No. 104937-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

NAOMI BENNETT, an individual; and JANET HUGHES, an individual, on behalf of themselves and others similarly situated,
Respondents,

v.

PROVIDENCE HEALTH & SERVICES, a Washington Nonprofit Corporation,
Petitioner.

RESPONDENTS' SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Providence—a billion-dollar healthcare organization—chose not to pay its caregivers for nearly 177,000 hours of work. And, despite the long hours these caregivers work, Providence failed to provide them the second meal break that Washington law requires.

Washington has a "long and proud history of being a pioneer in the protection of employee rights." *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 760 (2018). Yet Providence asks this Court to hold that an employer may systematically underpay 70 percent of its employees as long as it does so pursuant to a "rounding" policy. It asks the Court to hold—contrary to U.S. Supreme Court precedent—that federal law requires that employers be permitted to negotiate the right to violate their state meal-break obligations. It asks the Court to hold that a class's claims are destroyed if a named plaintiff turns out to be atypical, even if there is another named plaintiff who adequately represents the class. And it asks the Court to hold that employees consent to labor violations if they do not quit their jobs.

Washington workers have a "fundamental right" to "health and safety protection." *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 520 (2020). And the legislature has evinced a "strong … intent" to "protect employee wages and assure payment." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159 (1998). Providence invites this Court to undermine those protections in favor of rules so hostile to workers that no appellate court in the country has adopted them. This Court should decline its request and affirm.

STATEMENT

Providence is Washington's largest healthcare provider, employing tens of thousands of hourly "caregivers." CP 14-16, 1581. These caregivers have difficult jobs and work long hours—often 12-hour shifts. CP 1582-83. But for years, Providence systematically underpaid them. During the five-year class period, Providence underpaid 70 percent of its workforce to the tune of over $7 million. CP 1447. It also failed to provide its caregivers the meal breaks Washington law requires.[1]

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[1] Unless otherwise specified, all internal quotation marks, citations, and alterations are omitted throughout this brief;

Failure to pay wages owed. Washington law requires that employers pay employees for "all time worked." *Xerox*, 191 Wn.2d at 761. That should pose no problem for Providence because it keeps careful track of every minute its caregivers are on duty: Caregivers must clock in and out when they start and end work, and they must attest that their timekeeping records are accurate. CP 1538, 1546-47, 1561.

Nevertheless, in calculating employees' wages, Providence chose to round employees' time to the nearest quarter hour. CP 276, 1568-70. Under Washington law, an employer may adopt a rounding policy as long as it compensates employees "for all the time they have actually worked." ES.D.1 § 11.2. But Providence didn't do so. Over the five-year class period, 70 percent of Providence's caregivers were clocked in for more time than they were paid. CP 1447. On net, Providence failed to pay for nearly 177,000 hours that caregivers worked, shorting them over $7 million in unpaid wages. CP 1447; Resp. Br. 11-12.

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citations to "Opening Br.," "Resp. Br.," and "Op." are to the briefing and opinion in the court of appeals; and citations to Providence's arguments are to its petition for review.

That disparity is the expected result of Providence's policies. Rounding was "strictly for pay purposes"; it was not a "grace period" from Providence's strict attendance policy. CP 1664-65. Caregivers who clocked in even a few minutes late were subject to discipline, including termination. CP 3359, 3364, 3371. Caregivers, therefore, had every reason to report for duty early. And because of Providence's rounding practice, they were never paid for that time.[2]

On summary judgment, Providence argued that it was lawful to avoid paying for nearly 177,000 hours of work for two reasons. First, it contended that it was not required to pay employees for any time between when they clocked in and the official start of their shift. CP 1149, 2606-10. Both the trial court and the court of appeals rejected that argument because it is blackletter law that employees are "on duty"—and thus owed payment—whenever they are under their employer's "control." CP 3706; Op. 16; *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 897-98 (1982). And caregivers were under Providence's control as

[2] Providence ended its rounding policy in November 2020, after conducting an internal analysis to "remediate legal risk of liability." CP 284, 1035, 1622-23.

soon as they clocked in. *See* Resp. Br. 8-9; CP 1629 (employees who are clocked in may not ignore an order from a supervisor); CP 3349 (disciplining caregiver for "badg[ing] in early" without "report[ing] to the[ir] unit"); CP 3358 (similar). Providence's petition does not challenge this holding.

