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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM
THE UNITED STATES
DISTRICT COURT FOR
THE WESTERN DISTRICT
OF WASHINGTON

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.

**ANSWER TO AMICUS BRIEF OF WASHINGTON FARM LABOR
ASSOCIATION, WASHINGTON STATE TREE FRUIT ASSOCIATION,
AND WASHINGTON GROWERS LEAGUE**

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ORIGINAL

I. INTRODUCTION

Plaintiffs-Petitioners (“the workers”) file this brief in answer to the amicus brief submitted by the Washington Farm Labor Association, Washington State Tree Fruit Association, and Washington Growers League (“WAFLA Amici”). In their brief, WAFLA Amici repeatedly suggest the workers seek “to change the law.” On the contrary, it is WAFLA Amici who ask for a ruling that will apply a different legal interpretation of “on the employer’s time” than DLI and Washington courts have adopted under WAC 296-126-092(4). DLI states that “[t]he term ‘on the employer’s time’ is considered to mean that the employer is responsible for paying the employee for the time spent on a rest period.” DLI Admin. Policy ES.C.6 § 10 (2005). WAFLA Amici, however, argue that “on the employer’s time” means something different in WAC 296-131-020(2): that pay for farm worker rest break time is subsumed in the piece rates employers pay for time spent picking fruit. WAFLA Amici do not cite a single case supporting this interpretation. Thus, this Court should reject their argument.

In accordance with RAP 10.3(f), this brief is “limited solely to the new matters raised in the brief of amicus curiae.” Prior briefs already explain the difference between rest break obligations and Minimum Wage Act (“MWA”) obligations, the proper regulatory construction of WAC 296-131-020(2), and the limited relevance of federal authority in this case. Those arguments will not be addressed here. Similarly, the workers will not address WAFLA Amici’s novel

interpretations of Department of Labor and Industries (“DLI”) policies. With regard to those policies, the workers refer the Court to previous briefs submitted by the workers and DLI’s amicus brief.

In this brief, the workers address three misunderstandings in WAFLA’s amicus brief. First, piece-rate pay may not be used to offset the compensation owed for rest break time. Second, piece-rate pay and salary are not analogous forms of compensation. Third, the question of retroactivity is beyond the scope of the certified questions, but if the Court addresses the question, it should not depart from the presumption of retroactivity.

II. ARGUMENT

A. Piece-Rate Pay Does Not Compensate for Rest Break Time.

WAFLA Amici fail to cite any case law in support of their argument that piece-rate pay compensates workers for rest break time. *See* WAFLA Amici Brief at 9-10. Ignoring DLI’s interpretation of “on the employer’s time” in the generally applicable rest break regulation, WAFLA Amici assert that rest break time is like “non-productive” time and that employers need not separately pay employees for such time. WAFLA Amici are wrong. First, this Court has held that rest periods “may not be offset by time spent working.” *Wash. St. Nurses Ass’n v. Sacred Heart Med. Ctr.*, 175 Wn. 2d 822, 832, 287 P.3d 516 (2012). Indeed, rest breaks are “hours worked” and must be paid. *Id.* at 831-32.

Second, under Washington law, piece-rate pay may not be used to offset pay requirements for so-called “non-productive” work time that is otherwise unpaid. WAFLA Amici’s apple picking example demonstrates their misunderstanding. *See* WAFLA Amici Brief at 9. In the example, much of the work is part-and-parcel of picking apples, such as moving from tree to tree and putting apples picked into a bin. The workers do not dispute that such work is compensated by per-bin piece pay. But the other duties mentioned—meeting time and orientation sessions to review employer policies—must be separately paid as hours worked. *See Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 836, 991 P.2d 1126, *modified*, 1 P.3d 578 (2000) (holding that mandatory pre-employment orientation sessions were work subject to compensation under the MWA); DLI Admin. Policy ES.C.2 at 1 (2008) (“The department’s interpretation of ‘hours worked’ means all work requested, suffered, permitted or allowed and includes . . . training and meeting time, wait time, on-call time, preparatory and concluding time . . .”). Under Washington law, an employer may not require an employee to perform work for which no compensation is paid. *See Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007). “If the work is performed, it must be paid.” DLI Admin. Policy ES.C.2 at 1.

