

No. 919453

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ABELARDO SAUCEDO, FELIPE ACEVEDO MENDOZA, JOSE  
VILLA MENDOZA, JAVIER SAUCEDO, SANDRA SAUCEDO,  
INDIVIDUALLY, AND ON BEHALF OF ALL OTHER SIMILARLY  
SITUATED PERSONS,

*Plaintiffs – Respondents,*

v.

JOHN HANCOCK LIFE INSURANCE COMPANY, JOHN HANCOCK  
LIFE & HEALTH INSURANCE CO., TEXAS MUNICIPAL PLANS  
CONSORTIUM, LLC, FARMLAND MANAGEMENT SERVICES,  
AND  
NW MANAGEMENT AND REALTY SERVICES, INC.,

*Defendants - Petitioners.*

Case No. 13-35955

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**BRIEF OF DEFENDANTS-PETITIONERS**

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## CERTIFIED QUESTIONS

The United States Court of Appeals for the Ninth Circuit certified two questions to the Washington State Supreme Court:

1. Does the Washington Farm Labor Contractor Act (“FLCA”), in particular Washington Revised Code § 19.30.010(2), include in the definition of a “farm labor contractor” an entity who is paid a per-acre fee to manage all aspects of farming—including hiring and employing agricultural workers as well as making all planting and harvesting decisions, subject to approval—for a particular plot of land owned by a third party?

2. Does the FLCA, in particular Washington Revised Code § 19.30.200, make jointly and severally liable any person who uses the services of an unlicensed farm labor contractor without either inspecting the license issued by the director of the Department of Labor & Industries to the farm labor contractor or obtaining a representation from the director of the Department of Labor & Industries that the contractor is properly licensed, even if that person lacked knowledge that the farm labor contractor was unlicensed?

## INTRODUCTION

Both questions certified by the United States Court of Appeals for the Ninth Circuit are novel only because Plaintiffs interpret the FLCA in ways fundamentally inconsistent with the statute’s plain text and longstanding application by courts and regulatory agencies. Before the decision below, no state or federal court or agency in Washington had ever required an agricultural employer like Northwest, hiring agricultural employees solely for its own farming operations, to obtain a farm labor contractor license. And with good reason: the FLCA was enacted to protect farmers and farm workers from farm labor contractors—unaccountable “intermediar[ies] between farm workers and farmer[,]” *see Perez-Farias v. Global Horizons, Inc.*, 175 Wash. 2d 518, 521-22 (2012)—*not* to impose civil and criminal liability on *farmers themselves*.

Similarly, no state or federal court had ever read the operative statutory language, establishing civil and criminal liability for any person who “knowingly uses” an unlicensed farm labor contractor (RCW 19.30.200), to punish persons who *unwittingly* use an unlicensed contractor. Nor had any court construed its proviso that a person “may rely” on (i) the license issued by the Department of Labor & Industries (“L&I”), or (ii) a representation of licensure from the L&I director, as restricting users to these two means of determining licensure only. Rather,

the *only* court to address that issue—*Yapuna v. Global Horizons Manpower Inc.*, 2008 WL 4224454, at \*2 (E.D. Wash. Sept. 10, 2008) (“Yapuna”)—expressly rejected such a requirement.

On both certified questions, this Court should reject Plaintiffs’ interpretation of the FLCA. An agricultural employer solely hiring farm workers for its own operations is not a farm labor contractor, regardless of whether it owns the land farmed or farms for a per-acre fee paid by the landowner. And Plaintiffs fail to prove *knowing* use of an unlicensed farm labor contractor, as the statute plainly requires to impose joint liability.

### **STATEMENT OF THE CASE**

#### **I. Factual Background**

##### **A. The Parties**

Plaintiffs were employees at three apple orchards (the “Orchards”) in Yakima County, Washington in 2009, 2010, or 2011. ER 109.

Defendants John Hancock Life & Health Insurance Co., John Hancock Life Insurance Company, and Texas Municipal Plans Consortium, LLC (“TMPC”) (collectively, “Hancock”) owned the Orchards.<sup>1</sup>

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<sup>1</sup> Case No. 13-35955, Dkt. No. 68 (the “Cert.”) at 9; ER 49. The Hancock parties are investors that own agricultural properties. For example, TMPC invests on behalf of the Dallas Police and Fire Pension System.

Hancock leased the Orchards to Defendant Farmland Management Services (“Farmland”) under a Master Lease and Management Agreement (the “Master Lease”).<sup>2</sup> Cert. at 9.<sup>3</sup> Farmland, in turn, hired Defendant NW Management and Realty Services, Inc. (“Northwest”) to operate the Orchards under an Orchard Management Agreement (“OMA”).<sup>4</sup>

**B. Northwest Was Among the Largest and Most Established Apple Growers in Washington State**

Northwest was a fixture in central Washington for nearly three decades. ER 481: ¶¶ 3, 7-8. Its Pasco business office existed for 20 years and employed many of the same individuals for more than a decade. *Id.* ¶ 8. Northwest’s President, Rob Wyles, testified to his belief that Northwest picked more apples—150,000 bins in a typical season—than any other independent grower in Washington. ER 484: ¶ 15.

Northwest built its business through stable, long-term relationships. ER 481: ¶ 8. Northwest’s most enduring business relationship—with Farmland—dated to the late-1980s. ER 482: ¶ 9; ER 297: ¶ 6. With the brief exception of T-16, a liquidating agent for whom

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<sup>2</sup> Under the Master Lease, Farmland agreed to directly operate the Orchards *or* sublease their operation to an agricultural management company. Cert. at 9; ESR 97: ¶ C; ESR 98: ¶ 4.1. References to “ESR \_\_\_\_” refer to Appellants’ Joint Excerpts of Sealed Record. Each orchard was governed by an identical Master Lease. Cert. at 9; ER 49 n.1.

<sup>3</sup> ER 21-35, 49, 96-121, 122-47.

<sup>4</sup> Cert. at 9; ESR 148-60, 161-73, 21-35.

Northwest provided services for seven months in 2010, Northwest did not farm for anyone other than Farmland. ER 292: ¶¶ 5-6; ER 482: ¶ 9.

### **C. Northwest Independently Operated the Orchards**

Under its OMA with Farmland, Northwest agreed to independently run a “first-class agricultural operation.”<sup>5</sup> Cert. at 10; ER 244, 162: ¶ 3. Northwest had virtually unfettered autonomy: it would “supervise,” “maintain,” “service,” “manage” and “operate” the Orchards.<sup>6</sup> It made all decisions about agricultural activities, including optimal fruit varieties, quantities, tree densities, irrigation, fertilizer and pest management treatments.<sup>7</sup> It performed all farming itself, including growing, producing and harvesting the apples.<sup>8</sup> Post-harvest, it managed all sales, marketing, storage and distribution relationships and decisions. ER 484: ¶¶ 15-19. Northwest also developed capital improvement projects and plans, as well as the annual farm operating plan. ESR 165-66: ¶ 4B.1. The District Court thus aptly noted that Northwest supplied “all expertise, equipment, materials and labor necessary to operate the orchards” (ER 51), and was “responsible” for “all aspects of the day-to-day farming operations.”<sup>9</sup>

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<sup>5</sup> The subleases for the Orchards are identical in all material respects. ER 50 n.3.

<sup>6</sup> ER 50-51, 226, 244, 324: ¶ 29; ESR 162-63: ¶¶ 3(A)-(C), (E)-(F); Cert. at 10.

<sup>7</sup> ESR 162-63, 169: ¶¶ 3, 3(A)-(G), 12.

<sup>8</sup> ER 483-86: ¶¶ 12-21; ER 492: ¶ 5; ER 500-01: ¶ 14; ESR 162-63, 169: ¶¶ 3, 3(A)-(G), 12.

<sup>9</sup> ER 52-53, 483: ¶ 12; ESR 94: ¶ 7; ER 484: ¶ 16; ESR 163: ¶ 3(C), (E).

Farmland, by contrast, did no farming at the Orchards; employed no persons at the Orchards; had no involvement in Northwest's day-to-day management of the Orchards; and was not involved in any of Northwest's employment decisions.<sup>10</sup> Northwest's discretion was subject only to its periodic reporting and submission of annual budgets and payment requests to Farmland for expenses, which Farmland "routinely approve[d] without modification," and which Hancock "routinely approved" thereafter.<sup>11</sup>

Finally, the OMA expressly required Northwest to "promptly" and "diligently" comply with all applicable legal requirements, including obtaining any required "licenses" or "permits" (ESR 38-39: ¶ 3.G).

#### **D. Northwest Controlled All Employment Decisions**

In no aspect of its farming operations did Northwest exercise greater autonomy than over its own workforce at the Orchards. As the Ninth Circuit found, "Neither Farmland nor Hancock exerted any control over NWM's [Northwest's] employment decisions, leaving NWM to decide unilaterally how many people to hire, whom to hire, and when or whether to terminate employment." Cert. at 10.

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<sup>10</sup> ER 224; ESR 94: ¶¶ 5, 7; ER 492: ¶ 5.

<sup>11</sup> ER 482: ¶¶ 11.2, 11.3; ER 500-01: ¶ 14; ESR 94: ¶ 7; ER 51; Cert. at 10.

All workers were employees of Northwest, and Northwest handled and directly paid all payroll.<sup>12</sup> Northwest made *all* employment decisions “unilaterally,” “with no input whatsoever” from Farmland, including: who, when, where, and how many workers to hire and fire;<sup>13</sup> compensation and other employment terms;<sup>14</sup> and training, placement and supervision of farm labor in Northwest’s organizational system, which employed over 1,000 workers growing, pruning and harvesting apples at the Orchards at peak season.<sup>15</sup>

Northwest directly hired and employed workers for its agricultural operations. As the parties expressly agreed in the OMA, Northwest’s employment decisions were solely on “*its [Northwest’s] own behalf*” not on behalf of Farmland; Northwest was “engaged *independently* in the business of managing Properties” as an independent contractor; and all employment arrangements were made “*unilaterally*” by Northwest.<sup>16</sup>

The OMA restricted Farmland’s involvement in Northwest’s workforce decisions. Farmland was *contractually barred* from directing

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<sup>12</sup> Cert. at 10; ER 483: ¶ 11.5; ER 226-27.

<sup>13</sup> See ER 486: ¶ 23; ER 226-27, 244; ER 51.

<sup>14</sup> See ER 486: ¶ 23.

<sup>15</sup> See ER 486: ¶ 23; ER 500-01; ER 315; ESR 4.

