in the Petition, the Court should grant review of the Court of Appeals' decision in *Athena*.

DATED: May 8, 2026

STOEL RIVES LLP

*/s/ J. Alexander Bish*

---

Misha Isaak, OSB No. 086430

misha.isaak@stoel.com

John B. Dudrey, OSB No. 083085

john.dudrey@stoel.com

J. Alexander Bish, OSB No. 173060

[alexander.bish@stoel.com](mailto:alexander.bish@stoel.com)

STOEL RIVES LLP

760 SW Ninth Avenue, Suite 3000

Portland, OR 97205

Telephone: 503.224.3380

*Attorneys for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH PETITIONS LENGTH  
UNDER ORAP 9.05(3)(a) AND TYPE SIZE REQUIREMENTS UNDER  
ORAP 5.05(a)(d)(ii)**

I certify that: (1) this Petition for Review complies with the word-count limitation in ORAP 9.05(3)(a); and (2) the word-count of this brief as described in ORAP 5.05(1)(d)(i) is 4,552. 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(1)(d)(ii).

*/s/ J. Alexander Bish*

---

J. Alexander Bish, OSB No. 173060

## CERTIFICATE OF FILING AND SERVICE

I certify that on May 8, 2026, I filed *AMICI CURIAE'S BRIEF IN SUPPORT OF PELICAN BREWING COMPANY AND KIWANDA HOSPITALITY GROUP, LTD.'S PETITION FOR REVIEW* with the State Court Administrator via the Oregon Judicial Department's e filing system. I further certify that on April 17, 2026, I caused true copies of *AMICI CURIAE'S BRIEF IN SUPPORT OF PELICAN BREWING COMPANY AND KIWANDA HOSPITALITY GROUP, LTD.'S PETITION FOR REVIEW* to be served on the following addresses via the Oregon Judicial Department's e filing system, with a courtesy copy via U.S. first-class mail.

Jon M. Egan, OSB No. 002467  
 Email: [jegan@eganlegalteam.com](mailto:jegan@eganlegalteam.com)  
 JON M. EGAN P.C.  
 547 Fifth Street  
 Lake Oswego, OR 97034  
 Telephone: 503-697-3427

*Attorney for Plaintiffs-Respondents,  
 Respondents on Review Athena, Leila  
 Barbeau, and Aaron St. Pierre*

Michael T. Garone, OSB No. 802341  
 Email: [mgarone@schwabe.com](mailto:mgarone@schwabe.com)  
 Nicholas D. Lauren, OSB No.  
 172039  
 Email: [nlauren@schwabe.com](mailto:nlauren@schwabe.com)  
 SCHWABE, WILLIAMSON &  
 WYATT, P.C.  
 1211 SW Fifth Avenue, Suite 1800  
 Portland, OR 97204  
 Telephone: 503-222-9981

*Attorneys for Defendants-Appellants,  
 Petitioners on Review Pelican  
 Brewing Company and Kiwanda  
 Hospitality Group, Ltd.*

Douglas S. Parker, OSB No. 821017  
[parkerd@lanepowell.com](mailto:parkerd@lanepowell.com)  
 Heather St. Clair, OSB No. 154252  
[stclairh@lanepowell.com](mailto:stclairh@lanepowell.com)  
 Ian T. Maher, OSB No. 221585  
[maheri@lanepowell.com](mailto:maheri@lanepowell.com)  
 BALLARD SPAHR LLP  
 601 S.W. Second Avenue, Suite 2100  
 Portland, Oregon 97204  
 Telephone: 503.778.2100

David P.R. Symes, OSB No. 961350  
[dsymes@symeslawoffice.com](mailto:dsymes@symeslawoffice.com)  
 SYMES LAW OFFICE LLC

39085 Pioneer Blvd., Suite 1003  
Sandy, OR 97055  
Telephone: 971.801.3320

*Attorneys for Putative Amicus Curiae  
Jack in the Box Inc.*

*/s/ J. Alexander Bish*

---

J. Alexander Bish, OSB No. 173060

*Attorney for Amici Curiae*