

No. 90932-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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ANA LOPEZ DEMETRIO and FRANCISCO EUGENIO PAZ,
individually and on behalf of all others similarly situated,
Petitioners/Plaintiffs,
v.
SAKUMA BROTHERS FARMS, INC.,
Respondent/Defendant.

**BRIEF *AMICUS CURIAE* OF FARMWORKER JUSTICE, NATIONAL EMPLOYMENT
LAW PROJECT, MIGRANT CLINICIANS NETWORK AND SEA MAR COMMUNITY
HEALTH CENTERS**

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Washington State Supreme Court

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TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESiii

INTEREST OF THE AMICI CURIAE1

STATEMENT OF THE CASE.....3

I. INTRODUCTION3

II. ARGUMENT4

A. Piece rate farmworkers are particularly vulnerable to work-related health problems and on-the-job injuries.....4

1. Agricultural work is one of the most dangerous job sectors and puts workers at a high risk for on-the-job accidents, musculoskeletal injuries, and heat-related illness.....4

2. Economic and social pressures push workers to prioritize efficiency above safety.....5

B. Paying piece rate workers separately for rest breaks is fair treatment under state and federal law and sound public health policy.....7

**C. Rest breaks are a crucial part of worker safety in dangerous industries
like agriculture.....9**

**D. The Court should interpret the statute in a manner consistent with its
goal of protecting the health and safety of all workers.....10**

III. Conclusion.....12

CERTIFICATE OF SERVICE14

TABLE OF AUTHORITIES

CASES

<i>Wingert v. Yellow Freight Systems, Inc.</i> , 146 Wash.2d 841 (2002).....	11
--	----

STATUTES

RCW § 49.12.010.....	11
----------------------	----

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Anthony, M.J., Martin, E.G., Avery, A.M., Williams, J.M. <i>Self-Care and Health Seeking Behavior of Migrant Farmworkers</i> . The Journal of Immigrant and Minority Health, No. 12 (2010).....	5
Arlinghaus, A. <i>et. al.</i> , <i>The effect of rest breaks on time to injury – a study on work-related ladder fall injuries in the United States</i> . Scand. J. Work Environ. Health. 2012; 38(6): 560-567.....	8,9
Bandiera, O., Barankay, I., Rasul, I., <i>Social Incentives in the Workplace</i> . The Review of Economic Studies, No. 77 (2010).....	6
Bureau of Labor Statistics, United States Department of Labor, <i>The National Agricultural Workers Survey, Findings from the National Agricultural Workers Survey (NAWS) 2001 – 2002, A Demographic and Employment Profile of United States Farm Workers</i> (2005).....	7
Bureau of Labor Statistics, United States Department of Labor. News Release: October 25, 2012.	
Dembe, A.E., <i>et. al.</i> , <i>The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States</i> . Occup. Environ. Med 2005; 62:588-597.....	9
Department of Health and Human Services. Respiratory Disease in Agricultural Workers: Mortality and Morbidity Statistics. DHHS (NIOSH) Publication Number 2007-106 (2007).....	5
Early, J. <i>Housing characteristics of Farmworker Families in North Carolina</i> , Journal of Immigrant and Minority Health April, 8(2). P. 173-184. (2006).....	5
Estill, C.F., Baron, S., and Steege, A. L. <i>Research and Dissemination Needs for Ergonomics in Agriculture</i> . Public Health Reports, No. 117 (2002).....	6
Feldman, S.R., <i>et. al.</i> , <i>Health Care Utilization among Migrant and Seasonal Farmworkers: the Case of Skin Disease</i> . The Journal of Rural Publication, Winter 2009.....	5
Jackson, L., and Rosenberg, H., <i>Preventing Heat-Related Illness Among Agricultural Workers</i> , Journal of Agromedicine, 15:3 (2010), 200-215.....	10
Johansson, B., Rask, K., Stenberg, M., Luleå University of Technology, Department of Human Work Sciences, Industrial Work Environment, Luleå S-971 87, Sweden.....	7
Lilley, R., Feyer, A-M., Kirk, P., Apr 2002. <i>A survey of forest workers in New Zealand – do hours, work, rest and recovery play a role in accidents and injury?</i> Journal of Safety Research 33 (1), 53-71.....	8
Luginbuhl, R. <i>et. al.</i> , <i>Heat-Related Deaths among Crop Workers – United States, 1992-2006</i> . MMWR, 57 (24), p. 649-653 (2008).....	4,10

Mirabelli, M.C. *et al.*, *Symptoms of Heat Illness Among Latino Farm Workers in North Carolina*. American Journal of Preventative Medicine, No. 39 (2010).....6