Second, Providence argued that, despite shorting 70 percent of its caregivers for 177,000 hours of work, its rounding policy was "neutral." CP 1145-48, 2610-11. Again, both courts below disagreed, holding that a policy that "systematically" underpays such a large percentage of employees is not "neutral" because it does not "compensate" employees "for all time actually worked." CP 3707; Op. 19-20. This is the only rounding argument that Providence continues to pursue before this Court. Pet. 22-25.

Failure to provide meal breaks. Washington law requires that employers provide employees who work over 10 hours with two 30-minute meal breaks. WAC 296-126-092; *see Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 581 (2017). There is only one circumstance in which an employer need not provide a meal break: If an individual employee "wishes to waive [a] meal period, the employer may agree to it." ES.C.6.1 § 8; *Brady*, 188 Wn.2d at 581. Even then, employees retain the right to revoke their waiver at any time. ES.C.6.1 § 8.

Providence's written meal-break policy acknowledged that caregivers are entitled to second meal breaks, CP 289, but Providence did not actually provide them. Although Washington employers have "an affirmative duty to ensure their employees take their meal breaks," *Brady*, 188 Wn.2d at 582-84, Providence's "decades long norm" was to provide only one meal break "by default." CP 1604-05; *see* CP 1153 (Providence admitting that it "does not assume employees take their second meal periods"); *see also* CP 702-03, 1620-21. To get a second meal break, employees had to explicitly ask for it, make special arrangements with their supervisor, CP 1605, clock in and out for that meal break, CP 703, 1153, 1574, and stay at work for an additional 30 minutes, CP 1357, 1604. *See* Resp. Br. 14-17.

Providence has always required that caregivers who take a second meal break clock in and out. CP 252, 703, 1574. Unsurprisingly, Providence's time records demonstrate that caregivers did not receive that meal break in 99.4 percent of more than 3.7 million shifts longer than ten hours. CP 1442, 1452.

At summary judgment, the court analyzed the meal-break claims under the burden-shifting framework laid out in *Brady*, 188 Wn.2d 576. CP 3709-10. The court found—and Providence does not dispute—that the plaintiffs met their initial burden to show that class members "did not receive second meal breaks." CP 3709-10.

Providence was then required to "rebut" that showing by producing evidence, sufficient to create a material dispute of fact, "that in fact no violation occurred or a valid waiver exists." *Brady*, 188 Wn.2d at 584. Providence argued that it had met its burden with respect to one of the two class representatives, Janet Hughes. CP 1155-57. Just before summary judgment, Providence discovered a document where Ms. Hughes purportedly waived her second meal break. CP 1155-57, 2264. It also produced testimony from her deposition and her supervisor that she had actually taken paid second meal breaks while on duty. CP 1155-57, 1227-28. Based on this evidence, the trial court denied summary judgment on Ms. Hughes's individual claim and permitted Providence to present this evidence at trial. CP 3714.[3]

But, as Providence itself explained, the evidence regarding Ms. Hughes was "wholly different" than its evidence for the rest of the class. CP 2616-17. As to the rest of the class, Providence produced only a handful of second-meal-break waivers, and a declaration suggesting that approximately 20 other caregivers in Ms. Hughes's clinic also waived second meal breaks. CP 1227-28, 3711. This evidence, too, the trial court ruled, Providence could present to the jury. CP 3711, 4001-02.

Providence "speculat[ed]" that perhaps some other class members received on-duty meal breaks, not reflected in Providence's time-keeping records, but it provided no evidence of that. CP 3710-11; Op. 29-30. The trial court ruled that no reasonable factfinder could conclude that Providence's speculation was sufficient to meet its burden to demonstrate that class members "actually took" a second meal break. CP 3710.

[3] Before trial, the plaintiffs voluntarily dismissed Ms. Hughes's individual meal-break claim. CP 4133, 4234.