Under the approach advocated by WAFLA Amici, however, any work that an employer considers “non-productive” could go uncompensated so long as the piece-rate pay that an employee receives for picking time satisfied minimum

wage obligations *on a workweek basis*. This would lead to unfair results. For example, an employer could require an employee to attend an uncompensated all-day meeting at the start of each week so long as the employee's piece-rate pay for picking work in the following days met a *weekly* minimum wage requirement. Or an orchard foreman could require an employee to spend an uncompensated hour at the end of each day washing the foreman's truck so long as the piece-rate pay for picking work resulted in at least minimum wage for all hours worked *when averaged over the week*. Just as hourly pay for certain hours worked cannot be used to offset the obligation to pay for other hours worked, piecework pay may not be used to offset hours spent working on non-piecework tasks.¹ See PI's Reply Brief on Certified Questions at 9-14.

Washington employers have an independent obligation to pay workers for rest break time. See WAC 296-131-020(2) (requiring provision of rest breaks "on the employer's time"); DLI Admin. Policy ES.C.6 § 10 (defining "on the

¹ The workers acknowledge there is no Washington case authority directly addressing whether an employer may refuse to pay an employee for certain work time when the employee performs a combination of piecework and other work. But on issues of first impression in Washington, this Court may look at cases from other jurisdictions for guidance. *In re Parentage of L.B.*, 155 Wn.2d 679, 702, 122 P.3d 161 (2005). Interpreting similar statutory language, state and federal courts in California have held that employers who pay on a piece-rate basis for "productive" work "must also pay . . . a separate hourly minimum wage for time spent during . . . work shifts . . . [on] non-[productive] tasks." *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 40, 155 Cal. Rptr. 3d 18, 20 (Cal. Ct. App. 2013) (interpreting wage order with language similar to RCW 49.46.020 and DLI Admin. Policy ES.C.2 that requires payment of not less than minimum wage for all "hours worked"); see also *Quezada v. Con-Way Freight, Inc.*, No. C 09-03670 JW, 2012 WL 2847609, at *4 (N.D. Cal. July 11, 2012) (holding pieceworkers who do non-productive work must be separately paid for that time); *Carillo v. Schneider Logistics, Inc.*, 823 F. Supp. 2d 1040, 1044 (C.D. Cal. 2011) (same); *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246, 1253 (C.D. Cal. 2011) (same).

employer's time" in generally applicable rest break regulation "to mean that the employer is responsible for paying the employee for the time spent on a rest period"). Because Sakuma's employees go without compensation whenever they stop picking fruit in order to take a rest break, Sakuma is violating the law.

B. Piece-Rate Pay Is Different Than Salary.

The argument that piece-rate farm workers are not entitled to separate pay for rest break time because piece-rate pay is akin to salary compensation is unpersuasive. *See* WAFLA Amici Brief at 15-16. "Salary is where an employee regularly receives for each pay period . . . a predetermined monetary amount (salary)" regardless of variations in the "quantity or quality of work performed." DLI Admin. Policy ES.A.9.1 at 2 (2014). In contrast, piece-rate pay is based on the *quantity* of the work performed. *See* DLI Admin. Policy ES.A.8.2 at 2 (2014) (stating that piece-rate employees are "paid a fixed amount per unit of work"); *Erickson v. Dep't of Labor & Indus.*, 185 Wn. 618, 620, 56 P.2d 713 (1936) (noting that "piece work" occurs where workers are "paid by the piece instead of by the hour or day"). Thus, while a salary may cover all work time (including rest break "hours worked"), a piece rate does not. It only covers the "units of work" for which it is designed—for example, pounds of strawberries or bins of apples.