Moline, C., Zambrana, R.E., Aguirre-Molina, M. *The Influence of Culture, Class and Environment on Healthcare*. Latino Health in the U.S.: a growing challenge. Washington: American Public Health Association; 1994.....7

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Sundstrom-Frisk, C., 1984, *Behavioral control through piece rate wages*. Journal of Occupational Accidents 6 (1-2), 49-59.....8

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Work-related Agricultural Fatalities in Washington State, 1998-2005, SHARP Report #72-3-2006. July 27, 2006.....4

**STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY
TO FILE OF *AMICI CURIAE***

This brief of *Amici Curiae* is respectfully submitted, pursuant to Rule of Appellate Procedure 10.1(e), in support of the Plaintiffs.

Farmworker Justice is a non-profit organization that seeks to empower migrant and seasonal farmworkers to improve their living and working conditions, immigration status, health, occupational safety, and access to justice. Farmworker Justice accomplishes these aims through policy advocacy, litigation, training and technical assistance, coalition-building, public education and support for union organization.

The National Employment Law Project (NELP) is a non-profit legal organization with nearly 40 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards laws, and that employers are not rewarded for skirting those basic rights. NELP's areas of expertise include the workplace rights of low-wage immigrant workers under state and federal employment and labor laws, with an emphasis on wage and hour rights. NELP has litigated directly and participated as amicus in numerous cases involving wage and hour laws, before state and federal courts. In Washington State, NELP has participated as amicus in several cases before the Supreme Court: *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 664 (2010); *Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 50 P.3d 256 (2002); and *Becerra Becerra v. Expert Janitorial, LLC et al.*, 181 Wn.2d 186 (2014).

Migrant Clinicians Network (MCN) is a national organization with offices in Washington State. MCN is a force for health justice for the mobile poor, with work that occurs at the intersection of poverty, mobility and health. Founded 30 years ago, MCN has at its foundation the health and well-being of America's farmworkers and their families. Recognized as experts in farmworker morbidity, mortality and Social Determinants of Health, MCN serves the nation's 1200 federally funded health centers as well as numerous outreach and community-based organizations and clinics. Experts have direct experience in farmworker care and provide technical assistance in areas of infectious disease, occupational and environmental health, maternal and child health, chronic illness care, violence prevention, behavioral health, oral health and bioethics.

Sea Mar Community Health Center is a community-based organization committed to providing quality, comprehensive health, human and housing services to diverse communities, specializing in service to Latinos. Sea Mar has been providing service since 1978. Sea Mar strives to remove barriers of access to health and human services, whether include barriers of poverty, socio-economic status, language, culture and geography. 34% of Sea Mar's clients are Latino, and a significant portion of these patients are farmworkers. Sea Mar physicians provide care to farmworker patients, including treatment of occupational illnesses and injuries.

STATEMENT OF THE CASE

Amici Curiae incorporate the Plaintiff's Statement of the Case by reference.

I. INTRODUCTION

Piece rates are a common method of payment for farm workers who harvest fresh fruit and vegetable crops. Piece rate pay schemes provide the grower with a stable production cost and incentivize worker productivity. However, because workers are not paid separately for their rest breaks, they only earn pay while they are working.

Piece rate payment schemes provide an immediate incentive to boost productivity, but that boost comes at the cost of faster and less careful work. Studies have identified a variety of specific injury and health related risks that are associated with piece rates and show that piece rate work is often time-pressured. Workers feeling the pressure to sustain high levels of effort in order to achieve maximum productivity are discouraged from taking unpaid rest breaks. Piece rates encourage workers to compromise safe work practices in order to maximize their earning potential with low per-unit piece rates.

Agricultural employment is among the nation's most hazardous occupations. Farmworkers are exposed to heat, physical fatigue, stress, and a variety of environmental factors that put them at increased risk for both acute and chronic occupational injuries and illness. Periodic, separately-paid rest breaks are

an effective way to counteract the heightened risk of accidents that accompany long periods of continuous, repetitive and sustained work activities. Therefore, farmworkers paid by piece rate must be encouraged to take regular breaks without fear of earning lower wages. To ensure basic workplace standards of health and safety for Washington farm workers, this Court should hold that farm workers paid by piece rate are entitled to separate pay for their rest breaks, just like other Washington workers.

II. Argument

A. Piece-rate farmworkers are particularly vulnerable to work related health problems and on-the-job injuries.

1. Agricultural work is one of the most dangerous job sectors and puts workers at a high risk for on-the-job accidents, musculoskeletal injuries, and heat-related illness.

