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SUPREME COURT OF THE STATE OF WASHINGTON

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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The certified questions ask this Court to determine the intent of the Legislature on two basic questions: (i) the class of persons required to obtain a farm labor contractor license, and (ii) the mental state Plaintiffs must prove to trigger joint civil and criminal liability under the FCLA.

As to the first issue, the central inquiry is whether the Farm Labor *Contractor Act*, as drafted by the Legislature and reasonably understood by key stakeholders for years, requires agricultural employers who “hire” and “employ” workers solely for *their own* agricultural operations, rather than brokering workers to a third party, to obtain licensure as “farm labor *contractors*.” Plaintiffs’ arguments ignore the term “contractor”—an intermediary between agricultural employees and the agricultural employer. Ordinary usage, statutory context, trade practice, and this Court’s own pronouncements all confirm that an agricultural employer that hires workers solely for its own agricultural activities is not a “contractor.” Plaintiffs do not dispute that in the 60 years since the FLCA was enacted, no Washington court has *ever* subjected farmers hiring for their own farming operations to licensure—whether they farm their own land or farm another’s land for a fee, as the majority of Washington farmers do. This does not mean that farmers such as Northwest are

unregulated; quite the contrary, other laws and requirements specifically apply to agricultural employers.

Plaintiffs' arguments concerning the mental state required to trigger civil and criminal liability under the FLCA are equally meritless. Plaintiffs contend that "knowledge" is irrelevant, and that that statutory term "knowingly" merely means failing to verify licensure by either method referenced in Section 200's safe harbor. Under that approach, a person who fails to take one of the two mentioned actions would be deemed "knowingly" to use an unlicensed contractor—even if she genuinely believes after reasonable inquiry that a contractor is licensed. Such a reading improperly renders the "knowingly" requirement surplusage and transforms the FLCA into a strict liability statute. And it is particularly misguided because: (i) L&I's promulgated regulations, which this Court has traditionally accorded substantial deference, require user knowledge; (ii) federal courts in Washington previously construed "knowingly" in Section 200 to mean "with knowledge"; (iii) the Legislature carefully deliberated the inclusion and consequences of adopting the "knowingly" standard; and (iv) this Court strictly construes a statutorily-required mental state—here, "knowingly."

Plaintiffs' unprecedented reading of the FLCA should be rejected.¹

I. NORTHWEST IS NOT A FARM LABOR CONTRACTOR

A. Plaintiffs Ignore the Plain Meaning of "Contractor"

Plaintiffs do not address Defendants' plain language analysis, and Plaintiffs' attempted application of the FLCA to agricultural employers hiring farm workers solely for their own farm operations fails for the *uncontroverted* reasons stated therein (Opp. 10-17; Br. 15-21, 24-27)²:

First, Plaintiffs' proffered conception of farm labor contractor is contrary to its ordinary and customary trade meaning—a "broker" of farm labor to a third party (the farmer). ER 111; Br. 15-17. *Second*, it ignores the rule that the ordinary meaning of undefined words (such as "contractor" and "contracting") in a statutorily-defined phrase control. Br. 15-17. *Third*, it is contrary to this Court and the District Court's own pronouncements—which Plaintiffs do not mention—that a farm labor *contractor* is not the farmer, but rather an "*intermediary* between farm

¹ Plaintiffs assert that one Northwest foreman donned a firearm to intimidate workers and broke verbal promises to pay higher wages. Opp. 1. But Plaintiffs voluntarily dismissed with prejudice individual claims under RCW 49.32.020—the only legal theory to which their "gun wielding" allegations relate. Opp. 1; Dkt. No. 261. As such, Plaintiffs did not proffer evidence substantiating these allegations to the Court, never asked the Court to determine their validity, and premised summary judgment entirely on Northwest's alleged failure to obtain licensure and provide workers certain disclosures. Dkt. Nos. 162, 184; ER 38, 42-43.

² We refer to Defendants' opening brief and Plaintiffs' Answering Brief as "Br. ___" and "Opp. ___," respectively. All emphasis herein is our own unless otherwise noted. Undefined capitalized terms have the same meaning as in Defendants' opening brief.

workers and farmer,” *Perez-Farias v. Global Horizons, Inc.*, 175 Wash. 2d 518, 521 (2012). Br. 20-21; ER 111. *Fourth*, Plaintiffs violate their own maxim by ignoring “context”—neighboring words of limitation in the definition of “farm labor contractor” and the FLCA’s tripartite structure. Br. 17-20, 24-27; Opp. 10.³ Lastly, Plaintiffs concede that the central rationale for the single-employer exemption applies equally to *fixed situs* farmers like Northwest. Br. 32-34.