On appeal, Providence argued that there was, in fact, sufficient evidence to go to a jury that class members "received paid meal breaks." Opening Br. 44-45. But Providence "fail[ed]" to support that argument with citations to "specific parts of the record." Op. 29. Again, at most, Providence could only "[s]peculat[e]" that some caregivers "may" have received a second meal break. Op. 29-30. Because "speculation and conclusory statements will not preclude summary judgment," the court of appeals affirmed. *Id.* (quoting *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301 (2019)).

The court of appeals also rejected Providence's argument that it was improper for the trial court to grant summary judgment to the class but permit Ms. Hughes's meal-break claim to go to trial. Op. 35. After all, Providence itself had argued that Ms. Hughes was "atypical" of the class. Op. 36. And the class remained represented by a second named plaintiff, Naomi Bennett. *Id.*

Willfulness. Washington law provides that an employer who "wilfully" underpays its employees is liable for exemplary damages, unless employees "knowingly submitted" to the violation. RCW 49.52.050(2), 49.52.070. In its answer, Providence asserted that its actions were "not willful" because it "reasonabl[y] belie[ved]" that its policies were lawful. CP 545. So the plaintiffs sought discovery on those beliefs. CP 774-86. To avoid this discovery, Providence withdrew its "good faith" defenses. CP 1029. Relying on that withdrawal, the trial court declined to compel discovery, and "precluded [Providence] from asserting any defense based on its subjective understanding of law or based on a subjective belief that wages were not owed." CP 1101.

Providence nonetheless attempted to reassert a good-faith defense at summary judgment, but the court held Providence to its withdrawal. CP 3714. Again, the court of appeals affirmed. Op. 43-44. Due to Providence's "withdrawal of good-faith defenses"—and its choice to prevent the development of any record to support them—the court held that "no reasonable jury could find that Providence had a subjective genuine belief" that its policies were lawful. *Id.*

The court of appeals also concluded that Providence did not "provide argument or cit[ation] to the record to establish that caregivers" "knowingly submitted" to its violations. Op. 45-46.

ARGUMENT

I. A collective bargaining agreement cannot supersede an employer's mandatory obligation to provide meal breaks.

The legislature enacted the Industrial Welfare Act to ensure that "all employees be protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. As part of that guarantee, Washington law "imposes a mandatory obligation" on employers to give their employees a meal break "of at least thirty minutes" for every five hours that they work. *Brady*, 188 Wn.2d at 584; WAC 296-126-092.

For decades, Providence ignored this obligation, providing its employees only one meal break, regardless of how long they worked. *See supra* 5-6. For the vast majority of its employees, Providence has no defense: Only a handful of caregivers waived their second meal break. Providence seeks to add to this number by relying on a collective bargaining agreement—covering only 5 percent of the class for a few months of the class period—that purports to relieve Providence of its legal obligation to provide a second meal break. *See* CP 2191, 2211.[4] But it's undisputed that Washington does not permit employers to bargain around their statutory meal-break obligations.

Providence therefore argues that federal law requires that it be permitted to do so anyway. But Providence waived this argument multiple times over. And the U.S. Supreme Court has explicitly held that states *may* impose labor standards that cannot be collectively bargained away. Far from preempting the state meal-break claims here, federal law authorizes them.

A. Washington law does not permit employers to negotiate away their obligation to provide meal breaks.

Providence does not seriously dispute that Washington law prohibits the company from evading its mandatory meal-break obligations via collective bargaining agreements. With good reason. The legislature has authorized employers in only three industries to negotiate a collective bargaining agreement that

[4] Providence suggests there are more, but the trial court found only one, and Providence's petition does not challenge that conclusion. CP 3713.

"supersede[s]" the state's meal-break requirements: public employers, employers in the construction trades, and minor league baseball. RCW 49.12.187. There is no exception for healthcare. *See State v. LG Elecs., Inc.*, 186 Wn.2d 1, 9 (2016) ("Where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.").

That's why L&I directs that meal-break requirements may not be overridden by collective bargaining agreements. ES.C.6.1 § 15; *see Brady*, 188 Wn.2d at 581 (affording ES.C.6.1 a "high level of deference" due to the "agency's expertise"). Providence may not give itself an exception that the legislature chose not to provide.