According to a 2011 report of the Bureau of Labor Statistics, agriculture remains one of the most dangerous industries in the United States with some of the highest incidence of occupational injury and illness.¹ A report released in 2008 estimated that every day about 243 agricultural workers suffer lost-work time injuries, and about 5 percent of these result in permanent impairment.² The fatality rate for the agriculture, forestry and fishing industry in Washington State in the years 1998-2002 was 25.7 fatalities per 100,000 workers, by far the highest of any major industry division.³

¹ Bureau of Labor Statistics, United States Department of Labor. News Release: October 25, 2012.

² National Institute for Occupational Health and Safety. (2008). NIOSH Safety and Health Topic: Agricultural Safety.

³ Work-related Agricultural Fatalities in Washington State, 1998-2005, SHARP Report #72-3-2006. July 27, 2006.

Research findings illustrate that the very nature of farm work puts laborers at increased risk of physical injury and illness. A national study published in 2008 found that in the previous 15-year period, 423 workers in agricultural and non-agricultural industries died from heat exposure. Results indicated that 67 percent of those fatalities were crop workers employed in the crop production or support activities for crop production sectors.⁴ Farmworkers very often will experience musculoskeletal injuries because farm labor consists of constant bending, twisting, carrying heavy items, and repetitive motions during long hours.⁵ Agricultural work poses specific risks for eye injuries because of the constant exposure to chemicals including pesticides, growth enhancers, fertilizers, tools and machinery.⁶ Farmworkers must also be vigilant and protect themselves from work-related injuries and illnesses including infectious diseases⁷, respiratory illnesses⁸, and skin disorders⁹.

2. Economic and social pressures push workers to prioritize efficiency above safety.

Economic pressures often serve as a barrier to safe work practices, putting workers' motivations for short-term gains at odds with their long-term health. Piece rates are very low – the average Washington farmworker household earns

⁴ Luginbuhl, R.C., et. al., *Heat-Related Deaths among Crop Workers – United States, 1992-2006*. MMWR, 57 (24), p. 649-653 (2008).

⁵ Anthony, M.J., Martin, E.G., Avery, A.M., Williams, J.M. *Self-Care and Health Seeking Behavior of Migrant Farmworkers*. The Journal of Immigrant and Minority Health, No. 12 (2010).

⁶ Quandt, S.A., et. al.. *Occupational Eye Injuries Experienced by Migrant Farmworkers*. The Journal of Agromedicine. Vol. 17 (2012).

⁷ Early, J. *Housing characteristics of Farmworker Families in North Carolina*, Journal of Immigrant and Minority Health April, 8(2). P. 173-184. (2006).

⁸ Department of Health and Human Services. *Respiratory Disease in Agricultural Workers: Mortality and Morbidity Statistics*. DHHS (NIOSH) Publication Number 2007-106 (2007).

⁹ Feldman, S.R., et. al., *Health Care Utilization among Migrant and Seasonal Farmworkers: the Case of Skin Disease*. The Journal of Rural Publication, Winter 2009.

approximately \$17,000 a year¹⁰ – meaning that workers must be extremely productive to make a living wage. As a result, workers tend to prioritize their economic gains over health and safety concerns. When rest breaks are subsumed in the piece rate instead of being paid separately, workers get paid less when they forego rest breaks. This creates a system that economically incentivizes low-wage workers to continue working through conditions which create increased injury risk, such as heat and fatigue. This happens often. One survey of farmworker behavior found that it was uncommon for workers to change their work hours or activities in response to extreme heat.¹¹

Among other things, this risky behavior can be attributed to both economic pressures and cultural attitudes that characterize pain as a “normal” part of work.¹² Workers normalize their effort and productivity on the job in part based on social influences.¹³ In socially isolated low-income communities, this drives working conditions down by normalizing unhealthy work behaviors.

This normalizing effect is magnified in work populations without adequate safety training. A 2006 survey of Washington farmworkers found that over 77% could neither read nor write English.¹⁴ The average household income for Washington farmworkers was \$17,000 in 2006.¹⁵ Only 8-12% have health

¹⁰ *Washington State Farmworker Housing Trust Survey* (May 2007) at 11, available at http://www.appliedsurveyresearch.org/storage/database/homelessness/farmworkers/WashingtonFarmworkers_2006.pdf (last visited January 21, 2015).

¹¹ Mirabelli, M.C. *et al.*, *Symptoms of Heat Illness Among Latino Farm Workers in North Carolina*, *American Journal of Preventative Medicine*, No. 39 (2010).

¹² Estill, C.F., Baron, S., and Steege, A. L. *Research and Dissemination Needs for Ergonomics in Agriculture*. *Public Health Reports*, No. 117 (2002).