Plaintiffs’ aside that Hancock qualified as a farmer for tax purposes based on its ownership of land on which farming was conducted does not alter the applicable legal analysis under the FLCA: whether Northwest acted as an “intermediary” by brokering farm labor to a third party (the farmer), or whether Northwest *was* the farmer. Opp. 4-5. As the District Court properly found, there is “no genuine dispute” that *Northwest* was the “agricultural employer” under the FLCA, because Northwest alone was “responsible for all aspects of the day-to-day farming operations.” ER 53-54; Dkt. No. 161 at 5. Plaintiffs did not dispute *that* determination below and assign no factual or legal error to it now.⁴

³ Although Plaintiffs correctly note that the FLCA predated the FLCRA and APWA (Opp. 18), Plaintiffs do not dispute that the FLCA employs a similar tripartite structure. Br. 24. Further, such sequence is irrelevant to Hancock’s analysis of the FLCA’s single-employer exemption and AWPA’s blanket exclusion. *See infra* I.D.

⁴ Hancock’s ownership of farm assets and revenue, and reimbursement of Northwest’s costs, are irrelevant under the FLCA (Opp. 3-4): the uncontroverted

B. Plaintiffs Construe “For a Fee” Contrary to Precedent

Although the FLCA defines “fee” flexibly (Opp. 12), the fee must be “closely tied” to farm labor contracting activity. *Escobar v. Baker*, 814 F. Supp. 1491, 1495, 1500 n.9 (W.D. Wash. 1993). But here, Northwest was undisputedly paid a fee to *farm*—not to broker workers to a third party (the farmer). ESR 37 ¶ 3 (Northwest agreed to “conduct[] a first-class agricultural operation”). Plaintiffs’ contrary reading vitiates the essence of farm labor *contracting* activity—to “act as *intermediary* between farm workers and farmer,” *Perez-Farias*, 175 Wash. 2d at 521; Opp. 12, 17.

That Northwest “hired” and “employed” workers—without more—is not enough: it is undisputed that Northwest did so to staff *its own*, not *another* farmer’s, agricultural operations. Opp. 13; Br. 6-8. Application of the FLCA to any compensated business that “hires” or “employs” farm workers *for itself* would ensnare the majority of Washington farmers, who farm land owned by another for a fee. *See* Br. 28 & n.36; ER: 312: 8-9. This is not what the Legislature intended, and no Washington court in 60 years has applied the statute so broadly.⁵

evidence showed that neither Hancock nor Farmland employed farm workers or engaged in “agricultural activity” at the Orchards; *ergo*, they were not “agricultural employers” under the FLCA. Br. 4-6; *see* RCW 19.30.010(4) (requiring “growing, producing, or harvesting” farm products to be “agricultural employer”).

⁵ To perform its bookkeeping, Northwest used a software suite from Datatech titled “*Farmer’s Office Standard Edition*.” ER 315. That suite included a pre-packaged

C. The FLCA’s Remedial Aims Do Not Override Its Plain Language, and Would Not Be Served by Transforming Most Farmers into Labor Contractors

As their fallback, Plaintiffs simply assume that requiring *farmers* to be licensed would further the FLCA’s remedial aims. Opp. 15-17. But the *only* policy evidence confirms that the law’s historic offenders were transient crew leaders—*not* farmers with stable operations. Br. 32-34.

Further, contrary to Plaintiffs’ suggestion (Opp. 2, 16-17), separate legal regimes applicable to agricultural employers *already* guarantee farm workers many similar protections.⁶ There is no record evidence these safeguards are insufficient. And the fact that Northwest no longer operates, far from “illustrat[ing] the wisdom” of re-classifying the majority of Washington farmers as farm labor contractors, serves as a cautionary tale. Opp. 16. Northwest was a fixture in Central Washington for three decades and ceased operations only *after* it was unable to procure a farm labor contractor license due to this litigation. Opp. 2 n.3; WER 45.

module, “The *Grower* Labor Report/Labor Contractor,” which automatically generated labor reports titled “Labor Contractor Report[s].” *Id.* Plaintiffs erroneously suggest that *Datatech*’s titling of its software, pre-packaged modules and report outputs dictates whether Northwest was a “farm labor contractor” under the FLCA. Opp. 5; ER 245.

⁶ See Br. 34 n.41; compare RCW 19.30.110(8) with WAC 296-131-015 (mandatory detailed pay statements); RCW 19.30.110(9)(a) with WAC 296-131-017 and 29 U.S.C. § 1821(d) (mandatory recordkeeping); RCW 19.30.110(7) with 29 U.S.C. § 1821(a) (mandatory initial wage disclosures); *Sandoval v. Rizzuti Farms, Ltd.*, 656 F. Supp. 2d 1265, 1272 (E.D. Wash. 2009) (federal protections for agricultural employees); Opp. 19 (noting AWPA “imposed new substantive duties on agricultural employers”).

Plaintiffs also erroneously assume the Legislature intended to confer *limitless* protection on workers—without any consideration of countervailing costs. But “no legislation pursues its purposes at all costs,” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (*per curiam*), and licensure is costly. Contractors are “heavily regulated” (ER 111-12), and must be “licensed, bonded, and insured.” WAC 246-205-061(2)(a).