<sup>16</sup> All emphasis is our own unless otherwise noted. See ESR 170-71: ¶ 14; ER 486: ¶ 23.

or controlling Northwest's employment decisions, and had no input on how Northwest staffed its operations. ESR 170-71: ¶ 14; ER 486: ¶ 23.<sup>17</sup>

Northwest's set fee of \$12.50 per month per acre was not "affected by these employment decisions, such as how many people it hired."<sup>18</sup>

**E. Farmland Assured Hancock Licenses Were In Place**

Under its Master Lease with Hancock, Farmland was obligated to procure all "licenses, franchises, and other authorizations" required to manage the farms, or, alternatively, to "require any third party hired to do so."<sup>19</sup> The Master Lease expressly prohibited Farmland from violating "any law, ordinance, rule or regulation." ESR 101: ¶ 14.1.

Hancock verified that Farmland discharged its contractual duties. Hancock's representative, Oliver Williams, inspected the Orchards annually, reviewed Farmland's compliance with applicable "Legal Requirements," and ascertained whether all required "Permits" and "Licenses" were in place.<sup>20</sup> When Mr. Williams inquired whether

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<sup>17</sup> Aside from "routinely approving our [Northwest's] budget at the start of each year," and reimbursing Northwest's labor costs "in the ordinary course," Farmland had minimal input in Northwest's labor decisions. ER 482-83, 486: ¶¶ 11.4, 23; ER 228-29.

<sup>18</sup> Cert. at 9-10; ESR 169: ¶ 11; ER 483: ¶¶ 11.6, 12; ER 243.

<sup>19</sup> Cert. at 10; ESR 101: ¶ 14.2; ER 297: ¶ 6.

<sup>20</sup> ER 237-38; ESR 82-84, 87-90; ER 297: ¶ 6; ESR 59-60 (Williams Tr. 45:10-46:23).

required licenses were in place, Farmland “represented to Hancock’s representative Oliver Williams that it had done so.”<sup>21</sup>

## **II. Proceedings Before the District Court and Ninth Circuit**

Plaintiffs sued their former employer, Northwest, for, *inter alia*, alleged violations of the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), 29 U.S.C. § 1801, *et seq.*, and the FLCA, RCW 19.30.010, *et seq.* in 2009, 2010 and 2011.<sup>22</sup> ER 318: ¶ 1. Plaintiffs claimed that Northwest violated the FLCA by failing, *inter alia*, to obtain a farm labor contractor’s license. ER 334: ¶ 97.

Plaintiffs also asserted claims against the owner (Hancock) and the lessee (Farmland) of the Orchards, alleging that Hancock and Farmland were derivatively liable under RCW 19.30.200 for “knowingly” using the services of an unlicensed farm labor contractor (Northwest).

Hancock and Farmland separately moved to dismiss the FLCA claims. Dkt. Nos. 15, 18. Hancock argued that Plaintiffs failed to state a claim under RCW 19.30.200, because Plaintiffs did not allege that Hancock knew Northwest was unlicensed. Dkt. No. 15.

Farmland incorporated Hancock’s argument and urged that Northwest was exempt from licensure because Northwest hired Plaintiffs

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<sup>21</sup> Cert. at 10; ER 237-38; ESR 59-60 (Williams Tr. 45:10-46:23).

<sup>22</sup> Plaintiffs did not seek summary judgment on their claims under the AWPA. ER 38.

solely for Northwest's own farm operations, rather than for a third party. Dkt. No. 18 at 5-11. Denying Defendants' motions, Judge Rice held that Defendants' knowledge that Northwest was unlicensed was irrelevant, and that Section 200 imposed an affirmative duty on Defendants to verify Northwest's licensure. ER 106-24.

After discovery, Defendants sought summary judgment that Northwest was not a farm labor contractor under RCW 19.30.010(2)—and was thus exempt from licensure—because Northwest was an agricultural employer engaged in planting, growing and harvesting apples, and hired workers solely for its own farm operations. Dkt. No. 114. The Court denied Defendants' motion following argument. ER 48-62.

Plaintiffs moved for summary judgment that: (i) Northwest was a farm labor contractor subject to licensure under the FLCA; (ii) Northwest violated the FLCA by, *inter alia*, failing to procure a license; and (iii) Hancock and Farmland were jointly liable for Northwest's alleged violations because they "used" Northwest's services without verifying Northwest's licensure by either means described in RCW 19.30.200. Dkt. No. 183. The Court granted Plaintiffs' motion after argument. ER 37-47.

Defendants appealed. ER 1, 125-37. Following briefing and oral

argument, the Ninth Circuit certified, and this Court accepted, the two questions set forth above. *Supra* Certified Questions.

### **SUMMARY OF THE ARGUMENT**

This case requires the Court to interpret the FLCA—a statute designed to protect farmers and farm workers from unscrupulous middlemen, the “brokers of labor” between workers and farmers. ER 111. These transient “crew-leaders” were the primary violators of workers’ rights; yet, these “crew pushers” were hard to locate and even harder to hold accountable. ER 60. The FLCA’s stated purpose was to impose accountability by requiring these middlemen to be licensed.

The certified questions present two main issues. First, is Northwest—an established agricultural employer hiring and employing workers solely for its own farm operations where it was paid a fee per acre, rather than “brokering” those workers to a third party—a farm labor contractor subject to licensure under RCW 19.30.010(2)? Second, if so, does a person “knowingly” use the services of an unlicensed farm labor contractor, as required to impose joint civil or criminal liability under RCW 19.30.200, where, as here, such person lacks knowledge that the contractor is unlicensed? Relatedly, does Section 200’s proviso that a user “may rely” on a license issued by L&I or a representation from the L&I

director as to licensure mean that persons using a farm labor contractor *must* verify licensure by either such means?

As to the first issue, Plaintiffs' attempted classification of Northwest as a farm labor contractor cannot be squared with its ordinary meaning. In both common and "regular" trade usage, a farm labor *contractor* does not use farm labor in its own operations but rather is "essentially a *broker of farm labor*" to third parties (farmers)—an "intermediary" between farmers and farm workers. ER 111; *Perez-Farias*, 175 Wash. 2d at 521-22.

By this plain meaning, Northwest was *not* a farm labor contractor. Northwest was *not* an "intermediary between farm worker and farmer"; rather, it *was* the farmer because, as the District Court found, it was "responsible for all aspects of the day-to-day farming operations at the [orchards], including the growing and harvesting of apples." ER 53. Nor was Northwest a "broker of farm labor" to third parties; rather, Northwest undisputedly used such labor solely in its own operations at the Orchards. Further, to the extent that the intended scope of farm labor contractor is ambiguous, the rule of lenity, applicable to any provision imposing both civil and criminal penalties, requires resolution in Defendants' favor.

As to the second issue, Plaintiffs contend that Defendants “knowingly” used an unlicensed farm labor contractor because they did not verify Northwest’s licensure by either means referenced in the statute—*i.e.*, inspecting the farm labor contractor license or obtaining a representation of licensure from the L&I director. But the verification duties Plaintiffs attempt to graft onto Section 200 are contrary to its plain language—including the permissive phrase, “*may* rely.” Accordingly, in *Yapuna*, the court squarely rejected mandatory employer verification and found, instead, that the statute’s explicit discretionary language created an optional “safe harbor” for persons choosing to verify licensure through either means referenced in the statute. 2008 WL 4224454, at \*2.

Further, Plaintiffs violate a cardinal rule of statutory interpretation by reading a critical term—“knowingly”—out of Section 200. Indeed, according to Plaintiffs, Section 200 imposes joint liability on *any* person who does not verify licensure by either statutorily-described means—including persons who *unwittingly* use an unlicensed contractor.

But even if Section 200 were ambiguous, its legislative history and implementing regulations are not. Section 200’s drafting history reflects that the Washington legislature (the “Legislature”) inserted the word “knowingly,” over vigorous objection that requiring knowledge could

invite willful ignorance by some users. That same history also confirms the Legislature’s expectation that the two verification methods described in Section 200 would constitute an optional safe harbor only. Regulations promulgated by L&I comport with this drafting history and compel substantial deference. In any event, the rule of lenity requires this Court to resolve any ambiguity in favor of enforcing the statutorily-prescribed mental state—*i.e.*, knowledge—to impose civil or criminal liability.

### ARGUMENT

#### **I. AGRICULTURAL EMPLOYERS HIRING FARM WORKERS SOLELY FOR THEIR OWN OPERATIONS ARE NOT FARM LABOR *CONTRACTORS***

##### **A. The Plain Meaning of Farm Labor Contractor Precludes Plaintiffs’ Construction of the Statute**

The first certified question requires this Court to decide whether “agricultural employers” like Northwest—which hire and employ farmer workers solely in their own *fixed situs* agricultural operations and unilaterally “manage all aspects of farming,” rather than brokering farm labor to third parties—constitute “farm labor contractors” under the FLCA. Cert. at 8. The parties agree on the applicable principles of statutory construction: that the Court’s “fundamental objective” is to effect the Legislature’s intent; that the “plain meaning” of the operative terms and related provisions controls; and that the Court may not render

any portion of the statute “meaningless or superfluous.” ER 118-19. Here, not only the plain language meaning of “farm labor contractor” but also the overall structure of the FLCA—including its definitions of “agricultural employer” (the farmer) and agricultural employee” (the farm worker)—confirm that Northwest was not a “farm labor contractor.”

1. The Ordinary Meanings of “Contractor” and “Contracting” Are Determinative

At the outset, “farm labor *contractor*” must be given its plain meaning—one who procures labor for use *by a third party*.

The FCLA defines “farm labor contractor” as any person (or his agent or subcontractor) who, for a fee, performs “farm labor *contracting* activity.” RCW 19.30.010(2). “Farm labor contracting activity,” in turn, is defined as “recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees.”<sup>23</sup> RCW 19.30.010(3).

“[C]ontractor” in “farm labor *contractor*” (RCW 19.30.010(2), and “contracting” in “farm labor *contracting* activity” (RCW 19.30.010(3)), have established meanings in ordinary and trade usage. These meanings are thus operative. *See Tesoro Ref. & Mktg. Co. v. State, Dep’t of*

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<sup>23</sup> “Agricultural employees,” in turn, are defined as any person performing “services to, or under the direction of, an agricultural employer [Northwest] in connection with the employer’s [Northwest’s] agricultural activities.” RCW 19.30.010(5).

*Revenue*, 173 Wash. 2d 551, 556 (2012). The fact that “contractor” and “contracting” appear within *phrases* that are statutorily defined—“farm labor contractor” and “farm labor contracting activity”—does not vitiate the ordinary meaning of these undefined words themselves. *Schrom v. Bd. For Volunteer Fire Fighters*, 153 Wash. 2d 19, 28 (2004) (en banc) (statutory definition of “fire fighter” containing the phrase “fire fighter” “does not dispense with the plain and ordinary meaning of ‘fire fighter,’ which we derive from a standard dictionary if possible”).