In analogizing piece-rate farm workers to salaried employees, WAFLA Amici rely on a single case from three decades ago concerning meal breaks for salaried employees: *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 901,

639 P.2d 732 (1982). *Weeks* is inapposite. There, the Court held that state patrol troopers' salaries were designed to pay for all working hours, including one hour of lunch time each day. *Id.* at 900-01. This is consistent with DLI's explanation of "salary" set forth above. WAFLA Amici suggest that the same analysis applies to *rest break time* for *piece-rate* farm workers, but this is time in which the workers otherwise receive no pay. Thus, the holding in *Weeks* has no application to piece-rate workers.

C. WAFLA Amici's Request That the Court Depart From the Presumption of Retroactivity Is Beyond the Scope of the Certified Questions, but if This Court Addresses the Issue, the Ruling Should Apply Retroactively.

In addition to the certified questions presented to this Court and addressed by the parties, WAFLA Amici seek to interject another question: If this Court holds that employers must pay piece-rate farm workers for rest break time, may that decision be applied only prospectively despite the general rule that this Court's decisions apply retroactively?

This Court may answer only the certified questions presented by the federal district court because the Court lacks jurisdiction to go beyond those questions. *See Kitsap Cnty. v. Allstate Ins. Co.*, 136 Wn.2d 567, 577, 964 P.2d 1173 (1998). Thus, the Court should not consider the question of retroactivity.

If the Court does consider this additional question, the Court should hold that the general rule of retroactive application applies. WAFLA Amici fail to cite

any authority supporting a departure from the general rule in these circumstances. Indeed, the cases on which they rely concern changes in the law or pronouncements of a new rule after the overruling of a previous decision. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270-76, 208 P.3d 1092 (2009) (holding that new rule of strict product liability applied retroactively); *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59, 75, 316 P.3d 469 (2013) (holding that presuit notice requirement of former RCW 7.70.100(1) did not violate constitution for claims against the state, but applying that ruling only prospectively because Court previously held that notice requirement was unconstitutional in a case that did not involve state defendants).

Here, the certified questions concern the proper interpretation of an existing regulation—not a request to overrule prior precedent or change the law. Moreover, the workers rely on existing cases and a DLI administrative policy providing that “on the employer’s time” in an analogous rest break regulation means employers must pay for the time spent on a rest period. Thus, the workers do not seek to establish a new rule. *See Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009) (stating that “once a statute has been construed by the highest court of the State, that construction operates as if it were originally written into it” and the construction “relates back to the time of the statute’s enactment”).

Even if this Court were overruling a previous decision or establishing new law, retroactive application would still apply. “Retroactive application, by which a decision is applied both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule, is “overwhelmingly the norm.”” *Lunsford*, 166 Wn.2d at 270 (quoting *Robinson v. City of Seattle*, 119 Wn.2d 34, 74, 830 P.2d 318 (1992)). It is the “general rule that a new decision of law applies retroactively.” *Id.* at 271. It is only “in rare instances” that this Court applies a decision only prospectively. *McDevitt*, 179 Wn.2d at 75. Particularly here, where neither party raised the issue in its initial briefing on the certified questions, there is no reason to depart from the norm of retroactive application.

To determine whether application of a new rule of law should depart from the general rule of retroactivity, the Court has at times applied the United States Supreme Court’s *Chevron Oil* test. See *Lunsford*, 166 Wn.2d at 272 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)). Under the *Chevron Oil* test, the Court may depart from the presumption of retroactivity only if the following three conditions are *all* met: “(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result.” *Id.* (citing *Chevron Oil*, 404 U.S. at 106–07).

Here, none of the three requirements is satisfied. First, if this Court holds that employers must pay piece-rate farm workers for rest break time, it will not be establishing a new rule of law that overruled any precedent or that was not clearly foreshadowed. No case has held that employers need not pay farm workers for rest break time, and both this Court and the Court of Appeals have interpreted the generally applicable rest break rule—which contains the same language as the agricultural rule—to require payment for rest break time. *See Sacred Heart*, 175 Wn. 2d at 831-32; *Wingert v. Yellow Freight Sys.*, 146 Wn.2d 841, 847-48, 50 P.3d 256 (2002); *Pellino v. Brink's Inc.*, 164 Wn. App. 668, 689, 267 P.3d 383 (2011).