But even if universal licensure were salutary, Plaintiffs may not burden a specific class the Legislature sought to protect—*farmers*. Br. 30. Contrary to Plaintiffs’ assertion (Opp. 16), the FLCA and FLCRA targeted “middlemen” “exploiting *both* farm workers and *farmers*.” Br. 30 (citations omitted). Nor may the Court “effectively rewrite the statutory definition” of farm labor contractor to advance the FLCA’s “remedial purpose.” *Lewis v. Hepper*, 2002 WL 1360431, at *5 (Wash. Ct. App. June 24, 2002).

D. The Rule of Lenity Forecloses Plaintiffs’ Position

Even if “farm labor contractor” were ambiguous, the rule of lenity requires strict construction in Defendants’ favor. Br. 27-29. Plaintiffs’ discussion of the rule of lenity only confirms its applicability here.

First, although Plaintiffs’ disclaim knowledge of “any precedent of this Court applying the rule of lenity to interpret a civil statute” (Opp. 20),

Plaintiffs' cited authority, *In re Disciplinary Proceeding Against Haley*, itself stated, "courts apply the rule of lenity to *any* statute imposing penal sanctions"—including a "*civil statute imposing [a] penal sanction.*" 156 Wash. 2d 324, 347 (2006) (citations omitted). The Court suggested the rule applies equally "*in a civil case* because the statute also has criminal sanctions." *Id.* (internal citations omitted). Plaintiffs cite no Washington authority purporting to limit the rule of lenity to criminal cases. Rather, this Court twice found no error in appeals courts' application of the rule in civil contexts.⁷ The U.S. Supreme Court, and other State Supreme Courts, follow the same approach.⁸ Br. 27-29.

Second, contrary to Plaintiffs' argument (Opp. 20), a statute's "remedial purposes' does not outweigh the Court's duty under the 'rule of lenity' to construe criminal statutes strictly." *United States v. McClendon*, 712 F. Supp. 723, 729 (E.D. Ark. 1988); *see, e.g., Commonwealth v. Ventura*, 987 N.E.2d 1266, 1273-74 (Mass. 2013) ("[a]lthough the

⁷ *See State v. Harris*, 39 Wash. App. 460, 464-65 (1985), *review denied*, 1985 WL 321051 (Wash. App. 5, 1985) (denying review); *Internet Cmty. & Entm't Corp. v. State*, 148 Wash. App. 795, 809 (2009), *rev'd sub nom. Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 169 Wash. 2d 687 (2010) (declining to apply rule of lenity but solely because statutory language was clear).

⁸ *See, e.g., N. Carillon, LLC v. CRC 603*, 135 So. 3d 274, 279 (Fla. 2014), *reh'g denied* (Mar. 12, 2014); *State v. Harenda Enters. Inc.*, 746 N.W.2d 25, 47-48 (Wis. 2008); *State v. Hurley*, 117 A.3d 433, 439 (Vt. 2015). The purported simplicity of verifying licensure is irrelevant to the fundamental interest in fair notice that underlies the rule of lenity. Opp. 3; Br. 28.

registration requirement is remedial and not punitive,” “we apply the ‘rule of lenity,’” as “criminal penalties may be imposed”) (citations omitted); *Ziotas v. Reardon Law Firm, P.C.*, 997 A.2d 453, 459 (Conn. 2010) (applying rule of lenity “although § 31–72 is remedial”).⁹ Courts thus “strictly construe the provisions creating the wrong” and setting criminal penalties (here, RCW 19.30.020, 19.30.200, and 19.30.150), while construing liberally provisions defining civil remedies (RCW 19.30.170). *In Interest of I.V.*, 326 N.W.2d 127, 130 (Wis. Ct. App. 1982).¹⁰ Plaintiffs’ cases do not even involve an ambiguous statutory provision and thus do not support a contrary result. Opp. 20-21.

E. The Legislative History Is Equally Conclusive

Although no Washington court in 60 years has imposed licensure requirements on farmers like Northwest, Plaintiffs assume that the Legislature intended to undo this longstanding distinction between farmers and contractors by *inaction* alone—*i.e.*, because the Legislature did not follow Congress’s lead by substituting its own single-employer exemption with a blanket exclusion for all farmers. Opp. 19. Plaintiffs’ conjecture is untenable, for several reasons. *State v. Brown*, 139 Wash. 2d 20, 32

⁹ *Accord City of Fort Wayne v. Bishop*, 92 N.E.2d 544, 546 (Ind. 1950).

¹⁰ *See, e.g., Grier v. Kan. City, C.C. & St. J. Ry. Co.*, 228 S.W. 454, 459 (Mo. 1921), *aff’d*, 258 U.S. 610 (1922) (strictly construing the “provisions giving the penalty—that is, creating the liability”); *Watkinson v. Adams*, 103 P.2d 498, 500 (Okla. 1939).

(1999) (refusing to infer “indirect amend[ment]” of statute by “silence”).