In common usage, a “contractor” refers to a person who “contracts to do work or provide supplies *for another*.” See Black’s Law Dictionary 375 (9th ed. 2009); *Garrison v. Wash. State Nursing Bd.*, 87 Wash. 2d 195, 196 (1976) (dictionary probative of “common meaning”).<sup>24</sup>

In industry usage, farm labor contractor also refers to one supplying farm labor *to a third party* (the farmer). As Northwest’s President, Rob Wyles, explained, “In the agriculture industry a ‘farm labor contractor’ is understood to be a mobile or transient vendor of labor services” for third parties. ER 487: ¶ 27.<sup>25</sup> Michael Gempler, the

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<sup>24</sup> *Accord* Collins English Dictionary 371 (Harper Collins 10th ed. 2009) (“[A] person or firm that contracts to supply materials or labor”).

<sup>25</sup> Precisely because Northwest conceived of itself as the farmer, rather than a contractor, the OMA permitted Northwest to “retain reputable contractors to provide any required labor.” ESR 150: ¶ 3.I. Northwest did not do so.

Executive Director of the Washington Growers League and past president of the National Council of Agricultural Employers, thus stated that farmers like Northwest that hire employees solely for their own agricultural operations are *not* farm labor contractors in customary trade usage. ER 312: ¶¶ 9-10. Because nothing in RCW 19.30.010(2) expressly alters this “ordinary use of [these] words at the time when used, and the meaning adopted at that time,” *Broughton Lumber Co. v. BNSF Ry. Co.*, 174 Wash. 2d 619, 628 (2012), these established meanings govern. *Infra* II.B.2 (noting same, decades-long legislative and judicial meaning).<sup>26</sup>

Terms directly adjacent to “hiring” and “employing” in the statutory definition of farm labor contracting activity similarly emphasize the provision of labor *to a third party*. See, e.g., RCW 19.30.010(3) (referencing “supplying,” “transporting,” and “recruiting” of agricultural employees). As words “grouped in a list,” “hiring” and “employing” “should be given related meaning” to, and their intended scope should be limited by, these neighboring terms.<sup>27</sup> *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1994); *Burns v. City of Seattle*, 161 Wash. 2d 129,

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<sup>26</sup> See *Maine v. Thiboutot*, 448 U.S. 1, 14 (1980) (“[S]tatutes must be given the meaning and sweep dictated by their origins and their language—*not their language alone*.”).

<sup>27</sup> See, e.g., *Jongeward v. BNSF R. Co.*, 174 Wash. 2d 586, 601 (2012) (stating that “the meaning of words may be . . . controlled by those with which they are associated,” and finding that terms adjacent to the phrase “otherwise injure” implicitly limit its scope).

148 (2007) (“When two or more words are grouped together and have a similar but not equally comprehensive meaning, the general word is limited and restricted by the special word.”).<sup>28</sup>

Notably, the Legislature embraced this historic definition of farm labor contractor as a person procuring farm labor *for a third party* (the farmer) when it defined farm labor contractor as a person performing farm labor contracting activities “*for a fee.*” RCW 19.30.010(2); *see Kawashima v. Holder*, 615 F.3d 1043, 1047 (9th Cir. 2010) *aff’d*, 132 S. Ct. 1166 (U.S. 2012) (“[A]lthough a phrase sweeps broadly when read in isolation, surrounding statutory text clarifies that Congress actually intended a narrower meaning.”); *Skamania Cnty. v. Columbia River Gorge Comm’n*, 144 Wash. 2d 30, 45 (2001) (refusing to read statutory terms in isolation and to their outermost definitional limit) (emphasis in original).

Finally, farmers like Northwest that are compensated “per acre” *farmed*, rather than per head recruited, hired, or transported (Cert. 9-10), do not perform *farm labor contracting activities* “for a fee,” as statutorily required. RCW 19.30.010(2). To stress that the referenced fee must be

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<sup>28</sup> By contrast Northwest procured labor *for itself*—not for others. Indeed, it is undisputed that Plaintiffs, as “agricultural employees,” performed “*services to, or under the direction of, an agricultural employer* [Northwest] in connection with the employer’s [Northwest’s] agricultural activities.” RCW 19.30.010(5); *supra* SOF I.C. D; ER 53-54.

tioned to procuring, supplying, or transporting labor, the Legislature intentionally defined “farm labor contractor” and “fee” reflexively. Hence, “farm labor contractor” is defined as one performing “farm labor contracting activity” “for a fee.” RCW 19.30.010(2). “Fee,” in turn, is defined using these very same statutory phrases. RCW 19.30.010(7).<sup>29</sup>

The FCLA’s description of “farm labor contracting activity” stands in contrast to its description of “agricultural activity,” which is incorporated into the definition of “agricultural employer.” Section 19.30.010(4) provides that an “[a]gricultural employer means any person engaged in agricultural activity, including the growing, producing, or harvesting of farm or nursery products . . . .” RCW 19.30.010(4). Significantly, the definition of agricultural employer draws no distinction between farmers that own the land they farm and those that perform agricultural activities for a fee for a distinct landowner. A person is an agricultural employer if they are “engaged in agricultural activity,” namely “the growing, producing, or harvesting of farm . . . products.” All agree that Northwest was an agricultural employer engaged in agricultural activity, as the District Court found. ER 53.

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<sup>29</sup> RCW 19.30.010(7) defines “fee” as valuable consideration paid for services “rendered by a farm labor contractor” or “received by a farm labor contractor for or in connection with any services described in subsection 3 [defining “farm labor contracting activity”].

The undisputed record confirms that Northwest was paid a fee only for its “agricultural activity” as an “agricultural employer”—*not* for “farm labor contracting activity” as a “farm labor contractor.” Because Northwest’s compensation was independent of, and in no way “affected by[,] [its] employment decisions, such as how many people it hired” (Cert. at 9-10), Northwest’s flat per acre fee to farm the Orchards was not *for* “farm labor contracting activity.” See *Escobar v. Baker*, 814 F. Supp. 1491, 1495, 1500 n.9 (W.D. Wash. 1993) (stating that fee must be “closely tied to recruiting activities”; hence, flat fee paid to row boss to manage employees was not “*for* farm labor contracting activities”—even though duties included transporting workers to the farm). Instead, it was a fee for Northwest’s agricultural activities, which the FLCA treats as distinct from contracting activities. Thus, while Northwest farmed for a fee, it did not perform contracting activity for a fee within the meaning of the FLCA.

2. This Court Has Expressly Distinguished Farmers From Farm Labor Contractors

This Court’s own pronouncements support this longstanding conception of farm labor contractors as brokers of labor to third parties.

In *Perez-Farias v. Global Horizons, Inc.*, this Court opined, consistent with trade practice and trade usage, that farm labor contractors

under the FLCA broker labor to third parties: “*As regular practice, farmers secure farm workers through the services of farm labor contractors, who act as intermediary between farm workers and farmer.*” 175 Wash. 2d at 521-22. Accordingly, the District Court properly characterized a farm labor contractor as “any person who recruits, solicits, employs, supplies, transports, or hires a farm laborer *on behalf of a farmer*”: “Thus, for all practical purposes, a ‘farm labor contractor’ is essentially *a broker of farm labor.*” ER 111.

Under these stated definitions, farmers like Northwest that hire workers solely for their own farming operations are *not* farm labor contractors. Northwest did not “broker” farm labor to third parties; rather, Northwest utilized such farm labor solely in *its own* independent operations at the Orchards. *Supra* SOF II.B, C, D. Nor did Northwest hire farm labor “on behalf of a farmer”; rather, Northwest *was* the farmer. ER 53 (deeming Northwest to be an “agricultural employer” because Northwest itself “engaged in . . . the growing, producing, or harvesting of farm . . . products”); *see* ESR 26-27, 37.

### 3. The Single-Employer Exemption Proves Farmers Like Northwest Are Not Contractors

The broader statutory context confirms that farmers hiring only for their own operations are *not* farm labor contractors.

RCW 19.30.010(6), the “single-employer exemption,” works hand-in-glove with RCW 19.30.010(2), (3) and thus informs the proper scope of farm labor contractor under those provisions. This exemption excludes from licensure one who performs farm labor contracting activities “only within the scope of his or her regular employment for one agricultural employer on whose behalf he or she is so acting . . . .” RCW 19.30.010(6). The Legislature deemed unnecessary licensure of such persons because their ties to one farmer ensured the requisite stability, permanence, and accountability. ER 59-60.

But the logic underlying the single-employer exception applies with equal or greater force to farmers like Northwest. *First*, unlike single-employer contractors, Northwest and other farmers hiring only for their own operations broker labor to no one; they *are* the farmer and employ all workers in their own farm operations. *Second*, such farmers are more firmly rooted than even single-employer contractors, due to their economic dependence on one (or a few) landowners. *See Escobar*, 814 F.

Supp. at 1501-02 (single-employer exception applies to contractor supplying labor to two farmers because purpose of licensure—permanence and accountability—was served). Indeed, with one minor exception, Northwest provided farming services exclusively for Farmland, its client for more 20 years.<sup>30</sup>

*Third*, farmers hiring only for their own operations are even more easily located than single-employer contractors because they are rooted to the land they farm and the *situs* of their agricultural operations. Indeed, Northwest had farmed for Farmland since the late-1980's, maintained its Pasco office for over 20 years, and had served as an independent agricultural operator in central Washington for over three decades. ER 481-82: ¶¶ 3, 7-9. During peak season, Northwest employed over 1,000 record employees to manage, run, and farm the Orchards. ER 486: ¶ 23. Such extensive and longstanding operations provide even greater permanence than a solo, single-employer contractor, who could easily change employers. Hence, the stated rationales for the single-employer exemption confirm the Legislature did not intend to saddle farmers hiring only for their own operations with licensure.<sup>31</sup>

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<sup>30</sup> ER 482: ¶ 9; ER 297: ¶¶ 5-6.

<sup>31</sup> See *HJS Dev., Inc. v. Pierce Cnty. ex rel. Dep't of Planning & Land Servs.*, 148 Wash. 2d 451, 471 (2003) (requiring “harmony” with “other statutory provisions”).

4. The FLCA’s Tripartite Scheme Confirms That Farmers Hiring Only For Their Own Operations Are Not Farm Labor Contractors

The FLCA’s “scheme as a whole” further reinforces this fundamental distinction between farmers hiring workers for their own farming operations and farm labor contractors. *Christensen v. Ellsworth*, 162 Wash. 2d 365, 373 (2007) (“context” and “related provisions” inform plain meaning). Like its federal predecessor, the Farm Labor Contractor Registration Act (“FLCRA”), the FLCA creates three basic classifications:

1. **“Agricultural employer” (the farmer)**: “[A]ny person engaged in agricultural activity, including the growing, producing, or harvesting of farm or nursery products . . . .” RCW 19.30.010(4).
2. **“Agricultural employee” (the worker)**: “[A]ny person who renders personal services to, or under the direction of, an agricultural employer in connection with the employer’s agricultural activity.” RCW 19.30.010(5).
3. **“Farm labor contractor” (the middleman)**: “[A]ny person, or his or her agent or subcontractor, who, for a fee, performs any farm labor contracting activity,” defined as “*recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees.*” RCW 19.30.010(2), (3).