¹³ Bandiera, O., Barankay, I., Rasul, I., *Social Incentives in the Workplace*. *The Review of Economic Studies*, No. 77 (2010).

¹⁴ *Washington State Farmworker Housing Trust Survey*, *supra*, at 35.

¹⁵ *Id.* at 11.

insurance as a benefit of employment.¹⁶ The result is a social environment where workers are both desperate for increased income and unlikely to receive safety training due to cultural and linguistic barriers.

B. Paying piece rate workers separately for rest breaks is fair treatment under state and federal law and sound public health policy.

The notion that piece rate pay models are associated with higher productivity rates and wages is popular and well-ingrained. Piece-rate wages incentivize workers to be more productive, which typically means working longer, faster, and without adhering to proper safety practices.¹⁷ However, piece rate pay also generates unwanted consequences for farmworkers. Piece rate work is heavily time-pressured and encourages workers to forego safety in the interest of efficiency. To the piece rate worker, time spent resting means time wasted because the worker is not earning wages.

The consensus in the scientific literature is that there is a link between piece rate work and workplace injury and illness.¹⁸ This is because workers increase productivity at the cost of less careful work higher likelihood of work-related illness and injury.

¹⁶ Bureau of Labor Statistics, United States Department of Labor, *The National Agricultural Workers Survey, Findings from the National Agricultural Workers Survey (NAWS) 2001 – 2002, A Demographic and Employment Profile of United States Farm Workers* (2005).

¹⁷ For example, piece rate workers are paid a certain amount for each unit of produce they pick. Because they must focus on collecting as many units of produce as possible, they may not take the time to wash their hands every time they break for food, water, or to use the bathroom. Moline, C., Zambrana, R.E., Aguirre-Molina, M. *The Influence of Culture, Class and Environment on Healthcare*. Latino Health in the U.S.: a growing challenge. Washington: American Public Health Association; 1994.

¹⁸ For a broad review of the analysis of relevant research articles published internationally about piece rate wages and their effect on health and safety see *Piece rates and their effects on health and safety – A literature review*. Johansson, B., Rask, K., Stenberg, M., Luleå University of Technology, Department of Human Work Sciences, Industrial Work Environment, Luleå S-971 87, Sweden.

Pressure to work faster at a piece rate encourages workers to risk their health. Much of the accumulated knowledge about the impacts of piece rate work indicates that piece rate work itself often has a negative effect on farmworker health and safety.¹⁹ During piece rate work there is usually a correlation between increased earning and increased risk taking by the worker. Workers under pressure to work faster and harder have increased levels of stress and an attendant increasing tendency for mistakes. Moreover, researchers found that piece rate workers were more reluctant to take breaks during work despite feeling more exhausted and tired than workers with fixed wages.²⁰

The conditions for effective risk management are worsened the longer a continuous working period persists without any rest breaks.²¹ Temporal factors have been linked to the development of fatigue in the workplace, which may lead to performance errors and eventually result in injuries in the workplace.²² Work-related temporal factors, such as time spent on tasks, or the number of daily working hours, play a role in the accumulation of fatigue and can influence occupational injury risk. Studies have shown that occupational injury rates increase as the shift continues. Among other things, this increased risk of injury is attributed to the accumulation of work-related fatigue.²³

¹⁹ *Id.*

²⁰ Lilley, R., Feyer, A-M., Kirk, P., Apr 2002. *A survey of forest workers in New Zealand – do hours, work, rest and recovery play a role in accidents and injury?* Journal of Safety Research 33 (1), 53-71.

²¹ Sundstrom-Frisk, C., 1984, *Behavioral control through piece rate wages.* Journal of Occupational Accidents 6 (1-2), 49-59.

²² Arlinghaus, A. *et. al.*, *The effect of rest breaks on time to injury – a study on work-related ladder fall injuries in the United States.* Scand. J. Work Environ. Health. 2012; 38(6): 560-567.

²³ *Id.*

Long workweeks also contribute to higher accident rates. Farmworkers often work over 40 hours per week, which, according to one study, results in a 61% higher injury hazard rate compared to jobs without overtime.²⁴ Working at least 12 hours per day was associated with a 37% increased hazard rate and working at least 60 hours per week was associated with a 23% increased hazard rate.²⁵ These findings link long work schedules with occupational injury risk and show that long working hours indirectly precipitate workplace accidents by inducing fatigue or stress in affected workers. Incentivizing piece rate workers, who often work long hours performing physically strenuous tasks, to take rest breaks will reduce stress and fatigue and decrease risk of injury.