B. Federal law does not preempt the caregivers' meal-break claims.

Unable to argue that Washington law permits it to bargain away its statutory obligations, Providence instead contends that the meal-break claims are preempted. But Providence waived this defense. And, in any event, it is foreclosed by U.S. Supreme Court precedent.

1. In the trial court, Providence never argued that the caregivers' meal-break claims were preempted. In fact, Providence expressly withdrew the only preemption defense it had alleged: preemption under the Labor Management Relations Act. *See* CP 32, 1120, 1124-26, 5037-38 (informing the trial court that there was no "LMRA preemption issue"). And the court of appeals rejected Providence's attempt to argue it for the first time on appeal. Op. 48 n.30.

In its petition, Providence argues for the first time that the National Labor Relations Act also preempts the meal-break claims. But that argument is waived twice over by Providence's failure to present it either to the trial court or to the court of appeals.[5] The "preemptive effect of federal law is not an issue that satisfies any of the exceptions to the general [preservation] rule." *Wingert v. Yellow Freight Sys. Inc.*, 146 Wn.2d 841, 853-54 (2002). This

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[5] In the trial court, Providence briefly argued that the NLRA preempted plaintiffs' *rounding* claims, not its meal-break claims. CP 1151-52. Even that argument was so "inadequate[ly]" briefed that the trial court could not consider it. CP 3708. Providence did not raise the NLRA at all on appeal.

Court, therefore, should not even reach Providence's preemption arguments. *See id.*

2. If this Court were to reach the issue, Providence cannot satisfy its burden to show that the meal-break claims are preempted. *See Wash. State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 327 (1993). "[P]reemption cannot be based on a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Kansas v. Garcia*, 589 U.S. 191, 202 (2020). Rather, a party asserting that state-law claims are preempted must identify a specific constitutional provision or federal statute that conflicts with them. *See id*.

Providence (at 13) first tries section 301 of the LMRA, which provides: "Suits for *violation of contracts* between an employer and a labor organization … may be brought in any district court of the United States having jurisdiction of the parties." 29 U.S.C. § 185(a) (emphasis added). Section 301 demonstrates Congress's intent that federal law "be used to address disputes *arising out of labor contracts*." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209 (1985) (emphasis added). In such disputes, "state contract law must yield to" federal law, "lest common terms in bargaining agreements be given different and potentially inconsistent interpretations in different jurisdictions." *Livadas v. Bradshaw*, 512 U.S. 107, 122 (1994).

Section 301 therefore preempts claims "founded directly on rights created by collective-bargaining agreements" or that are "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987). But because the LMRA is about interpreting collective bargaining agreements, it does not preempt claims that are "independent of a labor contract." *Hill v. Garda CL Nw., Inc.*, 191 Wn.2d 553, 570 (2018) (quoting *Allis-Chalmers,* 471 U.S. at 212).

The right to a meal break—and the cause of action to enforce that right—are provided by Washington's Industrial Welfare Act and the Administrative Code, "independent" of any collective bargaining agreement. *See id.*; *Wingert*, 146 Wn.2d at 848-50; WAC 296-126-092. Section 301 therefore does not preempt meal-break claims. *See Livadas*, 512 U.S. at 123-24

Providence argues (at 13) that, because individual employees may choose to waive a meal break, the LMRA requires that employers be permitted to negotiate away their obligation to provide meal breaks at all. But, again, section 301 governs only the interpretation of collective bargaining agreements, not "what private parties may agree to" in the first place. *Allis-Chalmers*, 471 U.S. at 211. States are thus free to create rights that employers may not collectively bargain away—even if the right is individually waivable. *See Livadas*, 512 U.S. at 123; *Valles v. Ivy Hill Corp.*, 410 F.3d 1071, 1078, 1080-81 & n.5 (9th Cir. 2005) (section 301 did not preempt meal-break claims under a state statute that allowed individual employees to waive).[6]

3. Falling back, Providence argues for the first time (at 14) that the National Labor Relations Act also preempts the meal-break claims. It provides almost no explanation for this assertion. Nor could it. The NLRA governs *how* labor and management bargain, not *what* they may bargain over. *See Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 796 (2015).