Moreover, DLI has interpreted the same “on the employer’s time” language in the generally applicable regulation to mean “that the employer is responsible for paying the employee for the time spent on a rest period.” DLI Admin. Policy ES.C.6. § 10. Thus, it should come as no surprise to employers that they must pay farm workers for the time spent on rest breaks. Nonetheless, WAFLA Amici suggest that the “entire agriculture industry” has relied on government interpretations that purportedly preclude separate payment for break times. But the Attorney General states in its amicus brief that requiring separate payments for rest breaks follows from the plain language of WAC 296-131-020. Amicus Brief of the Attorney General of Washington at 7. And DLI states in its amicus brief that DLI guidance and interpretations do not address whether or not

piece-rate farm workers should be separately paid for rest breaks. Amicus Brief of DLI at 2-8. Nothing in the record shows any reliance on any government interpretation or court decision for the proposition that payment for rest break time is not required.²

Second, retroactive application would not “impede the policy objectives of the new rule.” To the contrary, the policy objectives of separate payment for rest break time are to both protect farm workers’ wage rights and to ensure farm workers receive much-needed breaks from physical work in the elements for their health and safety. These objectives are satisfied through retroactive and prospective application. Indeed, WAFLA Amici do not address how retroactive application would impede the policy objectives of the requirement that employers pay farm workers for rest break time.

Finally, retroactive application would not produce a “substantially inequitable result.” Instead, it will allow any farm workers who have not been paid for rest break time to pursue proper claims for deprivation of their wages. WAFLA Amici essentially seek to obtain a release of claims from potentially

² To the contrary, DLI’s rulemaking file for WAC 296-131-020 shows that when promulgating the rule, the Department rejected the “Grower Position” that there be no pay requirement for rest breaks. *See* Appendix at 302 (attachment to letter from DLI Rules Officer). DLI’s rule proposals chart shows that the “Grower Position” was merely to provide a “10 minute break/4 hours” and that the “Labor Position” was to provide a “Paid 10 minute break/4 hours.” *Id.* (emphasis added). The “Department Recommendation” was for a “Paid 10 minute break/4 hours”—the same as the “Labor Position.” *Id.* (emphasis added). In accordance with RAP 10.4(c), the workers provide this regulatory history document in an appendix to this brief, as Sakuma did with other documents from the rulemaking file. *See* Sakuma’s Response Brief at 9 n.1.

hundreds of thousands of Washington farm workers who may not have been paid properly—without those workers ever having had their day in court. That result would be a “substantially inequitable result” for the low-wage farm workers who already face grueling work conditions and frequent violations of their workplace rights. WAFLA Amici argue— without factual support—that application of the rest break payment requirement to farm workers will have a “disastrous” effect on employers. Their hyperbolic assertions about putting agricultural employers “out of business” do not support a departure from the presumption of retroactivity.

III. CONCLUSION

Employers of piece-rate farm workers must separately pay the workers for rest break time. WAFLA Amici have not cited a single case to support the argument that piece-rate pay may be used to offset the compensation owed for rest breaks, and their analogy to salary-based compensation systems ignores the inherent differences between a salary and a piece rate. The low-wage farm workers who seek pay for their rest break time do not receive generous salaries that compensate them for all work time, regardless of quantity or quality. Instead, they are paid based only on the amount of fruit they pick. Finally, the certified questions before the Court do not include the “retroactivity” question posed by WAFLA Amici. This Court need not address that question, but if it does, it should conclude that WAFLA Amici have presented no valid reason to depart from the presumption of retroactivity.

RESPECTFULLY SUBMITTED AND DATED this 5th day of March,
2015.