Three aspects of this scheme inform the scope of “farm labor contractor” under RCW 19.30.010(2). First, only farm labor contractors must be licensed. RCW 19.30.020. Second, “farm labor contracting activity” omits all agricultural activities—including all farming activities

in the “agricultural employer” definition—and, instead, is confined to *non-agricultural activities*—“recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees.” RCW 19.30.010(2)-(3). Conversely, the statutory definition of “agricultural employer” omits *all farm labor contracting activities* and, instead, includes solely agricultural activities—“growing, producing, or harvesting” farm products. RCW 19.30.010(4). By legislative design, then, planting, growing and harvesting agricultural products—*i.e.*, “farming”—does *not* trigger licensure. Third, an “agricultural employer” is broadly defined as *anyone* who engages in “growing, producing or harvesting”—*i.e.*, anyone who farms—*regardless* of whether the person farms land she owns, or farms land owned by another for a fee. *Id.*

The FLCA’s entire statutory scheme, then, reinforces the longstanding conceptual division between: (i) agricultural employers (the farmers), who employ agricultural employees for “growing” “producing” and “harvesting” agricultural products (RCW 19.30.010(3)); (ii) agricultural employees (the farm workers), who “render[] personal services to, or under the direction of” such agricultural employer (RCW 19.030.010(5); *see supra* SOF I.C, D); and (iii) farm labor contractors (the middlemen), who engage in “recruiting,” “soliciting,” “supplying,” and

“transporting” those agricultural employees to an agricultural employer and alone require licensure (RCW 19.30.010(2)). Agricultural employers like Northwest that hire agricultural employees for their own operations, therefore, are not subject to licensure.<sup>32</sup>

Plaintiffs ignore this statutory scheme by attempting to stretch the meaning of “hire” and “employ” in RCW 19.30.010(3) to their outermost definitional limit—*i.e.*, to sweep in not only contractors hiring workers for third parties (farmers) but also farmers employing farm workers in *their own* agricultural operations. This tactic fails. *See, Skamania Cty.*, 144 Wash. 2d at 45 (refusing to read Commission’s statutory authorization to “do *anything* that it believes is necessary to ensure that the Act is not violated” to its definitional limit because “[a] court may not . . . read a provision in isolation”); *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (stating that “[a] word in a statute may or may not extend to the

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<sup>32</sup> Absent limitation of RCW 19.30.010(2) to persons hiring or employing farm labor for third parties, every farmer would conceivably constitute a farm labor contractor because: (i) all farmers, by virtue of “hiring” or “employing” farm workers, engage in “farm labor contracting activities” under RCW 19.30010(3); and (ii) all farmers receive a “fee,” broadly defined to include “any” “valuable consideration” paid or promised to be paid for services rendered (a) by a “farm labor contractor” or (b) “for or in connection with” farm labor contracting activities. RCW 19.30.010(7). Indeed, payments received by a farmer for his produce constitute a “fee” under either “test” because they are (a) paid to a farm labor contractor, and (b) paid “in connection with” the employment of farm workers, who harvest the produce that the farmer exchanges for payment.

outer limits of its definitional possibilities” and adopting a “narrower reading” consonant with its “purpose and context”).<sup>33</sup>

**B. Even if the FLCA Is Ambiguous, the Rule of Lenity and Legislative History Support Defendants’ Position**

Even if this Court concludes that the intended scope of “farm labor contractor” is ambiguous, the rule of lenity requires its construction in Defendants’ favor. And independent of this rule, over half-a-century of judicial and legislative precedent confirms that the Legislature never intended to extend licensure requirements to farmers hiring workers solely for their own farming operations, like Northwest.

1. The Rule of Lenity Bars Hancock’s Liability

The rule of lenity requires the Legislature to identify criminal conduct clearly. A criminal prohibition susceptible to alternative, reasonable interpretations, then, must be construed in defendant’s favor. Because statutory terms must be construed consistently in civil and criminal contexts, this rule applies to any statute that “has both criminal and noncriminal applications”—even when only civil liability and penalties are sought in a civil proceeding. *Leocal v. Ashcroft*, 543 U.S. 1,

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<sup>33</sup> *Kawashima*, 615 F.3d at 1047 (limiting scope of phrase that “sweeps broadly when read in isolation” because statutory context “clarif[ied] that Congress actually intended a narrower meaning”); accord *Bodine v. Graco, Inc.*, 533 F.3d 1145, 1151, 1154-55 (9th Cir. 2008) (“context” limited scope of statutory phrase, even absent express limitation).

12 n.8 (2004).<sup>34</sup> Washington courts follow the same approach.<sup>35</sup>

Here, the rule of lenity applies to any theoretically ambiguous term because the FLCA provides “criminal and civil penalties for violations of any [of its] provisions.” *Valley Fruit Orchards, LLC v. Global Horizons Manpower, Inc.*, 2010 WL 1286367, at \*4 (E.D. Wash. Mar. 26, 2010); RCW 19.30.150 (prescribing up to six months’ imprisonment). Further, the fundamental principle underlying the rule of lenity—a defendant’s right to fair notice of the precise conduct prohibited—applies with particular force to Defendants.

Despite its size, prominence and longevity, Northwest had *never* been advised by *any* regulator to whom it regularly reported in its decades of operation—including the Department of Agriculture, the Department of Ecology, or L&I—that it was a farm labor contractor subject to licensure, or that farmers hiring solely for their own operations are farm labor contractors.<sup>36</sup> Nor had any “published decision of either the Washington

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<sup>34</sup> See, e.g., *U.S. v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011).

<sup>35</sup> See, e.g., *State v. Harris*, 39 Wash. App. 460, 465 (1985) (extending the rule of lenity to civil proceedings); *Internet Cmty. & Ent’t Corp. v. State*, 148 Wash. App. 795, 808-09, 201 P.3d 1045, 1051 (2009) *rev’d sub nom. Internet Cmty. & Entm’t Corp. v. Wash. State Gambling Comm’n*, 169 Wash. 2d 687, 238 P.3d 1163 (2010) (reversing trial court and applying rule of lenity because the “civil posture of the case” is not determinative).

<sup>36</sup> See ER 487-88: ¶ 28; ER 312: ¶¶ 9-10. As Northwest’s President, Robert Wyles, testified, “[u]ntil this dispute began, I was not even aware that there was such a licensing requirement.” ER 292: ¶ 4. The Washington Growers League’s Executive Director of

Supreme Court or the Washington appellate courts” even once “interpreted the relevant provisions of this statute” to extend to farmers hiring solely for their own operations. Cert. at 5; *id.* at 13.

The rule of lenity is “premised on concepts that fair warning should be given to the world in language that the common world will understand.” *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994). Hence, the rule precludes this Court’s parsing the underlying legislative history to ascertain the Legislature’s intent; rather, any ambiguity must be resolved in Defendants’ favor. *Id.*

2. The FLCA Mirrored an Established Distinction Between Farmers Hiring Workers For Their Own Operations And Farm Labor Contractors

Even if this Court examines relevant legislative history, that history squarely conflicts with Plaintiffs’ position. Indeed, the FLCA retained a longstanding distinction between farmers and contractors, recognized by FLCA’s federal predecessor, the FLCRA.

First, as the District Court properly noted, the FLCRA and the FLCA feature analogous single-employer exemptions. Significantly, the federal exemption protected from licensure “any farmer . . . who

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over 20 years, Michael Gempler, similarly testified that he had never heard of any farmer “being licensed as farm labor contractors (or being required to do so) merely because they hire employees to work on their farms.” ER 311-12: ¶¶ 3, 5, 10.

personally engages in any [labor contracting] activity for the purpose of supplying migrant workers solely *for his own operation*.” ER 58-59 (citing *Mendoza v. Wight Vineyard Mgmt.*, 783 F.2d 941, 944 (9th Cir. 1986) (quoting 7 U.S.C. § 2042(b)(2))). Congress exempted farmers “supplying workers for their own operations” because it “perceived the middlemen contractors to be exploiting both farm workers and farmers and sought by the Act to prevent such abuses. . . . *Congress did not intend to require that farmers, who were themselves being exploited by such middlemen, register under the Act. . . .*” *Marshall v. Heringer Ranches, Inc.*, 466 F. Supp. 285, 289 (E.D. Cal. 1979) *aff’d sub nom. Donovan v. Heringer Ranches, Inc.*, 650 F.2d 1152 (9th Cir. 1981).

The *Marshall* Court clarified that the FLCRA’s exemption applied to all farmers—regardless of the owner of the land farmed: “It matters not whether such farmers engage in activities defined by the Act as those of a farm labor contractor only incidentally or on a full-time basis *the exemption is blanket: Congress wrote the Act intending to exclude growers from its scope.*” *Id.* at 289-90. This “clear[.]” demarcation between farmers hiring for their own operations (like Northwest), and farm labor contractors, “has been *repeatedly manifested* in legislative history and subsequent amendments to the Act.” *Id.* at 287.

Second, the District Court correctly found that the Legislature modeled Washington’s own single-employer exemption, RCW 19.30.010(6), off of the FLCRA’s exemption. ER 59. By the Court’s own analysis, the FLCRA—and, by extension, the FLCA—thus codified a longstanding distinction between farmers hiring their own workers and farm labor contractors, exempting the former from licensure.<sup>37</sup>

Moreover, reading the FLCA as preserving this longstanding distinction between farmers hiring for their own operations and farm labor contractors respects any differences that may exist between the current federal scheme and the FLCA. For example, Plaintiffs have pointed to the fact that the definition of farm labor contractor in the AWPA categorically excludes all “agricultural employers.” *See* 29 U.S.C. 1802(7) (defining “farm labor contractor” to mean “any person, *other than an agricultural employer*, . . . who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity”). By contrast, the FLCA, which does not contain this categorical exclusion, conceivably applies to farmers who also engage in farm labor contracting activities—*i.e.*, by brokering some of their labor to other farmers. But this

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<sup>37</sup> The FLCRA’s predecessor, the Farm Labor Contractor Registration Act of 1963, made this same distinction. *Soliz v. Plunkett*, 615 F.2d 272, 276 n.2 (5th Cir. 1980).

difference does not support Plaintiffs' attempted equation of agricultural employers hiring workers *only* for their own operations with farm labor contractors. Indeed, both the federal and state statutes are consistent in rejecting licensure of such persons.