C. Rest breaks are a crucial part of worker safety in dangerous industries like agriculture.

Rest breaks relieve worker stress and fatigue. A worker's physical and mental recovery lowers the rates of work-related accidents and promotes better worker health. This is because rest breaks have a "dose-response" effect²⁶ with workplace safety, which returns workers to their baseline accident risk rates by allowing them to adequately recover from work-related stress.²⁷ This effect is present for both chronic medical issues and acute injuries.

This "dose-response" effect of rest breaks can especially benefit farmworkers. They are at increased risk for heat injury and illness due to the nature of agricultural work: it is done outdoors, in direct sunlight, with high

²⁴ Dembe, A.E., et. al., *The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States*. *Occup. Environ. Med* 2005; 62:588-597.

²⁵ *Id.*

²⁶ The dose-response relationship describes the change in effect on a subject by differing levels of exposure (or "doses") to a stressor after a certain exposure time.

²⁷ See Arlinghaus et. al., *supra*.

humidity levels, and in protective (and often heavy) work clothing and equipment. Unregulated heat stress can lead to heat-related illnesses such as dehydration, electrolyte imbalance, neurological impairment, multi-organ failure and death.²⁸ Through the use of proper rest breaks, agricultural workers can reduce their risk of heat-related illnesses by allowing their core body temperature to return to a steady baseline.²⁹

The disparate social position of agricultural workers compounds their occupational risks. Piece rate farmworkers, already struggling with low incomes, poor job security, lack of access to healthcare and a narrow employment window, avoid taking time off of work even if it means ignoring the safety risks of working long, continuous hours without rest breaks. If the goal is to ensure the protection of the piece rate workers' health, then it will only be met by economically incentivizing them to take rest breaks. Facing the choice between taking unpaid rest breaks, which means foregoing earnings, or continuing to work despite the increased danger of injury due to fatigue, dehydration, and stress, many workers will choose the latter and take the risk to their health and safety in order to achieve higher production levels.

D. The Court should interpret the statute in a manner consistent with its goal of protecting the health and safety of all workers.

Washington, like many other states, has a series of statutory and regulatory worker protections designed to protect the health of employees. Chapter 12 of Title 49 of the Revised Code of Washington, which contains

²⁸ Luginbuhl, R. *et. al.*, *supra*, at. 649-653 (2008).

²⁹ Jackson, L., and Rosenberg, H., *Preventing Heat-Related Illness Among Agricultural Workers*, *Journal of Agromedicine*, 15:3 (2010), 200-215.

general-purpose employment regulations, declares that “[t]he welfare of the state of Washington demands that all employees be protected from conditions of labor which have a pernicious effect on their health.”³⁰ Washington’s worker protection laws are not isolated regulations enforcing an employee’s right to certain wages and working conditions; they are a holistic scheme that seeks to protect worker health and safety.

This Court has interpreted other Washington employment regulations as health and safety regulations. In *Wingert v. Yellow Freight Systems, Inc.*,³¹ this Court addressed whether or not a collective bargaining agreement between a freight truckers’ union and the employer could waive the employees’ rights to a rest break on the employer’s time. The Court found that there was a “strong legislative intent that employees be afforded healthy working conditions and adequate wages” and that “[a]llowing a collective bargaining agreement to decrease the frequency of workers’ rest periods... would thwart that fundamental purpose.”³²

The policy of the Washington legislature is clear – employers may not avoid the mandates of workplace health and safety laws merely because they maintain that they compensate their employees for the risk. Thus, the goal of the rest break statute is not to *allow* workers to take rest breaks – but to *ensure* that they do. The consensus among the scientific community is clear – piece-rate workers often refuse to take rest breaks when they are uncompensated.³³ When

³⁰ RCW § 49.12.010

³¹ 146 Wash.2d 841 (2002).

³² *Id.* at 852.

³³ See Section A.2., *supra*.

workers forego their rest breaks, they do so at the expense of their well-being in the long-term, risking both acute injuries and chronic musculoskeletal damage.³⁴ Allowing workers to work through their rest breaks does not fully compensate them for the long-term health impacts of a workday without breaks and runs counter to the Washington legislature's stated intent of protecting the health and safety of all workers.

III. CONCLUSION

For reasons both of law and public policy, this Court should conclude that (1) employers have an obligation under WAC 296-131-020(2) and the MWA to separately pay piece-rate farm workers for the rest breaks to which they are entitled; and (2) employers must calculate the rate of pay for the rest break time to which piece-rate farm workers are entitled based on the average hourly rate from piecework each week, but not less than minimum wage.

³⁴ See Section C., *supra*.

RESPECTFULLY SUBMITTED AND DATED this 2nd day of February,
2015.

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