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Appendix



STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

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406 Legion Way S.E., Olympia, Washington 98504

April 19, 1990

Curt Greenwalt
E. 6404 Spangle-Waverly Road
Spangle, Washington 99031-9797

Dear Mr. Greenwalt:

Ray Schindler has informed me that you agreed to comment on the rule proposals for employment of minors in agriculture. A copy of the rule proposals and a fact sheet with the hearing dates is enclosed. I appreciate your willingness to share your expertise with us.

If the demands of your busy schedule prevent you from testifying at one of the public hearings on the proposed rules, your written comments would be appreciated. If you have any questions about the proposals or the hearing schedule, please call me at 586-5740 in Olympia.

Sincerely,

Paul Parker
Rules Officer

Enclosure

Subject	Washington Non-agricultural	Gracer Position	Labor Position	Department Recommendation
Permits	Minor work permit for workplace filed before hiring	<u>Minor work permit for workplace filed within three days after hiring.*</u>	<u>Minor work permit for workplace filed within three days after hiring.</u>	Delay implementation. <u>Minor work permit for workplace filed within three days after hiring.</u> Effective 11/1/90
Parent/School Authorization	Required	<u>Parent authorization required; School authorization for employment during the school year.</u>	<u>Parental authorization required; School authorization required for employment during school year.</u>	<u>Parental authorization required. School authorization required for employment during the school year;</u> Specify hours that can be worked.
Minimum Age	Age 14	Age 14, except for berries. Age 12 for berries.	Age 14.	Age 14. Age 12 and 13 only during non-school weeks for hand-harvesting or hand-cultivating of berries, bulbs, cucumbers and spinach.
Hours				
Per Day - Per Week				
	<ul style="list-style-type: none"> Under 16, up to 3 hours on schooldays, up to 18 hours in schoolweek; Under 18, up to 8 hours per day, 40 hours/week. 	<ul style="list-style-type: none"> <u>Age 14-15, up to 3 hours/day, 21 hours/week when school in session; up to 8 hours/day, to 40 hours/week when school not in session;</u> Age 16-17, up to 6 hours/day on schooldays, 38 hours/week during schoolweek; <u>up to 8 hours/day, 48 hours/week when school not in session</u> 	<ul style="list-style-type: none"> <u>Age 14-15, up to 3 hours/day, 21 hours/week when school in session; up to 8 hours/day, to 40 hours/week when school not in session;</u> Age 16-17, up to 4 hours/day, 24 hours/week when school in session; <u>up to 8 hours/day, 48 hours/week during summer vacation, with overtime for hours over 40.</u> 	<ul style="list-style-type: none"> Age 12-13, up to 8 hours/day, 40 hours/week during non-school weeks. <u>Age 14-15, up to 3 hours/schoolday, 21 hours/week when school in session; (8 hrs per day on weekends). Up to 8 hours/day, to 40 hours/week when school not in session.</u> Age 16-17, up to 3 hrs on schooldays; up to 28 hrs during school weeks. Up to 10 hours per day, 50 hours per week when school not in session. Up to 10 hours per day, 60 hours per week for wheat, hay, pea and lentil harvest.

*Underline represents consensus position.