First, there is no record evidence that the Legislature intended to subject for the first time farmers to licensure. *Second*, nothing in the legislative history suggests the Legislature was even cognizant of—let alone considered—Congress’s blanket exclusion, and then legislated on that basis. Nor is there evidence that the Legislature knew the impetus for Congress’s amendment—*federal* cases that Congress perceived construed its single-employer exemption “too narrowly.” ER 59-60; Opp. 19. To the contrary, a side-by-side comparison of key provisions of the AWPA and FLCA prepared by the Legislature during the drafting of the FLCA makes no mention of any of the foregoing. ER 661. Nor do the Legislature’s detailed summaries of H.B. 199. ER 663; ER 625-26. The total absence of *any* discussion, by *anyone*, of these issues precludes Plaintiffs’ speculation that the Legislature intended to blaze a “different path” than Congress by nothing more than *silence*. Opp. 19-20; *see Perez-Farias*, 175 Wash. 2d at 529 n.10 (rejecting cited differences in statutory schemes because “there is no indication the legislature looked to the Oregon remedies provision when amending the FLCA”).

Third, Plaintiffs’ argument also incorrectly assumes that a blanket exclusion was needed to protect Washington farmers in the first place.

But it is undisputed that no Washington court in 60 years had *ever* construed the single-employer exemption “too narrowly—*i.e.*, to require registration by virtually anyone who hired migrant workers to farm someone else’s land,” as some federal courts had done prior to the federal amendment. ER 59-60; Opp. 18-19. Nor had L&I itself ever done so prior to this case—as Plaintiffs also concede. And with good reason: in “regular practice,” a “farm labor contractor[]” was an “*intermediary* between farm workers and farmer”; it was *not* the *farmer itself*. *Perez-Farias*, 175 Wash. 2d at 521-22.¹¹

Fourth, Plaintiffs also incorrectly assume that AWWPA’s categorical exclusion represented a significant expansion of the existing single-employer exemption. Opp. 19-20; ER 59-62. But *Escobar v. Baker* confirmed that the FLCA’s single-employer exemption, while perhaps “more specific than that in the AWWPA,” “substantially parallels,” and is “similar in scope and purpose,” to AWWPA’s categorical exclusion. 814 F. Supp. at 1501 (citations omitted); *see also Rodriguez by Rodriguez v. Berrybrook Farms*, 672 F. Supp. 1009, 1018 (W.D. Mich. 1987) (stating

¹¹ A categorical exclusion was unnecessary because farmers farming another’s land have never been treated, legally or practically, as “farm labor contractors.” Br. 15-17, 20-21. Plaintiffs’ assertion that Northwest “operate[d] for years without oversight” under the FLCA confirms this point (Opp. 2), but simply ignores the separate legal regime applicable to farmers. *See supra* at 6 n.6.

that the definition of the term ‘farm labor contractor’ “remains essentially the same under AWPAs as it was under FLCRA”).¹² Indeed, Congress and the Legislature shared the same aim when each enacted its respective single-employer exemption—“to exclude growers from its scope.” Br. 30 (citations omitted); *see* ER 59-60; Opp. 18-19.¹³

Plaintiffs’ reliance on the FLCA and AWPAs’ differences is misplaced for a final reason. Opp. 14-15. The FLCA’s single-employer exemption *presupposes*—not rejects, as Plaintiffs posit—a basic distinction between farmers and contractors. *See* RCW 19.30.010(6) (protecting persons engaged in farm labor contracting activity “*for one agricultural employer*”).

II. THE FLCA EXPRESSLY PRECLUDES STRICT LIABILITY

Plaintiffs’ attempt to transform Section 200 into a strict liability statute flies in the face of its plain language and legislative history.

¹² Tellingly, while *Perez-Farias* noted that certain *other* provisions of the FLCA afforded workers greater protection than the AWPAs (Opp. 14), 175 Wash. 2d at 528-29, the Court never suggested that the AWPAs’ *blanket exclusion* was broader than the FLCA’s exemption, or that the FLCA required farmers like Northwest to be licensed.

¹³ Hence, a blanket exclusion merely effected Congress’s original intent by immunizing agricultural employers from licensure and correcting federal courts’ unduly narrow reading of the single-employer exemption; it did not mark a “fundamental change[]” in the FLCRA’s intended scope. Opp. 19; ER 59-60. Further, Plaintiffs’ proposed, narrow reading of the FLCA’s single-employer exemption would produce an anomalous result—subjecting agricultural employers to licensure, while exempting from licensure their hired crew leaders paid to recruit labor. Opp. 14-15.

A. The Word “Knowingly” Requires Knowledge

As Defendants’ opening brief demonstrated, and Plaintiffs’ perfunctory analysis now confirms (Opp. 24), Plaintiffs’ statutory interpretation effectively excises a key term—“knowingly.”