The NLRA protects the "equality of bargaining power" between labor and management, *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 754 (1985), by regulating the "economic

[6] *Hill* does not hold otherwise. *Contra* Pet. 11-12. *Hill* held only that, *if* a state right is collectively bargainable, a collective bargaining agreement purporting to waive that right "must include clear and unmistakable language." 191 Wn.2d at 571.

weapons of self-help"—"such as strikes and lockouts"—that labor and management use to achieve their bargaining goals, *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 615 (1986). *See, e.g.*, 29 U.S.C. § 158. The statute therefore preempts state laws that would disrupt that balance of power. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 19 (1987). But the NLRA is concerned only with "ensuring an equitable bargaining *process*," "not with the substantive terms" that may be bargained over. *Id.* at 20 (emphasis added).

A state law "that permits *no* collective bargaining on a subject" at all, therefore, "escapes NLRA pre-emption." *Id*. at 22. As the U.S. Supreme Court explained, nothing in the NLRA mandates "forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course" under state law. *Livadas*, 512 U.S. at 130; *accord Metro. Life*, 471 U.S. at 755.

The Supreme Court, therefore, has repeatedly rejected the contention that "Congress intended to leave the choice of terms in collective-bargaining agreements to the free play of economic forces." *Fort Halifax*, 482 U.S. at 19; *Metro. Life*, 471 U.S. at 754-55; *contra* Pet. 14-15. It does not "affect [the] interests implicated in the

NLRA" for states to provide employment rights that are "designed to give specific minimum protections to *individual* workers …. as individual workers, not as members of a collective organization." *Metro. Life*, 471 U.S. at 755.

Indeed, it is Providence's contention—that Washington must allow employers to negotiate away their meal-break obligations—that would threaten the careful balance of bargaining power that the NLRA establishes. *See id*. If a collective bargaining agreement can release employers from otherwise-mandatory state-law employment obligations, that would "penalize[] workers who have chosen to join a union"—thereby discouraging unionization and undermining the bargaining power of labor. *Id*. at 756.

Yet that's what Providence asks this Court to do. In its view, non-union employees have a right to meal breaks unless they choose to waive them, a waiver they may rescind at any time. Union employees, on the other hand, have to hope that their union manages to negotiate the right to take a meal break—a right for which, presumably, the union would have to give something up to obtain. That "would turn the policy that animated the" NLRA "on its head." *Id.* Nothing in the NLRA requires that states "allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally." *Id.* at 755.

Courts therefore consistently hold that the NLRA does not preempt nonbargainable state labor standards—even where the right is individually waivable. *See, e.g.*, *id.* at 755; *Concerned Home Care Providers, Inc. v. Cuomo*, 783 F.3d 77, 85-86 (2d Cir. 2015); *Alvarez v. IBP, Inc.*, 2001 WL 34897841, at *22 (E.D. Wash. 2001) (holding Washington meal-break claims are not preempted), *rev'd in part on other grounds*, 339 F.3d 894 (9th Cir. 2003); *Wylie v. Foss Mar. Co.*, 2008 WL 4104304, at *6, *14 (N.D. Cal. 2008) (holding California meal-break claims, which are individually waivable, are not preempted).

Providence does not cite a single case to the contrary. This Court should reject its request to be the first.

II. The trial court did not err in granting summary judgment to the class while denying it to one of the two named plaintiffs.

Providence next argues (at 17) that the court was required to deny summary judgment to the class because one of the named plaintiffs turned out to have a defense that didn't apply to other class members. But Providence itself recognized that this class representative was "atypical" of the class. *Supra* 9. And the class continued to be represented by another class representative.

1. Providence's argument (at 18) that a class may not proceed if one class representative turns out to be atypical runs afoul of basic class action law. A class action needs only one representative to survive. *See* CR 23 ("*One* or more members of a class may sue." (emphasis added)); *Davis v. Wash. State Dep't of Lab. & Indus.*, 159 Wn. App. 437, 443-45 (2011) (only "one named plaintiff must satisfy" claim prerequisites "before proceeding with a class action").

So, as long as there is another class representative, a class may proceed even if the claims of one of the named plaintiffs fail. *See E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977). And if a named plaintiff turns out to be atypical of the class, there is nothing wrong with "untether[ing]" liability to that plaintiff from class liability. *Contra* Pet. 21. After a class is certified, it "acquire[s] a legal status separate from the interest asserted by [a class representative]." *Sosna v. Iowa*, 419 U.S. 393, 399 (1975).