3. Equating Farmers Hiring Their Own Workers With Farm Labor Contractors Would Be Fruitless

Deeming farmers like Northwest to be farm labor contractors fails an important principle of statutory interpretation because it would *not* serve the stated purpose of licensure—*i.e.*, to “aid the enforcement of the regulatory provisions against traditional ‘crew leaders’ or ‘crew pushers’ who recruited crews of migrant and seasonal workers and moved them from job to job.” ER 59-60 (citing *Mendoza*, 783 F.2d at 944) (citations omitted). As the District Court properly noted, licensure ensured the accountability of such “crew pushers,” who were “usually transient,” “hard to find,” and “even harder to locate and control.” *Id.*

None of these considerations, however, applies to farmers like Northwest. First, Northwest was not “transient.” It was necessarily tied to the land it farmed and to Farmland, effectively its sole client. Nor was Northwest “hard to find” or hard to “control.” Its Pasco business office had existed for 20 years. ER 481-82: ¶ 8. Among the largest independent

apple growers in the State, Northwest had performed farming operations in central Washington for decades and employed at peak 1,000 employees at the Orchards. ER 481-82, 484, 486: ¶¶ 3, 7-8, 15, 23; ER 226-27. Nor did Northwest shuffle employees “from job to job”; rather, Northwest employed farm labor solely in its own operations, which were virtually exclusively for Farmland.<sup>38</sup> Finally, Northwest was not a “middleman” or “broker of farm labor” to any farmer. Rather, Northwest *was* the farmer.

Notwithstanding that licensure would be superfluous, Plaintiffs can be expected to argue that licensure is appropriate because Northwest farmed orchards owned by others. But that fact *further diminishes* the need for Northwest’s licensure. As *Mendoza* reasoned, “*By necessity, by practice, and by contract* they [vineyard management companies] are fixed to the vineyards they manage for an entire year. They are as *easily found* as an *owner or lessor*—perhaps *more so* in light of the common occurrence of absentee corporate ownership in this industry.” 783 F.2d at 944. Nor does RCW 19.30.010(4)’s language or logic support disparate licensure requirements for agricultural employers based solely on *ownership* of the land farmed; rather, engagement in “agricultural activity” alone matters under that provision. Agricultural employers who, for a fee,

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<sup>38</sup> ER 487-88: ¶¶ 26-28; ER 501: ¶ 15.

farm land owned by another, and those who farm their own land, are treated identically under RCW 19.30.010(4). Of course, had the Legislature sought to classify, or distinguish among, agricultural employers based on their ownership of the particular plot farmed, “it was fully capable of saying so”; but it did not. *Futurewise v. W. Washington Growth Mgmt. Hearings Bd.*, 164 Wash. 2d 242, 250 (2008).<sup>39</sup>

Lastly, adoption of Plaintiffs’ position would saddle most agricultural employers with costly licensure requirements, including bonding and insurance, because only a minority of farmers in Washington even owns the land they farm.<sup>40</sup> And because a separate legal regime *already* ensures agricultural employers are accountable and abide key labor protections, burdening *farmers* with the additional regulations set forth in the *Farm Labor Contractor Act* is particularly inappropriate.<sup>41</sup>

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<sup>39</sup> Nor are Defendants aware of any other Washington employment statute or regulation that purports to classify agricultural employers, or prescribe disparate agricultural employment standards, based on land ownership. *See, e.g.*, WAC 296-131-001 *et seq.* (setting agricultural employment standards without regard to locus of fee simple).

<sup>40</sup> ER 312: ¶¶ 8-9; RCW 19.30.030(d), (e); WAC 291-131-020.

<sup>41</sup> *See, e.g.*, WAC 296-131-006 (authorizing L&I director to inspect and investigate agricultural employer’s “work site,” copy “employment records,” and conduct interviews); WAC 296-131-010 (setting wage schedule for agricultural employers); WAC 296-131-015 (mandating detailed pay statements for agricultural employees); WAC 296-131-017 (requiring maintenance of detailed agricultural employment records).

## II. SECTION 200 LIMITS JOINT LIABILITY TO PERSONS “KNOWINGLY” USING AN UNLICENSED CONTRACTOR

Assuming, *arguendo*, Northwest’s licensure were required, the second certified question addresses whether RCW 19.30.200: (i) imposes strict liability on any person using an unlicensed farm labor contractor—even when such person lacks knowledge that a contractor is unlicensed; and (ii) requires persons to verify licensure solely by either method referenced in the statute —*i.e.*, inspecting a contractor’s license or receiving a representation of licensure from the L&I director—as the District Court found. ER 47. RCW 19.30.200 provides:

Any person who *knowingly* uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in this chapter. In making determinations under this section, any user *may rely* upon either the license issued by the director to the farm labor contractor under RCW 19.30.030 or the director’s representation that such contractor is licensed as required by this chapter.

As discussed below, the plain language of Section 200, its implementing regulations, and its legislative history all confirm that the Legislature intended to impose civil and criminal liability *only* when a person “knowingly” used an unlicensed contractor—that is, with knowledge that the contractor is unlicensed. Further, the phrase “may rely,” establishes a safe harbor only, which permits but does not require

use of either statutorily-referenced method of verification.

**A. The Plain Language of Section 200 Is Dispositive**

1. “Knowingly” Precludes Mandatory Verification

Before the District Court’s erroneous decision in this case, the sole decision specifically analyzing Section 200 *rejected* mandatory employer verification of licensure. *Yapuna*, 2008 WL 4224454, at \*2.

In *Yapuna*, former Chief Judge Whaley held that the second sentence of Section 200 (the “Reliance Clause”) does not impose an “affirmative duty” on users to verify that a farm labor contractor is licensed by either method referenced in the statute. *Id.* Because the Reliance Clause merely provides that a user “*may* rely” on an issued license or Director’s representations of licensure, Judge Whaley opined that the Reliance Clause creates a safe harbor, or “affirmative defense,” only. *Id.* As support, Judge Whaley cited the Washington regulation implementing Section 200, WAC 296-310-260. That regulation, indeed, expressly provides that a user “*may prove lack of knowledge* by proving that she or he *relied* on a license issued by the department under chapter 19.30 RCW or upon the department’s representation that the contractor was licensed.” *Id.*

Two years later, another federal court in Washington stressed that a user’s *knowledge* of licensure is essential. *Valley Fruit Orchards, LLC*, 2010 WL 1286367, at \*4. In *Valley*, the court, addressing a statute of limitations issue, emphasized the date on which the user “knew” the contractor was unlicensed. *Id.* And although *Valley* stressed the user’s “knowledge,” it made no mention of any purported duty to verify licensure by either method described in Section 200. *Id.* When it later amended the FLCA in 2011 and 2012, the Legislature itself implicitly endorsed *Yapuna* and *Valley*, as well as the Washington regulation implementing Section 200, by leaving that provision intact—without amending Section 200 to require verification by either statutorily-referenced method.<sup>42</sup>

Plaintiffs’ contrary interpretation of Section 200 fails where it must begin—the plain language of the statute. Indeed, Plaintiffs have consistently disregarded “knowingly,” by refusing to ascribe any meaning to that word at all. But Plaintiffs “are not permitted to simply ignore terms in a statute.” *In re Parentage of JMK*, 155 Wash. 2d 374, 393 (2005).

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<sup>42</sup> *ATU Legislative Council of Wash. State v. State*, 145 Wash. 2d 544, 554 (2002) (“[T]he legislature is presumed to be aware of judicial interpretations of statutes.”); see 2012 Wash. Legis. Serv. Ch. 158 § 1 (S.H.B. 1057); 2011 Wash. Legis. Serv. 1st Sp. Sess. Ch. 50 § 927 (S.S.H.B. 1087).

Once defined, “knowingly” precludes the duty Plaintiffs erroneously imply into Section 200. Plaintiffs have never disputed that “knowingly” means “with awareness, deliberateness, or intention.”<sup>43</sup> ER 119-20; App. Br. 48; *see* App. Opp. 37.<sup>44</sup> But Plaintiffs insist Section 200 imposes strict joint liability on any user who does not verify licensure by either statutorily-referenced method—even when such user lacks knowledge that a contractor is unlicensed. ER 122. Plaintiffs would thus impose liability in precisely the circumstances the Legislature excluded.

2. Plaintiffs’ Rationale for Ignoring “Knowingly” Fails

In their submission to the Ninth Circuit, Plaintiffs embrace the District Court’s statutory analysis. App. Opp. 18-22. The District Court focused on what it perceived to be an inconsistency between two parts of Section 200—“knowingly” and the reference to licensure “determinations” in the Reliance Clause. ER 120-22. The Reliance Clause begins, “In making determinations under this section, any user may rely upon . . .” RCW 19.30.200. The District Court found that this

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<sup>43</sup> *Accord Webster’s Third New International Dictionary of the English Language Unabridged*, 1252 (Merriam-Webster 1993); *Black’s Law Dictionary* 950 (9th ed. 2009) (“deliberate”; “conscious”; “having or showing awareness or understanding”); *see St. Joseph Gen. Hosp. v. Dep’t of Revenue*, 158 Wash. App. 450, 460-61 (2010) (dictionary definition of term is probative of its ordinary meaning).

<sup>44</sup> We refer to Hancock’s opening brief, and Plaintiffs’ opposition, before the Ninth Circuit as “App. Br.” and “App. Opp.,” respectively.

language contemplates that users will make a licensure “determination,” and that interpreting Section 200 to require knowledge that a contractor is unlicensed to impose joint liability would render this “determination” superfluous. ER 120-21. To resolve this perceived conflict, the District Court effectively: (i) excised a key statutory term, “knowingly”; and (ii) rewrote the statutory phrase—“*may* rely”—to mean “*must* rely.” ER 120-22; App. Opp. 18-22.

The District Court and Plaintiffs’ strained interpretation of Section 200, however, proceeds from a spurious premise. Indeed, construing “knowingly” to require knowledge *does not* render the Reliance Clause “superfluous.” To the contrary, *Yapuna* harmonized “knowingly” and the licensure “determination”—without mooted either sentence of the statute, as Plaintiffs would do. 2008 WL 4224454, at \*2. The Reliance Clause, *Yapuna* held, establishes an “affirmative defense” or safe harbor. *Id.* An employer verifying licensure by either statutorily-referenced method is deemed conclusively *not* to have “knowingly” used an unlicensed contractor.