We emphasize at the outset what Plaintiffs do *not* dispute: that (i) RCW 19.30.200 requires that a person “knowingly” use the services of an unlicensed farm labor contactor; (ii) an undefined statutory term is given its ordinary meaning—*i.e.*, “with awareness” (Br. 38); (iii) Hancock did *not* know that Northwest was unlicensed and, to the contrary, was assured by its lessee, Farmland, that Farmland believed all required licenses were in place. Br. 8-9, 52-53. That should end the inquiry.

But Plaintiffs seek to substitute in place of this plain meaning of knowingly a different meaning stitched together from *other* statutory language—failing to “make a determination based on one of two options” mentioned in the Reliance Clause. Opp. 24. But Plaintiffs’ self-serving definition, offered without citation of any authority, rests on circular reasoning. Plaintiffs simply *assume* their desired resolution of the ultimate legal issue—whether a duty to verify licensure by either referenced means exists. They then argue that violating this assumed duty constitutes “knowingly” using an unlicensed contractor. *Id.*

Plaintiffs’ proffered definition of “knowingly” eviscerates that term. According to Plaintiffs, a person is deemed to “know,” as a matter of law, that a contractor is unlicensed if such person does not verify licensure by either means referenced in the statute—even if she genuinely believes after other reasonable inquiry that the contractor is licensed. Opp. 9, 24. Even a user that relies on the published list of licensed contractors on L&I’s website (<http://www.Ini.wa.gov/workplacerrights/agriculture/farmlabor/liccontract/default.asp>) could be deemed “knowingly” to have used an unlicensed contractor, since the implementing regulation mentions a “signed” representation. *See* RCW 19.30.200; WAC 296-310-260(2). *Any* use of an unlicensed contractor thus *necessarily* triggers civil and criminal liability. But “if strict liability were intended, there would be no need for the word ‘knowingly’ in the statute.” *Lesnau v. Andate Enters. Inc.*, 756 N.E.2d 97, 101 (Ohio 2001)); *accord Northam v. Va. State Bar*, 737 S.E.2d 905, 908 (Va. 2013).¹⁴

Precisely because “knowingly” requires “knowledge,” *Valley Fruit Orchards, LLC v. Global Horizons Manpower, Inc.*, addressing a statute

¹⁴ *See, e.g., Marsh v. N.J. Dep’t of Envtl. Prot.*, 703 A.2d 927, 931 (N.J. 1997) (“strict liability is clearly inapplicable” because defendant “did not knowingly” act) (citations omitted); *Kane v. State*, 976 N.E.2d 1228, 1232 (Ind. 2012); *United States v. Carney*, 387 F.3d 436, 454 (6th Cir. 2004) (“knowingly” precludes “innocent, careless or negligent mistakes”).

of limitations issue, stressed the date on which the user “knew” the contractor was unlicensed. 2010 WL 1286367, at *4 (E.D. Wash. Mar. 26, 2010). Further, *Valley’s* flexible “reasonable diligence” approach precludes Plaintiffs’ attempt to restrict Section 200 to two methods of verifying licensure only. *Id.*¹⁵

Plaintiffs’ novel interpretation of “knowingly” is impermissible for three other reasons as well. *First*, if “knowingly” merely meant violating the Reliance Clause’s purported requirements—*i.e.*, failing to verify licensure by either referenced method (Opp. 24)—“knowingly” would become “wholly unnecessary” surplusage. *Veit ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wash. 2d 88, 113 (2011). *Second*, Plaintiffs’ position violates the presumption that a legislature uses direct language where available. Br. 42. Here, countless, clear alternatives existed if the Legislature wished to impose strict liability or mandate verification in a specific manner. *See, e.g.*, Br. 42-45 (discussing other states’ clear formulations); Br. 42-43, 51-52 (reflecting Legislature examined federal requirement that person “first take[] reasonable steps to determine” licensure). Plaintiffs cannot explain, then, the Legislature’s

¹⁵ *Valley* did not address Section 200’s “safe harbor” because there is no indication defendant invoked it—*not* because a safe harbor does not exist, as Plaintiffs posit. Opp. 27 n.43.

purported, convoluted approach—requiring a *heightened* mental state (“knowingly”) and inserting *permissive* language (“may rely”).¹⁶ Finally, Plaintiffs’ construction of “knowingly” improperly shifts the burden of proving an essential element of civil and criminal liability—knowledge—to *Defendants* by requiring users to prove the proper method was used.¹⁷

B. The Phrase “In Making Determinations” Does Not Restrict Verification to Two Means Only

Rehashing the District Court’s flawed reasoning, Plaintiffs next argue that the phrase, “In making determinations,” means a “determination[.]” *must* be made by either referenced method. Opp. 22-23.

