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No. 91945-3

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ABELARDO SAUCEDO, *et al.*,

Plaintiffs-Respondents,

v.

JOHN HANCOCK LIFE & HEALTH INSURANCE, CO., *et al.*,

Defendants-Petitioners.

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On Certified Questions from the United States Court of Appeals  
for the Ninth Circuit  
No. 13-35955

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On Appeal from the United States District Court  
for the Eastern District of Washington  
No. 2:12-cv-00478-TOR

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**ANSWERING BRIEF OF PLAINTIFFS-RESPONDENTS**

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## I. INTRODUCTION

The Workers filed this lawsuit to stop their gun wielding foreman from cheating them out of wages for work performed in John Hancock's<sup>1</sup> orchards.<sup>2</sup> The Farm Labor Contractors Act (FLCA) provides basic workplace protections aimed at preventing such exploitation of farm workers. Central to these protections are written disclosures so farm workers have proof of the promised wage, know the name and address of the owner of the agricultural operation (in this case Hancock), and are given notice of their right to assert a claim against the labor contractor's bond. None of this basic information was provided by NW Management, the labor contractor and intermediary between the Workers and Hancock/Farmland. Because these basic written wage disclosures were never provided, the foreman was able to exploit hundreds of farm workers year after year by verbally promising higher wage rates only to unilaterally lower them after the work had been performed.

Requiring labor contractors to be licensed and bonded is also central to FLCA's enforcement and deterrent purpose. Licensing provides oversight by the state enforcement agency and ensures farm workers have

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<sup>1</sup> "John Hancock" and "Hancock" refer to John Hancock Life & Health Insurance Co., John Hancock Life Insurance Company, and Texas Municipal Plans Consortium, LLC; "Farmland" refers to Farmland Management Services; "NW Management" refers to NW Management & Realty Services, Inc.; "Growers" refers to all Defendants-Petitioners; "Workers" refers to Plaintiffs-Respondents.

<sup>2</sup> WER 76-96; ER 74 & 80.

some recourse if their rights are violated. Wage bonds provide a safety net for farm workers when wages go unpaid. The Workers were denied these two basic protections when NW Management, an unlicensed—and now defunct—farm labor contractor, failed to obtain a license or a wage bond. NW Management was essentially a shell corporation with a business practice of “never put[ting] any money into anything,” and its failure to obtain a license and post a wage bond allowed it to operate for years without oversight.<sup>3</sup> FLCA requires licensing and bonding for an entity, like NW Management, that is paid a fee to hire and employ farm workers, even if a portion of the fee compensates it for additional farming activities performed on land owned by a third party.

Before using NW Management’s labor contracting services, neither Hancock nor Farmland took one of two simple steps to determine whether NW Management had a valid Washington farm labor contractor license. Hancock and Farmland neither reviewed the license nor confirmed licensure with the Department of Labor and Industries (L&I). Accordingly, Hancock and Farmland were held jointly and severally liable, as the

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<sup>3</sup> Once this litigation brought the Growers’ business practices to light, NW Management attempted to obtain a license, which was denied due to the pending claims. *See* WER 45. A new entity, AG Management Group LLC, took over the business. WER 37, 41-42. AG Management Group LLC is a licensed farm labor contractor. Department of Labor and Industries, *Licensed Farm Labor Contractors in Washington State (2015)*, <http://www.lni.wa.gov/WorkplaceRights/files/flc/licensedFLCs.pdf> (last visited Sept. 30, 2015). Farmland is also now a licensed farm labor contractor in Washington. *Id.*

Washington Legislature mandated, for NW Management's violations of the Act. FLCA requires entities like Hancock and Farmland to obtain knowledge of whether a contractor is licensed by making a determination in either one of two specified methods.

The Growers put forth numerous arguments that would strip FLCA of the means to achieve its most fundamental objectives—providing written notice to farm workers of their basic workplace rights and ensuring that farm workers are not left with paper judgments against unlicensed and unbonded contractors. The Workers urge this Court to reject these arguments and answer both certified questions in the affirmative: 1) an entity like NW Management is a farm labor contractor; and, 2) entities like Hancock and Farmland are jointly and severally liable if they fail to take either one of two simple steps before using an unlicensed farm labor contractor.