Notably, L&I, the state agency charged with construing Section 200, also deemed Section 200 to be a “safe harbor.” L&I’s implementing regulations provide: “Pursuant to RCW 19.30.200, *a person may prove*

*lack of knowledge* by proving that she or he *relied* on a license issued by the department under chapter 19.30 RCW, or upon the department's representation that the contractor was licensed." WAC 296-310-260(2). L&I made no mention of any affirmative duty to verify licensure in WAC 296-310-260(2). *Id.* In fact, L&I *omitted* from WAC 296-310-260(2) the very statutory phrase that Plaintiffs and the District Court theorize requires verification in the first place—"in making determinations." Under settled law, this Court must accord "substantial deference" to the interpretation of Section 200 manifest in L&I's promulgated regulations. *Overlake Hosp. Ass'n v. Dep't of Health of State of Wash.*, 170 Wash. 2d 43, 50 (2010).

Other compelling evidence supports classifying the Reliance Clause as an optional safe harbor—not as establishing a duty to verify licensure solely by either statutorily-referenced method of verification. *First*, express words of *permission* precede the two described methods to determine licensure. Indeed, the Reliance Clause provides that a user "*may*"—not must—verify licensure by inspecting the license issued by L&I or obtaining a representation from L&I that the contractor is licensed. RCW 19.30.200; *see Amren v. City of Kalama*, 131 Wash. 2d 25, 35 (1997) ("‘May’ is a discretionary term").<sup>45</sup>

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<sup>45</sup> *See Blueshield v. State Office of Ins. Com'r*, 128 P.3d 640, 646 (Wash Ct. App. 2006).

*Second*, the Legislature also inserted the phrase, “may rely”—typical “safe harbor” language. RCW 19.30.200; *see Ramos Oil Recyclers, Inc. v. AWIM, Inc.*, 2007 WL 2345014, at \*3 (E.D. Cal. Aug. 16, 2007) (citing 49 C.F.R. § 171.2(f)) (establishing affirmative defense for carriers of hazardous materials by providing they “may rely” on information provided by the offeror of the hazardous material).<sup>46</sup>

*Third*, the Reliance Clause conspicuously omits any words of obligation, including “shall” and “must.” These omissions are all the more significant because the Legislature used “shall” or “must” *elsewhere* in the FLCA—including in Section 200 itself.<sup>47</sup> RCW 19.30.200; *Scannell v. City of Seattle*, 97 Wash. 2d 701, 704 (1982) (“Where a provision contains both the word ‘shall’ and ‘may,’ it is presumed that the

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<sup>46</sup> *See, e.g., Fed. Election Comm’n v. Nat’l Rifle Ass’n*, 254 F.3d 173, 185 (D.C. Cir. 2001) (provision entitling party to “rely” on advisory opinion created “safe harbor”); *Willard ex rel. Moneta Bldg. Supply v. Moneta Bldg. Supply*, 1998 WL 34181937, at \*6 (Va. Cir. Ct. May 14, 1998), *aff’d*, 258 Va. 140 (1999) (provision entitling director to “rely” on information from designated individuals created “safe harbor”).

<sup>47</sup> *Compare* Wash. Rev. Code Ann. § 19.30.030 (receipts “*must* be deposited into the account”); *id.* § 19.30.170 (a new bond “*must* be furnished”); *id.* § 19.30.020 (the director “*shall*, by regulation, provide a means of issuing duplicate licenses”), *with id.* § 19.30.160 (“[T]he director *may* assess . . . a civil penalty”); *id.* § 19.30.170 (aggrieved person “*may* bring suit”). The selective use of the terms “may,” and “must” and “shall,” nearly a dozen times in the FLCA confirms that the Legislature ascribed different meanings to these terms.

lawmaker intended to distinguish between them, ‘shall’ being construed as mandatory and ‘may’ as permissive.”).<sup>48</sup>

*Fourth*, it is a well-established canon of statutory construction that when one interpretation of a statute or regulation obviously could have been conveyed more clearly with different phrasing, “the fact that the authors eschewed that phrasing suggests, *ceteris paribus*, that they in fact intended a different interpretation.” *U.S. v. Ibarra-Galindo*, 206 F.3d 1337, 1339 (9th Cir. 2000). Here, the Legislature rejected language, used in farm labor contractor statutes enacted by other states, that would have unambiguously required employers to verify licensure.<sup>49</sup> See Cal. Lab. Code § 1695.7 (“A grower has an *affirmative obligation to inspect the license* of any person contracted as a farm labor contractor, a copy of whose license is provided to the grower pursuant to paragraph (1), and to *verify* that the license is valid.”).<sup>50</sup> In fact, as discussed below, the

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<sup>48</sup> *State v. Roggenkamp*, 153 Wash. 2d 614, 625 (2005) (stating “fundamental rule” that legislature is “deemed to intend a different meaning when it uses different terms”).

<sup>49</sup> *Wash. Pub. Util. Dists. v. Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam Cnty.*, 112 Wash. 2d 1, 7 (1989) (court may consider other statutes dealing with the same subject matter in order to discern legislative intent).

<sup>50</sup> See, e.g., Del. Code Ann. tit. 19, § 1501(a) (requiring agricultural employers to “mak[e] reasonable efforts to assure that such independent farm labor contractor is in possession of a duly issued certificate of registration”); Md. Code Ann., Lab. & Empl. § 7-503(a) (prohibiting use of farm labor contractor “unless the person ascertains that the farm labor contractor is licensed by: (1) requesting confirmation from the Commissioner that the farm labor contractor is licensed; or (2) examining the license”).

legislative history confirms that Legislature specifically considered and *rejected* language contained in the FLCA’s federal analogue, the AWPAs, unequivocally requiring users to verify licensure. 29 U.S.C. § 1842 (“No person shall utilize the services of any farm labor contractor . . . *unless the person first takes reasonable steps to determine that the farm labor contractor possesses a [valid license]*”).

Lastly, the relevant drafting history, detailed below, also confirms that the Legislature deemed discretionary users’ reliance on either statutorily-referenced method of verification. As just one example, counsel to the House Commerce and Labor Committee (the “Committee”) advised committee Members, “Again, this [Reliance Clause] has to do with the *knowing* use of an unlicensed contractor. It adds the *stipulation* that someone *could rely* on a license” issued by L&I.<sup>51</sup>

Accordingly, inspecting a contractor’s license and receiving a representation of licensure from the L&I director constitute alternative avenues for users to obtain safe harbor protection—*not* obligatory acts triggering civil and criminal sanctions if not performed.

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<sup>51</sup> A digital recording of the entire hearing is available at: <http://www.digitalarchives.wa.gov/Record/View/BE8B7D1C37BD744997F7E3052D1B4835>. The discussion of HB 199 starts at approximately 66:10; Dkt. No. 49 n.1.

### 3. The Legislature's Policy Is Not Absurd

To justify disregarding “knowingly,” Plaintiffs can be expected to argue that giving “knowingly” its ordinary meaning would preclude enforcement of the statute against users willfully ignorant that a contractor is unlicensed—a supposedly absurd result. *See* ER 122-23.

But the Legislature's acceptance of this risk was not absurd. The Legislature could reasonably have concluded that: (i) imposing primary liability on farm labor contractors sufficed to deter most violations of the FLCA; (ii) imposing joint liability on persons *unwittingly* using unlicensed farm labor contractors was unnecessary, unfair, or could discourage good-faith use of labor contracting services; or (iii) these considerations outweighed any theoretical moral hazard.<sup>52</sup>

Comparing the Washington FCLA with analogous farm labor contractor statutes enacted by other states confirms that one size does not fit all, and that a spectrum of reasonable approaches exists to protect farm workers. Some states, for example, limit joint liability to users who “knowingly” use unlicensed farm labor contractors, as Washington does. *See, e.g.*, Idaho Code Ann. § 44-1611. Other states specifically require

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<sup>52</sup> The balance struck was particularly reasonable because the Department of Natural Resources *categorically* objected to imposing joint liability on employers. *See infra* II.C.

employers to take affirmative steps to verify licensure.<sup>53</sup> Still others require the employer to countersign its farm labor contractor's registration application and impose strict liability on growers using contractors lacking a certificate. N.Y. Lab. Law § 212-a(3)(a), (b). And Maine, by contrast, chooses to "ensure a safe working environment" for farm workers by confining liability to the contractor herself without imposing joint liability on users. Me. Rev. Stat. Ann. tit. 26, §§ 641, 642(3), 643-B, 646(1).

Accordingly, the Legislature's enacted policy, requiring user knowledge to impose joint liability, falls within a spectrum of reasonable approaches to protect farmers and farm workers. Plaintiffs' apparent preference for a different policy, reflecting a different allocation of risks, rewards, and costs, does not make the Legislature's enacted policy "absurd." *See In re Adams*, 178 Wash. 2d 417, 429 (2013) *rev. granted*, 175 Wash. 2d 1021 (2012) (rejecting construction that "fails to acknowledge" that statute "balance[s] competing policy interests") (McCloud, J.) (concurring in part/dissenting in part).

Lastly, the Legislature's limitation of liability to persons with knowledge that a contractor is unlicensed is particularly reasonable

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<sup>53</sup> *See, e.g.*, Md. Code Ann., Lab. & Empl. § 7-503(a); Del. Code Ann. tit. 19, § 1501(a); Cal. Lab. Code § 1695.7(a)(3)(A).

because Section 200 imposes potential civil *and* criminal penalties, including imprisonment, for violating the FLCA. RCW 19.30.200 (imposing liability “to the same extent and in the same manner” as primary violators); RCW § 19.30.150. But Washington law generally “disfavor[s]” “criminal offenses with no requirement of a mental element.” *State v. Bash*, 130 Wash. 2d 594, 606 (1996) (en banc).

**B. Even if Section 200 is Ambiguous, its Legislative History, Underlying Aims, and the Rule of Lenity All Preclude Mandatory Verification**

Even if this Court concludes that the terms “knowingly” and “may rely” in Section 200 are ambiguous, the rule of lenity precludes imposing strict liability on persons unwittingly using an unlicensed contractor. Further, the FLCA’s legislative history confirms that the Legislature: (i) specifically considered and *rejected* mandatory employer verification; (ii) dismissed concerns that requiring knowledge could encourage willful ignorance by employers; and (iii) embraced a policy protective of persons unwittingly using unlicensed contractors.

1. The Rule of Lenity Is Fatal to Plaintiffs’ Position

To the extent Section 200 is reasonably susceptible to alternative interpretations, the rule of lenity requires resolution of any ambiguity in Defendants’ favor. That rule, discussed earlier, *see supra* I.B.1, applies

with particular force to Hancock and Farmland, for three basic reasons.

First, Section 200 prescribes identical standards for civil and criminal liability, *see supra* I.B.1; hence, imposing civil liability without proof of knowledge would unacceptably expose persons unwittingly using unlicensed contractors, in turn, to criminal sanctions. *See Liparota v. United States*, 471 U.S. 419, 425-26, 429 (1985) (applying rule of lenity to require “proof of defendant’s knowledge” to avoid “criminaliz[ing] a broad range of apparently innocent conduct”).