As an initial matter, nothing in the cited text *requires* a licensure determination *at all*. RCW 19.30.200; Br. 38-40. “Must,” shall,” and “required” are conspicuously absent from the Reliance Clause, and this “court must not add [those] words where the legislature has chosen not to include them.” *Five Corners Family Farmers v. State*, 173 Wash. 2d 296, 311 (2011). Further, Plaintiffs cannot explain the Legislature’s purported preference for the “admittedly awkward” phrase, “In making

¹⁶ See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994) (rejecting use of “surprisingly indirect route to convey an important and easily expressed message”).

¹⁷ See *Sandstrom v. Montana*, 442 U.S. 510, 516 (1979) (prohibiting shifting burden to defendant to *disprove* he acted “knowingly”); *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) (plaintiff bears burden of proving defendant “knowingly” made false oath).

determinations” (ER 121), when clear, direct language was not only available but also specifically considered by the Legislature. *See* Br. 42-45, 51-52. Tellingly, no other state requiring verification employs this “awkward” formulation. ER 121; Br. 42, 42 n.50. Further, imposing a duty to “determine” licensure would sow conflict between RCW 19.30.200’s parts by potentially imposing liability—even when a person has no knowledge a contractor is unlicensed. And Plaintiffs concede the regulations implementing Section 200 *omit altogether* the phrase, “In making determinations,” and that L&I’s regulations interpreting the statute are due substantial deference. WAC 296-310-260(2); Br. 39-40.

But even if a user must “determine” licensure, Plaintiffs only cursorily address Judge Whaley’s conclusion that neither RCW 19.30.200 nor WAC 296-310-260 restricts that “determination” to two methods only; rather, Section 200’s parts operate harmoniously to create a safe harbor precluding liability if either verification method is used. *Yapuna v. Glob. Horizons Manpower Inc.*, 2008 WL 4224454, at *2 (E.D. Wash. Sept. 10, 2008); Br. 36. Judge Whaley deemed the statute’s clarity obviated the need to parse legislative history.¹⁸

¹⁸ Plaintiffs’ speculation that Judge Whaley would have reached a different conclusion if he had ruled post-*Perez-Farias* is unfounded because: (i) *Perez-Farias* addressed a *different* statutory provision, RCW 19.30.170(2), 175 Wash. 2d at 530; and

Notably, when the Legislature later amended the FLCA in 2011 and 2012, it implicitly blessed *Yapuna* by leaving intact RCW 19.30.200 and WAC 296-310-260—without restricting the means of verification. Br. 39; *see also State v. Ritchie*, 126 Wash. 2d 388, 393 (1995) (“Legislative silence regarding the construed portion of the statute in a subsequent amendment creates a presumption of acquiescence”).¹⁹

C. Plaintiffs Largely Concede Defendants’ Arguments that “May Rely” Does Not Mean “Must Rely”

Plaintiffs do not even mention—much less meaningfully address—Defendants’ arguments that the phrase, “*may* rely,” is permissive; it does not create an affirmative duty. Br. 39-41.

Plaintiffs’ sole argument for reading “*may* rely” to mean “*must* rely” undermines their position. Opp. 25. Plaintiffs invoke Section 170(2)’s proviso that the court “*may* award damages up to and including an amount equal to the amount of actual damages, or statutory damages of five hundred dollars per plaintiff per violation, whichever is greater.” RCW 19.30.170(2). *Perez-Farias* found this provision entitled the prevailing party to its actual or statutory damages. 175 Wash. 2d at 529.

(ii) Judge Whaley’s determination was based on Section 200’s plain language—not unidentified “FLCA rulings” “protect[ing] growers over farm workers.” Opp. 26 n.43.
¹⁹ Even if obligatory, a licensure “determination” was undisputedly made: Hancock was assured by Farmland that Farmland believed all required licenses were in place. Br. 8-9; Opp. 7-8.

But the Court’s reasoning belies Plaintiffs’ claim that “may” means “must.” *Perez-Farias* expressed concern that, if such award were optional, the phrase, “whichever is greater,” would be “superfluous”: the word “may” already conferred *discretion*. *Id.* at 526. As the legislative history was inconclusive, the Court, citing the FLCA’s remedial aim, deemed damages mandatory. *Id.* at 529-30. An award of damages was thus required *despite* “may”—*not* because “may” means “must.”

Plaintiffs’ analogy of RCW 19.30.200 to Section 170(2) also ignores their contrasting language. The Legislature’s inclusion of “knowingly” in Section 200 precludes equating “may rely” with “must rely.” *See supra* II.A. Further, Section 200 alone contains a standard safe harbor *phrase*—“may *rely*.” Br. 41; *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“[A] word is known by the company it keeps”).

Precisely because the Legislature did *not* equate “may” with “must” or “shall,” the Legislature expressed required conduct when it amended the FLCA by *replacing* “may” with “shall.” ER 609 (amending FLCA to provide that “director *shall* require the deposit of a surety bond”); RCW 19.30.040.²⁰ Construing “may” to mean “must” would also

²⁰ *See also* ER 614 (proposed substitution of “may” with “shall” to *require* director to “promulgate rules and regulations”).

alter the meaning of countless other provisions in the FLCA as well. *See* RCW 19.30.170 (aggrieved person “*may* bring suit”).²¹

Plaintiffs’ related contention that the “either-or” clause in Section 200 restricts available verification methods ignores a crucial antecedent phrase—“may rely.” Opp. 23. The “either-or” clause thus identifies the activities on which a user “may rely” to invoke the safe harbor. It does not negate the discretion “may rely” confers or transform it into “*must* rely.”