Subject	Washington Non-agricultural	Grower Position	Labor Position	Department Recommendation
Start - Finish (continued)	Under 16, work only between 7 a.m. and 7 p.m. during school year; until 9 p.m. in summer. No minor may work later than 9 p.m. on two consecutive nights preceding a school day.	- Under 14, 5 a.m. to 9 p.m. during summer; - Age 14-15, from 5 a.m. to 8 p.m. when school in session; between 5 a.m. and 9 p.m. when school not in session; - <u>Age 16-17, from 5 a.m. to 10 p.m. when school in session, not later than 9 p.m. on consecutive nights preceding a school day.</u>	- Age 14-15, from 3 p.m. to 7 p.m. after school; between 7 a.m. and 7 p.m. during non-school days; between 7 a.m. and 9 p.m. during summer vacation; - Age 16-17, from 3 p.m. to 7 p.m. after school; between 7 a.m. and 7 p.m. on non-school days; between 6 a.m. and 9 p.m. during summer vacation.	Under 14, 5 a.m. to 9 p.m. during summer. Under 16, between 7 a.m. and 8 p.m. (beginning at 6 a.m. for dairy, livestock, irrigation). Between 5 a.m. and 9 p.m. when school not in session. <u>Age 16-17, from 5 a.m. to 10 p.m. Not later than 9 p.m. on consecutive nights preceding a school day.</u>
Days Per Week	No more than 5 days/week	Six days per week, except for work in dairy, livestock, hay or irrigation.	Six days per week	Six days per week. Every day for work in dairy, livestock, hay, irrigation, with a day off every two weeks.
Rest Breaks - Meal Breaks	10 minute paid rest break/4 hours; 30 minute meal break/5 hours	<u>10 minute break/4 hours;</u> <u>30 minute meal break/5 hours.</u>	<u>Paid 10 minute break/4 hours;</u> <u>30 minute meal break/5 hours.</u>	<u>Paid 10 minute break/4 hours; 30 minute meal break every 5 hours.</u>
Notification	Post permit in plain view	<u>Post permit in conspicuous place. Post English/Spanish poster.</u>	<u>Post permit in conspicuous place in English, Spanish, and any other language common to the employees. Post English/Spanish poster.</u>	<u>Post permit in conspicuous place. Post English/Spanish poster.</u>

Subject	Washington Non-agricultural	Grower Position	Labor Position	Department Recommendation
Prohibited Employment	Long list in WAC 296-125-030 and -033; generally more restrictive than ag proposals.	<ul style="list-style-type: none"> • <u>Adopt federal standards to include all Washington crops;</u> • <u>Allow exemptions for federally recognized training programs</u> 	<ul style="list-style-type: none"> • <u>Adopt federal standards to include all Washington crops</u> with the exception of use of pesticide, anhydrous ammonia, blasting agents; • Minors may not ride or work near vehicles driven by minors under 16; • <u>Allow exemptions for federally recognized training programs;</u> • Minors may not harvest before expiration of pre-harvest interval. 	<ul style="list-style-type: none"> • <u>Adopt federal standards to include all Washington crops</u> plus prohibiting use of pesticides, anhydrous ammonia, blasting agents; • Minors may not ride or work near vehicles driven by minors under 16; • <u>Allow exemptions for federally recognized training programs;</u> • Minors may not harvest before expiration of pre-harvest interval. <p>Add a number of protections applying to minors in non-ag jobs.</p>
Variances	Allow employment in otherwise prohibited occupations for good cause shown.	<u>Variances allowed by crop or commodity or for a specific employer.</u>	<p><u>Variances to hours and days limitations allowed by crop or commodity or for a specific employer if:</u></p> <ul style="list-style-type: none"> - Adult workers unavailable; - No negative impact on school attendance or academic performance; - No harm to health, safety or welfare of minor employees; - Severe economic hardship to employer. 	<p>Variances to hours and days limitations allowed if:</p> <ul style="list-style-type: none"> • No harm to health, safety or welfare of minor employees; • Encourages or does not harm school attendance; • Necessary to meet usual crop, cultural or harvest requirements. <p>Variances for weather emergencies.</p>

CERTIFICATE OF SERVICE

I certify that on March 5, 2015, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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

DATED this 5th day of March, 2015.

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Subject: RE: Documents to be filed with the Supreme Court (Demetrio, et al v. Sakuma Brothers Farms, Inc., Case No. 90932-6)

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Attached please find Plaintiffs-Petitioners' Answer to Amicus Brief of Washington Farm Labor Association, Washington State Tree Fruit Association, and Washington Growers League, to be filed in *Demetrio, et al v. Sakuma Brothers Farms, Inc.*, Supreme Court Case No. 90932-6.

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