Second, construing statutory ambiguity in favor of strict liability also violates a separate axiom—that “[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.” *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978). The “legislative intent to dispense with a mental element should be clear before the court concludes the statute defines a strict liability crime.” *State v. Bash*, 130 Wash. 2d 594, 610 (1996). That principle applies with particular force here, where the mental element is not implied but was *explicitly prescribed* by the Legislature—“knowingly.” As such, “any ambiguity” regarding the Legislature’s intent to require knowledge, as a prerequisite for liability, must be resolved “by implying a *mens rea* element.” *United States v. Nguyen*, 73 F.3d 887, 891

(9th Cir. 1995); *United States v. Santos*, 553 U.S. 507, 514 (2008) (applying rule of lenity, a “fundamental principle,” over objection that requiring knowledge will “hinder[] effective enforcement of the law”).

Finally, Hancock’s good-faith belief that Section 200 did *not* require verification by either statutorily-referenced method was particularly reasonable because: (i) no Washington court has ever decided what “knowingly” means, and what, if any, verification duties exist under Section 200; and (ii) the *Yapuna* court stressed the requirement of “knowledge,” while expressly *rejecting* any duty of users to verify licensure by either statutorily-referenced method. *See supra* II.A.1.

As discussed above, *see supra* II.B.1, the rule of lenity requires the government to provide fair warning of the precise conduct prohibited. Accordingly, the rule precludes parsing the underlying legislative history of a statute to divine the Legislature’s intent; rather, the proscribed conduct must be clear from the face of the statute, and any ambiguity must be resolved in Hancock and Farmland’s favor.

## 2. The Legislature Rejected Mandatory Verification

To the extent the Court deems the legislative history relevant, however, that history unequivocally supports Defendants’ position. Successive bill drafts and accompanying commentary confirm that the

Legislature purposely *re-inserted* “knowingly,” understood that this term required knowledge, and intentionally excluded language requiring employer verification of licensure, over objections that its approach could invite willful ignorance by some unscrupulous employers:<sup>54</sup>

1. **November 14, 1984—“knowingly” included.** The initial draft of the House bill, H.B. 199, requires knowing use of an unlicensed farm labor contractor. ER 614-15.
2. **November 27, 1984—proposal to strike “knowingly.”** An attorney at Evergreen Legal Services, Ms. Smith, urges the Committee to strike “knowingly” to avoid “intentional ignorance on the part of users of farm labor contractors.” ER 622.
3. **November 30, 1984—the Committee retains “knowingly.”** Committee counsel circulates a bill summary stating “an employer who *knowingly* uses the services of an unlicensed contractor is fully liable along with the contractor for violations of the statute.” ER 626.
4. **Post-November 30, 1984—revised bill strikes “knowingly.”** “Knowingly” is stricken. On January 22, 1985, Smith opines that the revised draft now “largely mirror[s] existing federal law.” ER 633-34.

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<sup>54</sup> See *Lewis v. State Dep’t of Licensing*, 157 Wash. 2d 446, 470 (2006) (sequential drafts of a bill probative in ascertaining the legislature’s intent).

Smith also defends the imposition of strict liability because “no one is in a better position to learn of and correct abuses by contractors than those who use their services.” ER 634.

**5. January 23, 1985—Committee counsel distinguishes the Washington bill (omitting “knowingly”) from Oregon law (including “knowingly”).** Committee counsel prepares a side-by-side comparison of the liability provisions in H.B. 199 and Oregon’s parallel statute. This comparison includes, among other distinctions, the following:

<b>Oregon Statute 658.465</b>	<b>HB 199 - Section 14</b>
(1) Any person who <u>knowingly</u> uses the services of an unlicensed farm labor contractor shall be personally, jointly and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in ORS 658.453(4). <sup>55</sup>	(2) Any person who uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in this chapter.

ER 636, 638. Committee counsel explains, “*The only difference between the provisions is that, under Oregon law, the employer must “know” that the contractor was unlicensed.*” ER 636. This is the clearest indication that the Legislature understood the inclusion of knowingly meant “the employer must know.” *Id.*

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<sup>55</sup> Emphasis appears in original side-by-side comparison prepared by Committee counsel.

**6. January 24, 1985—The Department of Natural Resources objects to joint liability for employers:** The Washington Department of Natural Resources categorically objects to imposing joint liability on employers under the section. ER 628.

**7. January 26, 1985—“knowingly” is re-inserted.** Two days later, two amendments are proposed and adopted: (i) to *re-insert* “knowingly” into the bill; and (ii) to add what would become the second sentence of the enacted statute: “In making determinations under this subsection, . . . .” ER 656-57. These contemporaneous insertions buttress the *Yapuna* Court’s determination that these two parts of the statute do not conflict, as Plaintiffs speculate, but rather operate hand-in-glove to create an “affirmative defense.” 2008 WL 4224454, at \*2.

**8. Handwritten side-by-side comparison of AWPA and H.B. 199.** Shortly thereafter, a handwritten, side-by-side comparison of the federal AWPA and H.B. 199 is prepared, which states in pertinent part:

<b>Federal</b>	<b>HB 199</b>
Prohibits any person from using F.L.C. unless they first take reasonable steps to see if licensed.	Jt liab. for [knowingly] using an unlicensed K. <sup>56</sup>

This comparison further shows that the Legislature knew the AWPA

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<sup>56</sup> ER 661 (brackets in original).

required employers to take “reasonable steps” to verify licensure, but H.B. 199 did not. *Id.*

**9. January 29, 1985—“knowingly” emphasized.** The House Bill Report summarizing H.B. 199 again emphasizes knowledge of licensure—without mentioning any affirmative duty of users to verify licensure by either method referenced. ER 664.<sup>57</sup>

Because the above legislative history “clearly indicate[] a contrary legislative intent,” the Court may not use “policy considerations” to impose mandatory verification, *Hartson P’ship v. Martinez*, 96 P.3d 449, 453 (Wash. Ct. App. 2004), particularly where, as here, “the Legislature was aware of this public policy when it amended the statute.” *Abbott v. Gen. Acc. Grp.*, 39 Wash. App. 263, 268 (1984).<sup>58</sup>

On the record below, Hancock and Farmland are entitled to summary judgment because Plaintiffs have not—and cannot—carry their burden of proof that Defendants *knowingly* used an unlicensed farm labor contractor under Section 200.<sup>59</sup> Plaintiffs, for example, have not furnished

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<sup>57</sup> The Senate adopted H.B. 199 without amending the joint liability provision. ER 666.

<sup>58</sup> Although the District Court did not address this legislative history (ER 122-23), if this Court concludes Section 200 is ambiguous (and does not apply the rule of lenity), then it “*must* examine the legislative history.” *Tingey v. Haisch*, 159 Wash. 2d 652, 668 (2007).

<sup>59</sup> The Court’s grant of summary judgment for Plaintiffs on this issue also constituted legal error because Plaintiffs furnished no evidence that Defendants knew that Northwest was a “farm labor contractor” under Section 200.

any evidence that Hancock learned, believed, or knew that Northwest lacked any required license.<sup>60</sup> *See supra* SOF I.E. To the contrary, Hancock received express assurances from Farmland that Northwest had all required licenses. *Id.*<sup>61</sup>

### CONCLUSION

We respectfully ask the Court to hold that: (i) farmers hiring workers solely for their own farm operations, like Northwest, are not farm labor contractors under the FLCA; and (ii) Section 200 does not impose civil and criminal liability where, as here, a person lacks knowledge that a contractor is unlicensed, and does not restrict users to the two statutorily-referenced methods of verifying licensure only.

Respectfully submitted, this 9th day of September 2015.

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<sup>60</sup> Where, as here, a statute requires a specific mental state, plaintiff has the burden of proof. *See, e.g., Burton*, 171 Wash. 2d at 208-09; *In re Wright*, 364 B.R. 51, 75 (Bankr. D. Mont. 2007), *aff'd*, 2008 WL 160828 (D. Mont. Jan. 16, 2008) *aff'd sub nom. Olympic Coast Inv., Inc. v. Wright*, 340 F. App'x 422 (9th Cir. 2009); *In re Roberts*, 331 B.R. 876, 883 (B.A.P. 9th Cir. 2005) *aff'd and remanded*, 241 F. App'x 420 (9th Cir. 2007).

<sup>61</sup> Here, at minimum, the uncontroverted record evidence precluded the prior grant of summary judgment for Plaintiffs. *Supra* SOF I.E; *see also Burton v. Twin Commander Aircraft LLC*, 171 Wash. 2d 204, 241-42 (2011) (en banc); *S.E.C. v. Todd*, 642 F.3d 1207, 1212 (9th Cir. 2011) (reversing grant of summary judgment because whether defendant acted "knowingly" presented fact issue for jury).

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**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of September 2015, I caused a true and correct copy of the foregoing document, “Brief of Defendants-Petitioners NW Management and Realty Services, Inc., Farmland Management Services, John Hancock Life Insurance Company, John Hancock Life & Health Insurance Co., and Texas Municipal Plans Consortium, LLC” to be delivered by First Class U.S. Mail to the following counsel of record:

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Dated this 9th day of September 2015, at Spokane, Washington.

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**ADDENDUM OF KEY STATUTES AND REGULATIONS**

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**I. Washington Farm Labor Contractors Act, RCW 19.30.010, et seq. and Implementing Regulation**

RCW 19.30.010

“Person” includes any individual, firm, partnership, association, corporation, or unit or agency of state or local government.

RCW 19.30.010(2)

“Farm labor contractor” means any person, or his or her agent or subcontractor, who, for a fee, performs any farm labor contracting activity.

RCW 19.30.010(3)

“Farm labor contracting activity” means recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees.

RCW 19.30.010(4)

“Agricultural employer” means any person engaged in agricultural activity, including the growing, producing, or harvesting of farm or nursery products, or engaged in the forestation or reforestation of lands, which includes but is not limited to the planting, transplanting, tubing, precommercial thinning, and thinning of trees and seedlings, the clearing, piling, and disposal of brush and slash, the harvest of Christmas trees, and other related activities.

RCW 19.30.010(5)

“Agricultural employee” means any person who renders personal services to, or under the direction of, an agricultural employer in connection with the employer's agricultural activity.

RCW 19.30.010(6)

This chapter shall not apply to employees of the employment security department acting in their official capacity or their agents, nor to any

common carrier or full time regular employees thereof while transporting agricultural employees, nor to any person who performs any of the services enumerated in subsection (3) of this section only within the scope of his or her regular employment for one agricultural employer on whose behalf he or she is so acting, unless he or she is receiving a commission or fee, which commission or fee is determined by the number of workers recruited, or to a nonprofit corporation or organization which performs the same functions for its members. Such nonprofit corporation or organization shall be one in which:

(a) None of its directors, officers, or employees are deriving any profit beyond a reasonable salary for services performed in its behalf.