D. The FLCA’s Remedial Aim Is Not Determinative

Contrary to Plaintiffs’ position, the FLCA’s remedial aim is not “determinative” of the meaning of “knowingly” and “may rely” (Opp. 25)—terms given their plain meaning. *Silverstreak, Inc. v. Wash. State Dep’t of Labor & Indus.*, 125 Wash. App. 202, 209, 217-18 (2005) (barring “ignor[ing] the plain words” of law to “effect[]” remedial aim).²²

Even if these terms were ambiguous, Plaintiffs’ speculation that enforcing “knowingly” would encourage “deliberate ignorance” by users (Opp. 26) ignores that the Legislature *rejected* an identical objection—that retaining “knowingly” would invite “intentional ignorance on the part of

²¹ *See, e.g.*, RCW 19.30.040 (contractor “*may* file” deposit in lieu of bond); RCW 19.30.160 (director “*may* assess” against person who violates this chapter”).

²² *See State v. Jackson*, 137 Wash. 2d 712, 725 (1999) (enforcing plain language over “sound” contrary policy argument). *Perez-Farias* only considered the FLCA’s remedial aim when “indicia of legislative intent” were “absent.” 175 Wash. 2d at 529.

users of farm labor contractors.” ER 622; Br. 48-49.²³

Further, Plaintiffs’ argument fails because “no legislation”—remedial or otherwise—“pursues its purposes at all costs.” *Rodriguez*, 480 U.S. at 525-26. And saddling farmers with strict civil and criminal liability would impose severe costs, indeed.²⁴ *State v. Anderson*, 141 Wash. 2d 357, 362 (2000) (Although the Legislature “revealed its intention to address the problem of increasing violence in our society, it did not indicate that the problem should be addressed by sweeping entirely innocent conduct within this statute.”).

In any event, no policy prescription—let alone a specific definition of “knowingly” or “may rely”—may be divined from the FLCA’s general remedial aim, as the breadth and diversity of remedial statutes other states have passed to serve similar aims confirm. Br. 44-45.

Imposing strict liability on farmers would also undermine the law’s dual purpose—to protect “*both* farm workers and *farmers*” exploited by “middlemen.” Br. 30 (citation omitted); *see In re Adams*, 178 Wash. 2d 417, 429 (2013), *review granted*, 175 Wash. 2d 1021 (2012) (construction

²³ This objection was made by Evergreen Legal Services, now known as Columbia Legal Services, counsel to Plaintiffs. ER 622.

²⁴ The Department of Natural Resources accordingly objected to imposing joint liability on users under *any* circumstance. *See* Br. 44 n.52.

must “acknowledge” that law “balance[s] competing policy interests”) (McCloud, J.) (concurring in part/dissenting in part).²⁵

In any event, Plaintiffs’ fears that farmers will intentionally skirt the law ignores farmers’ independent interest in using licensed and bonded contractors. Br. 30. It also ignores L&I’s implicit, contrary judgment, reflected in its promulgated regulations, stressing user knowledge *without* restricting verification methods. *See* WAC 296-310-260(2); *Silverstreak, Inc. v. Wash. State Dep’t of Labor & Indus.*, 159 Wash. 2d 868, 885 (2007) (granting “high level of deference” because Court lacks agency’s “expertise and insight”). And Section 200’s safe harbor encourages farmers to insulate themselves from potential liability. Finally, because no statute serves its stated ends perfectly, conceivable adverse consequences do not authorize rewriting Section 200.²⁶ *See Stone v. Sw. Suburban Sewer Dist.*, 116 Wash. App. 434, 439-40 (2003) (“wisdom of the policy

²⁵ Plaintiffs’ unsubstantiated conjecture that the FLCA was intended to protect farm workers from “contractual arrangements creating shell entities” (Opp. 17) ignores the FLCA and the FLCRA’s shared purpose—to exclude growers, whether they farmed their own or another’s land. Br. 19, 30; *supra* I.E. Further, Plaintiffs unpersuasively argue that Northwest was a “shell” and “dependent on Hancock to stay afloat” merely because Hancock reimbursed Northwest’s Orchard expenses under their agreements. Opp. 16-17. But Northwest had thrived in central Washington for decades and picked more apples annually than any other independent Washington grower. Br. 4-6.

²⁶ *See City of Auburn v. Hedlund*, 165 Wash. 2d 645, 652-54 (2009) (policy immunizing accomplices from liability when they are a “victim” of the charged crime is not “absurd,” even though defendant “encourag[ing]” drunk driving escaped liability).

choices” best “left to the Legislature” despite predicted “cost overruns”).