Therefore, "provided the initial certification was proper" and "decertification not appropriate"—neither of which Providence disputes—"the claims of the class members" are not "destroyed" simply "because subsequent events … undermined [a] named plaintiff['s] individual claims." *E. Tex.*, 431 U.S. at 406 n.12; *see, e.g.*, *Burman v. State*, 50 Wn. App. 433, 440 (1988); *Spears v. First Am. eAppraiseIT*, 2014 WL 4647679, at *7-8 (N.D. Cal. 2014). The trial court's denial of summary judgment on Ms. Hughes's individual claim—and the claim's eventual dismissal—thus did not impact the class, which continued to be represented by Ms. Bennett.[7]

2. Providence argues (at 20–21) that the trial court could not "rationally" grant summary judgment to the class yet deny it to Ms. Hughes. But the trial court treated Ms. Hughes and the class the same way: Where there was sufficient evidence to create a dispute of material fact, the court sent that dispute to the jury. And where there wasn't, it didn't.

[7] Providence suggests (at 19) that Ms. Bennett was not an adequate class representative, but that is a class certification issue. *See Elter v. United Servs. Auto. Assoc.*, 17 Wn. App. 2d 643, 658, 661 (2021). And Providence did not appeal class certification.

With respect to Ms. Hughes, Providence produced evidence suggesting that she had waived second meal breaks and received "on-duty" meal breaks. *Supra* 7-8. But, by Providence's own admission, that evidence—Ms. Hughes's meal-break waiver, her deposition testimony, and a declaration from her manager—was unique to Ms. Hughes. *Id.* The only evidence that Providence presented with respect to the rest of the class was a small number of meal-break waivers, signed by class members, and a declaration suggesting that about 20 other caregivers in Ms. Hughes's clinic also waived their right to a second meal break. *Id.* The trial court ruled that all of this evidence—both the evidence specific to Ms. Hughes and the evidence that a handful of other class members waived their right to a second meal break—could go to the jury. *Id.*[8]

What the trial court did not allow to go to the jury was "evidence" that did not actually create a material dispute of fact because it amounted only to "speculat[ion]" that some class members *might* have received a second meal break or waived their

[8] Providence did not present any of this Hughes-specific evidence at class certification.

right to one. CP 3710-11; Op. 29-30. As both the trial court and the court of appeals held, "speculation will not suffice to defeat summary judgment." *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 420 (2018); *cf. Androckitis v. Va. Mason Med. Ctr.*, 32 Wn. App. 2d 418, 452 (2024), *review denied*, 4 Wn.3d 1007 (2025) (defendant's assertion that meal-break waivers were "commonplace" was insufficient to defeat summary judgment without any actual "evidence" of "specific instances" when a meal break was waived).[9]

Thus, the trial court treated the class no differently than Ms. Hughes. Where Providence raised evidence sufficient to create a material dispute of fact, the court permitted Providence to present that evidence to the jury.

Providence quibbles with the trial court's choice of words, insisting (at 18) that the court erred by granting summary judgment to the class on "liability." But there is nothing unusual about what the court actually did: It determined that Providence was liable for failing to provide second meal breaks in general—the issue that predominated the class claim—but left to the jury

[9] Indeed, the court of appeals held that Providence forfeited this argument because it failed to point to "specific parts of the record" to support it. Op. 29.

in the damages phase to consider whether there were any individual caregivers who should be excepted. *Cf. Chavez v. Our Lady of Lourdes Hosp. at Pasco*, 190 Wn.2d 507, 519 & n.12 (2018) (approving of this procedure in a meal-break case).

Adjudicating classwide liability, while deferring issues "peculiar to some individual class members," is not error; it's a widely accepted class-action-management technique. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016); *see Moeller v. Farmers Ins. Co.*, 173 Wn.2d 264, 280 (2011); William Rubenstein, *Newberg and Rubenstein on Class Actions* § 11:8 (6th ed. 2025).