(b) Membership dues and fees are used solely for the maintenance of the association or corporation.

RCW 19.30.010(7)

“Fee” means:

(a) Any money or other valuable consideration paid or promised to be paid for services rendered or to be rendered by a farm labor contractor.

(b) Any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described in subsection (3) of this section, and shall include the difference between any amount received or to be received by him, and the amount paid out by him for or in connection with the rendering of such services.

RCW 19.30.020

No person shall act as a farm labor contractor until a license to do so has been issued to him or her by the director, and unless such license is in full force and effect and is in the contractor's possession. The director shall, by regulation, provide a means of issuing duplicate licenses in case of loss of the original license or any other appropriate instances. The director shall issue, on a monthly basis, a list of currently licensed farm labor contractors.

RCW 19.30.030

(1) The director shall not issue to any person a license to act as a farm labor contractor until:

(a) Such person has executed a written application on a form prescribed by the director, subscribed and sworn to by the applicant, and containing (i) a statement by the applicant of all facts required by the director concerning the applicant's character, competency, responsibility, and the manner and method by which he or she proposes to conduct operations as a farm labor contractor if such license is issued, and (ii) the names and addresses of all persons financially interested, either as partners, stockholders, associates, profit sharers, or providers of board or lodging to agricultural employees in the proposed operation as a labor contractor, together with the amount of their respective interests;

(b) The director, after investigation, is satisfied as to the character, competency, and responsibility of the applicant;

(c) The applicant has paid to the director a license fee of: (i) Thirty-five dollars in the case of a farm labor contractor not engaged in forestation or reforestation, or (ii) one hundred dollars in the case of a farm labor contractor engaged in forestation or reforestation or such other sum as the

director finds necessary, and adopts by rule, for the administrative costs of evaluating applications;

(d) The applicant has filed proof satisfactory to the director of the existence of a policy of insurance with any insurance carrier authorized to do business in the state of Washington in an amount satisfactory to the director, which insures the contractor against liability for damage to persons or property arising out of the contractor's operation of, or ownership of, any vehicle or vehicles for the transportation of individuals in connection with the contractor's business, activities, or operations as a farm labor contractor;

(e) The applicant has filed a surety bond or other security which meets the requirements set forth in RCW 19.30.040;

(f) The applicant executes a written statement which shall be subscribed and sworn to and shall contain the following declaration:

“With regards to any action filed against me concerning my activities as a farm labor contractor, I appoint the director of the Washington department of labor and industries as my lawful agent to accept service of summons when I am not present in the jurisdiction in which the action is commenced or have in any other way become unavailable to accept service”; and

(g) The applicant has stated on his or her application whether or not his or her contractor's license or the license of any of his or her agents, partners, associates, stockholders, or profit sharers has ever been suspended, revoked, or denied by any state or federal agency, and whether or not there are any outstanding judgments against him or her or any of his or her

agents, partners, associates, stockholders, or profit sharers in any state or federal court arising out of activities as a farm labor contractor.

(2) The farm labor contractor account is created in the state treasury. All receipts from farm labor contractor licenses, security deposits, penalties, and donations must be deposited into the account. Moneys in the account may be spent only after appropriation. Expenditures from the account may be used only for administering the farm labor contractor licensing program, subject to authorization from the director or the director's designee.

RCW 19.30.150

Any person who violates any provisions of this chapter, or who causes or induces another to violate any provisions of this chapter, shall be guilty of a misdemeanor punishable by a fine of not more than five thousand dollars, or imprisonment in the county jail for not more than six months, or both.

RCW 19.30.200

Any person who knowingly uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in this chapter. In making determinations under this section, any user may rely upon either the license issued by the director to the farm labor contractor under RCW 19.30.030 or the director's representation that such contractor is licensed as required by this chapter.

Wash. Admin. Code 296-310-260(2)

Pursuant to RCW 19.30.200, a person may prove lack of knowledge by proving that she or he relied on a license issued by the department under

chapter 19.30 RCW, or upon the department's representation that the contractor was licensed. The department shall not make oral representations that a contractor is or is not licensed. All representations by the department that a contractor is licensed shall be made in writing and shall be signed by the director or the employment standards supervisor or the assistant director. The department shall not accept reliance on a supposed oral representation as proof in any administrative enforcement proceeding.

**II. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801, *et seq.***

29 U.S.C. §1802(7)

The term “farm labor contractor” means any person, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

29 U.S.C. § 1842

No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized. In making that determination, the person may rely upon either possession of a certificate of registration, or confirmation of such registration by the Department of Labor. The Secretary shall maintain a central public registry of all persons issued a certificate of registration.

29 U.S.C. § 1854(a)

Maintenance of civil action in district court by aggrieved person  
Any person aggrieved by a violation of this chapter or any regulation under this chapter by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein.

**III. Act to Amend the Farm Labor Contractor Registration Act of 1963, 7 U.S.C. § 2041, *et seq.***

PL 93-518, Dec. 7, 1974, 88 Stat 165

. . . . The second sentence of section 3(b) is amended to read as follows: “Such terms shall not include—, “(1) Any nonprofit charitable organization, public or nonprofit private educational institution, or similar organization; (2) Any farmer, processor, canner, ginner, packing shed operator, or nurseryman who personally engages in any such activity for the purpose of supplying migrant workers solely for his own operation. . . .

**IV. Other Pertinent State Statutes**

Cal. Lab. Code § 1695.7(a)(1)

Prior to entering into any contract or agreement to supply agricultural labor or services to a grower, a farm labor contractor shall first provide to the grower a copy of his or her current valid state license. A failure to do so is a violation of this chapter. The grower shall keep a copy of the license for a period of three years following the termination of the contract or agreement.

Cal. Lab. Code § 1695.7(a)(3)(A)

No grower shall enter into a contract or agreement with a person acting in the capacity of a farm labor contractor who fails to provide a copy of his or her license. A grower has an affirmative obligation to inspect the license of any person contracted as a farm labor contractor, a copy of whose license is provided to the grower pursuant to paragraph (1), and to verify that the license is valid. The grower shall request verification from the license verification unit by the close of the third business day following the day on which the farm labor contractor is engaged. The grower may be supplied services by the farm labor contractor and shall not be liable under this section for an invalid license while awaiting verification from the verification unit. The verification received from the license verification unit shall serve as conclusive evidence of the grower's compliance with this subparagraph. . . .

Del. Code Ann. tit. 19, § 1501(a)

If an employer of migratory or seasonal agricultural labor enters into a contract or agreement with an independent farm labor contractor engaging in interstate recruitment of farm labor as defined in the federal Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 et seq., that employer shall enter into such contract or agreement only after making reasonable efforts to assure that such independent farm labor contractor is in possession of a duly issued certificate of registration from the United States Secretary of Labor pursuant to the Farm Labor Contractor Registration Act.

Idaho Code Ann. § 44-1611

(1) If an agricultural employer uses a farm labor contractor who is properly licensed and bonded under the provisions of this chapter, that agricultural employer shall not be jointly and severally liable for any unpaid wages determined to be due and owing pursuant to chapter 6, title

45, Idaho Code, to any employee of the farm labor contractor who performed work for that agricultural employer.

(2) An agricultural employer who knowingly uses the services of an unlicensed farm labor contractor shall be jointly and severally liable for any unpaid wages determined to be due and owing pursuant to chapter 6, title 45, Idaho Code, to any employee of the unlicensed farm labor contractor who performed work for that agricultural employer. In making determinations under this section, any user of a farm labor contractor may rely upon either the license issued by the department to the farm labor contractor under section 44-1603, Idaho Code, or the department's representation that such contractor is licensed as required by this chapter.

Md. Code Ann., Lab. & Empl. § 7-503(a)

Except as otherwise provided in this title, a person may not use a farm labor contractor to perform a farm labor contracting service unless the person ascertains that the farm labor contractor is licensed by:

- (1) requesting confirmation from the Commissioner that the farm labor contractor is licensed; or
- (2) examining the license.

Me. Rev. Stat. Ann. tit. 26

Section 641: This subchapter must be liberally construed in light of the purposes of the law to ensure a safe working environment and safe transportation for forestry workers and migrant and seasonal farm workers and to prevent unfair competition in the marketplace by businesses whose practices would undermine safety and other employment standards.

Section 642(3): Employer. "Employer" means: . . . B. With regard to a migrant and seasonal farm worker, a farm labor contractor.

Section 643-B: Each farm labor contractor employing migrant and seasonal farm workers shall file a copy of its federal registration under the federal Migrant and Seasonal Agricultural Worker Protection Act with the bureau. The filing must include in-state contact information for the farm labor contractor or the farm labor contractor's representative.

Section 646(1): Joint and several liability. If more than one person or entity is an employer of the same worker or group of workers, each such person or entity is jointly and severally liable for all violations of this subchapter.

N.Y. Lab. Law § 212-a(3)(a) and (b)

3. Grower or processor who utilizes the services of a farm labor contractor.

a. No grower or processor shall utilize the services of a farm labor contractor unless such grower or processor has a certificate issued by the commissioner therefor, and the farm labor contractor is registered in accordance with the provisions of this section. The commissioner shall issue to such grower or processor a separate certificate of registration.

b. Every grower or processor who utilizes the services of a farm labor contractor shall countersign an application of the farm labor contractor for registration under subdivision two of this section, and shall state that the information contained in such application is true to the best of his knowledge and belief.

ORS 658.465

(1) Any person who knowingly uses the services of an unlicensed farm labor contractor shall be personally, jointly and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner as provided in ORS 658.453(4).

## OFFICE RECEPTIONIST, CLERK

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**Subject:** RE: Saucedo et al., v. Hancock et al / Case No. 919453 / Brief of Defendants-Petitioners

Rec'd 9/9/2015

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The Honorable Ronald R. Carpenter, Supreme Court Clerk:

On behalf of John R. Nelson, WSBA No. 16393, attached hereto please find the opening brief of Defendants-Petitioners NW Management and Realty Services, Inc., Farmland Management Services, John Hancock Life Insurance Company, John Hancock Life & Health Insurance Co., and Texas Municipal Plans Consortium, LLC in the case entitled *Abelardo Saucedo et al., v. John Hancock Life Insurance Company, et al.*, Supreme Court Case No. 919453. The Certificate of Service is attached as part of the brief.

Please contact Mr. Nelson by telephone at (509) 777-1604 or by email at [nelsj@foster.com](mailto:nelsj@foster.com) with any additional questions.

Thank you,  
Pam McCain

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