The FLCA’s remedial aim does not compel strict liability.

E. Ambiguity Must Be Construed in Defendants’ Favor

To the extent “knowingly” and “may rely” are ambiguous terms, their detailed legislative history and the rule of lenity require resolution in Defendants’ favor. Plaintiffs concede by silence Defendants’ arguments that the rule especially applies to a required mental state—“knowingly”—and that Washington courts and L&I *reject* strict liability. Br. 46-48.

Plaintiffs do not address any specific legislative materials furnished; nor do they proffer contrary legislative history. These materials “offer[] conclusive evidence” precluding strict liability. *Gorre v. City of Tacoma*, 2015 WL 5076290, at *6 (Wash. Aug. 27, 2015). They establish that: (i) the Legislature understood that Oregon law and the original draft of H.R. 199 differed, because “under Oregon law, the employer must ‘know’ that the contractor was unlicensed”; (ii) the Legislature *included, removed, then re-inserted*, “knowingly” over express objections that it would invite “intentional ignorance” by users; (iii) the consequences of including “knowingly” were carefully analyzed; and (iv) these same analyses do not *once* mention a duty to verify licensure, a glaring omission if the Legislature actually intended to impose such a duty. Br. 48-52.

Plaintiffs’ two procedural points fail. *First*, that “knowingly” and the Reliance Clause were “linked” (Opp. 27) confirms that RCW 19.30.200’s parts work hand-in-glove to create a safe harbor, and that “knowingly” is not unintended, residual verbiage. Br. 39, 51. *Second*, Plaintiffs erroneously restrict probative legislative history to member “discussions.” Opp. 27. But Washington courts regularly glean legislative intent from committee counsel memoranda²⁷ and draft bills and amendments—whether or not accompanied by member “discussions.”²⁸ Br. 52. And Plaintiffs erroneously assert that member “statements” are absent (Opp. 28): the legislative history specifically includes a House Bill Report issued by members themselves. ER 664. The Bill Report stresses “knowingly” and omits *any* mention of mandatory verification.²⁹

Plaintiffs’ only cited authority, *Perez-Farias*, 175 Wash. 2d at 529, did not restrict legislative history to member “discussions” either. There,

²⁷ See, e.g., *Sebastian v. State Dep’t of Labor & Indus.*, 142 Wash. 2d 280, 296 (2000) (staff counsel memorandum is “legislative history” that “continually reflects the Legislature’s fiscal concerns”); *State v. Turner*, 98 Wash. 2d 731, 737-38 (1983) (committee staff memorandum’s “comments” and comparison of provisions make legislative intent “particularly clear”); *Kearney v. Kearney*, 95 Wash. App. 405, 413 n.8 (1999) (committee counsel summary of provision’s effect probative “legislative history”).

²⁸ See, e.g., *Lewis v. State, Dep’t of Licensing*, 157 Wash. 2d 446, 470 (2006) (gleaning intent from “sequential drafts of a bill”).

²⁹ See *State v. Tracy*, 158 Wash. 2d 683, 697 (2006) (bill reports are “usual sources of legislative history”); *Buchanan v. Simplot Feeders, Ltd. P’ship*, 134 Wash. 2d 673, 688 (1998) (gleaning legislative intent from House Bill Report’s description of bill).

the cited provisions of Oregon's Farm Labor Contractors Act were unilluminating because there was "no indication the legislature looked to the Oregon remedies provision when amending the FLCA." *Id.* at 529 n.10. But here, comparisons of parallel provisions in the AWPA and Oregon's FLCA addressing "knowledge" were prepared and circulated, as were other analyses of "knowingly," before the bill passed. Br. 49-52; *see State v. Law*, 154 Wash. 2d 85, 113-14 (2005) (deeming successive drafts of bill, coupled with committee counsel commentary apprising members of bill modifications, "clearly demonstrate" legislature's intent).³⁰

Absent any record evidence that Defendants knew that Northwest lacked required licensures (Br. 52-53), there is no basis for imposing joint liability on Defendants under Section 200.

CONCLUSION

Defendants respectfully ask the Court to hold that the FLCA does not require licensure of farmers hiring workers solely for their own operations, and that Section 200 neither imposes joint liability absent knowledge, nor restricts users to two methods of verifying licensure only.

³⁰ *See State v. Frampton*, 95 Wash. 2d 469, 477 (1981) (stating "[t]he significance of this rejection [of language in prior draft] should not be overlooked in ascertaining legislative intent"); *Lewis*, 157 Wash. 2d at 470 (citing text included and excluded in "sequential drafts").

Respectfully submitted, this 14th day of October 2015.

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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 14th day of October 2015, I caused a true and correct copy of the foregoing document, “Reply 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 email and by First Class U.S. Mail to the following counsel of record:

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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 Reply Brief of Defendants-Petitioners 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., 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 with any additional questions.

Thank you,
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