III. Providence's rounding policy systematically underpaid caregivers in violation of Washington law.

No reasonable jury could conclude that an employer that underpaid 70 percent of its employees by nearly 177,000 hours paid them for "all the time they have actually worked." ES.D.1 § 11.2. This Court should therefore affirm the grant of summary judgment on the class's claim for unpaid wages.

1. Washington law requires employers to pay their employees "for all time worked." *Xerox*, 191 Wn.2d at 761. Employers may use a timekeeping system that "round[s]" work time, but only if the system "compensate[s] the employees properly for all the time they have actually worked." ES.D.1 § 11.2. Like all statutory and regulatory requirements protecting employees' right to be paid, this mandate must be "liberally construed in favor of the employee." *Xerox*, 191 Wn.2d at 762.[10]

Providence's rounding policy didn't pay caregivers for all the time they worked. Over the five-year class period, Providence underpaid 70 percent of its employees by millions of dollars. That's not an accident. CP 1451-52. Because Providence disciplined its caregivers if they arrived even a few minutes late, a rational employee would "arrive at work a few minutes early" to avoid sanction—only to have those minutes "rounded away." Elizabeth Tippett, *When Timekeeping Software Undermines Compliance*, 19 Yale J.L. & Tech. 1, 39 (2017).

Where unrebutted evidence demonstrates that an employer's rounding policy consistently underpays employees, no reasonable jury could find that that policy compensates

[10] Contrary to Providence's suggestion (at 22, 25), a collective bargaining agreement cannot exempt an employer from the requirement to pay its workers for all the time they worked. *See Schneider v. Snyder's Foods, Inc.*, 95 Wn. App. 399, 402 (1999).

employees for "all the time" they "actually worked." ES.D.1 § 11.2; *see also Gillings v. Time Warner Cable LLC*, 583 Fed. App'x 712, 713, 716 (9th Cir. 2014) (rounding policy that results in employees performing "uncompensated work at the beginning of every shift" is not "neutral in its effect"); *Canales v. World Pizza, Inc.*, 2017 WL 1233998, at *10 (S.D.N.Y. 2017); *Sanchez v. Clipper Realty, Inc.*, 2026 WL 496555, at *18 (S.D.N.Y. 2026).[11]

That's not a "categorical" rule of "per se liability." Pet. 22-23, 25. That's just a faithful application of L&I's requirement—which Providence itself endorses (at 23-24)—that an employer's rounding policy must "average[] out" so that employees are "compensated for all the time they actually work." ES.D.1 § 11.2.

2. Providence argues (at 24) that it doesn't matter that it systematically underpaid most of its caregivers, because its rounding policy was "beneficial or neutral" for some employees with specific job titles in some locations. But "[n]o matter how

[11] *Feltzs v. Cox Communications Cal., LLC*, 2021 WL 5050259 (C.D. Cal. 2021), is both nonbinding and does not suggest otherwise. There is no suggestion that the employer in *Feltzs* had a disciplinary policy that ensured employees would be underpaid.

one slices the data," the rounding policy favored Providence. *Houston v. Saint Luke's Health Sys.*, 76 F.4th 1145, 1151 (8th Cir. 2023). Even Providence's own expert couldn't gerrymander the data to show that employees benefitted. His best attempt only proved that the rounding policy disadvantaged employees with a majority of job titles and at a majority of locations. CP 2107. And the shift-level data that Providence emphasizes (at 24) similarly demonstrates that Providence benefitted from rounding far more often than its caregivers. CP 1224 (40 percent of shifts benefitted Providence, while only 25 percent benefitted caregivers).

No reasonable jury could find that a policy that results in workers not being paid for nearly 177,000 hours "average[d] out." *Contra* Pet. 23.[12]

[12] Providence briefly suggests (at 22) that the plaintiffs' rounding claims are preempted because, it says, some collective bargaining agreements contemplated rounding. But Providence forfeited any preemption argument by failing to raise it adequately below—and barely even arguing it in its petition. *See supra* n.5.

IV. The trial court's award of exemplary damages was proper.

Providence for years underpaid its workforce in violation of Washington's requirement that employers pay employees for all time worked. And it had a policy of not providing second meal breaks despite a clear obligation to do so. To avoid paying exemplary damages for these violations, Providence was required to show either that it had a "genuine belief" that it paid caregivers what they were due or that its caregivers "knowingly submitted" to the violations. *Hill*, 191 Wn.2d at 561-62.

In the trial court, Providence affirmatively withdrew its good-faith defense because it didn't want to reveal what it actually believed. *Supra* 10. And Providence did not produce any evidence from which a reasonable jury could conclude that employees knowingly submitted to the violation of their rights. The trial court therefore properly ruled that the plaintiffs were entitled to exemplary damages.

A. Providence did not satisfy its burden to show that it "genuinely believed" its actions were lawful because it affirmatively withdrew that defense.

To "deter" employers from underpaying their employees, Washington law provides that an employer who "wilfully" "pay[s] any employee a lower wage" than they are due must pay exemplary damages. RCW 49.52.050(2), 49.52.070; *Hill*, 191 Wn.2d at 573. "Where an employer fails to pay wages owed, only two instances negate a finding of willfulness: (1) the employer was careless or erred in failing to pay or (2) a bona fide dispute existed between the employer and employee regarding the payment of wages." *Wash. State Nurses Ass'n v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 834 (2012). The burden is on the employer to show that either exception applies. *Hill*, 191 Wn.2d at 562.

Providence has never argued that it acted carelessly or erroneously here. So, to avoid a finding of willfulness, Providence was required to show a bona fide dispute—that is, that it had an objectively reasonable, "genuine belief that [it] was not obligated to pay certain wages." *Chelan Cnty. Deputy Sheriffs' Ass'n v. Chelan Cnty.*, 109 Wn.2d 282, 301 (1987).

Providence raises (at 26-29) a host of arguments for why it might have believed its policies were lawful. But Providence affirmatively withdrew any "good faith" defense because it didn't want the plaintiffs to be able to take discovery on whether Providence had, in fact, acted in good faith. CP 1029; *see supra* 10. Providence cannot now ask this Court to revive the defense, based on the untested—and without discovery, untestable—assertions of its lawyers. *See City of Auburn v. Hedlund*, 137 Wn. App. 494, 504 n.20 (2007).

B. Caregivers did not agree to being underpaid and not provided second meal breaks.

Having withheld from its caregivers millions of dollars in unpaid wages and denied them the meal breaks to which they're entitled, Providence now insists that its employees got what they wanted. They "knowingly submitted" to those violations, Providence says (at 29-30), because the company implemented its policies "openly," yet caregivers didn't quit. *See* RCW 49.52.070. According to Providence, to avoid consenting to its labor violations, caregivers would have had to leave their jobs and find another, without being able to work for the largest healthcare provider in the state.

Fortunately, that is not the law. To knowingly submit to a wage violation, employees must have "deliberately and intentionally" agreed to be underpaid. *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 682-83 (2001). Merely "staying on the job" is not enough. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 837 (2009).

Providence argues (at 30) that at least the employees covered by collective bargaining agreements that mention rounding or meal breaks consented to be underpaid. But "no Washington court has found that a plaintiff knowingly submitted to a willful violation … based upon the existence of a collective bargaining agreement." *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 81 n.10 (2008). A collective bargaining agreement "cannot be viewed as an agreement with [an employee] *individually*," and thus cannot evidence any individual employee's voluntary consent. *Ervin v. Columbia Distrib., Inc.*, 84 Wn. App. 882, 893 (1997). Indeed, even Providence didn't believe that its collective bargaining agreements sufficed to withhold meal breaks. It required any caregiver who wished to waive a meal break to submit a request "in writing." CP 2846.

Unsurprisingly, Providence cannot point to any evidence that its caregivers voluntarily agreed to work hundreds of thousands of hours for free, or to do so without being provided a second meal break. There is no basis, therefore, to overturn the conclusion that it must pay exemplary damages for its willful violations of Washington employment law.

CONCLUSION

This Court should affirm.

I certify under RAP 18.17 that this brief contains no more than 5,993 words, excluding the parts of the document exempted from the word count by RAP 18.17(c). A motion for leave to extend the word limit has been filed concurrently with this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date stated below, I caused the foregoing brief to be served via Filing Portal and email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

July 9, 2026

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