## II. STATEMENT OF THE CASE

### A. Hancock Is The Owner And Financier Of The Orchard Operations.

Hancock owned and funded the orchard operations.<sup>4</sup> It not only owned the apple orchards, but every single piece of farm equipment on its property – down to the ladders and picking bags used by the Workers to

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<sup>4</sup> See *infra* notes 5-7.

harvest the crop.<sup>5</sup> Hancock also financed all orchard expenses, including the health care premiums of the gun-toting foreman.<sup>6</sup> For all of 2009 and January of 2010, Hancock wired payroll funds directly into NW Management's bank account to pay for all agricultural labor performed at Hancock's orchards.<sup>7</sup>

As part of its normal business practices, Hancock declared itself the "farmer" of the orchards. To receive tax breaks, Hancock signed Washington tax forms under penalty of perjury that it was the "farmer" of the orchards.<sup>8</sup> Those same tax filings avowed that Hancock was an "active farmer" that was "currently engaged in the business of growing, raising, or producing agricultural products."<sup>9</sup> Contracts signed with Washington fruit packing sheds also listed Hancock as the "Grower," and funds from the sale of Hancock's apples were wired directly into Hancock's bank accounts.<sup>10</sup> Hancock also applied for and received membership in a

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<sup>5</sup> ER 254-56 ¶¶ 3, 5, 7 & 9; ER 271-75 ¶¶ 42-44, 46, 48; ER 280 ¶ 62; ER 282 ¶ 66; ER 285 ¶¶ 77-78.

<sup>6</sup> ER 213-14 ¶ 16; ER 248-49 ¶ 87.

<sup>7</sup> ER 235 ¶ 51; WSR 1-39. Throughout 2009-2011, Hancock reviewed and approved monthly budgets prepared by NW Management. ER 246 ¶ 81. Hancock also had the right to review and modify Farm Operating Plans submitted by NW Management. ER 271 ¶ 40.

<sup>8</sup> ER 280-81 ¶¶ 61 & 65; WSR 41 & 43.

<sup>9</sup> ER 280-82 ¶¶ 62, 63, 66-67; WSR 41 & 43.

<sup>10</sup> ER 231-33 ¶ 47; ER 275 ¶ 48.

Washington farm cooperative—a type of membership that is “issued and held only by farmer producers.”<sup>11</sup>

**B. Hancock And Farmland Contracted With NW Management To Hire and Employ Agricultural Labor.**

To grow and harvest the crop, Hancock contracted with Farmland to either directly manage Hancock’s Washington orchards or contract with a third party to do so.<sup>12</sup> Hancock and Farmland have engaged in similar agricultural contracts and operations all over the United States.<sup>13</sup> Hancock’s Washington contract required Farmland to set up a bank account “for the payment of contract labor.”<sup>14</sup> Farmland submitted weekly “cash calls” to Hancock to cover all payroll costs at the Washington orchards, and Hancock funded those expenses.<sup>15</sup> NW Management also generated “Labor Contractor Reports” for Hancock’s orchards that contained a summary of all labor, including a breakdown of labor provided by each individual worker.<sup>16</sup>

In all of the contracts between Farmland and NW Management, NW Management was referred to as the “Manager” and paragraph 3, titled

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<sup>11</sup> ER 283 ¶ 69; WSR 48.

<sup>12</sup> ER 49; ESR 97 ¶ C; ESR 123 ¶ C.

<sup>13</sup> ER 296 ¶ 4. Farmland was a licensed and bonded farm labor contractor in California since at least 2010. ER 307.

<sup>14</sup> ER 216 ¶ 19.

<sup>15</sup> ER 276 ¶¶ 49-50.

<sup>16</sup> ER 245 ¶ 75; ER 362-67 (exemplars of reports for one employee in 2009, 2010 and 2011).

"Manager's Duties," listed all the "work and services" NW Management was obligated to perform.<sup>17</sup> The very first service listed was: "Labor and Services: Manager will hire, employ, discharge and supervise the work of all employees . . . performing labor . . . on [Hancock's orchards]."<sup>18</sup> It is uncontested that NW Management was paid a fee for all its services pursuant to paragraph 11, labeled "Compensation," which states:

As compensation for the services rendered by [NW Management] under this Agreement, Manager shall be entitled to [a] fee . . . [which] shall be paid out in equal installments during the period of this Agreement.<sup>19</sup>

NW Management admits it located and secured agricultural labor during the relevant time period in order to operate Hancock's orchards.<sup>20</sup>

**C. NW Management Had No Stake In Hancock's Orchard Operations And Is Now Defunct.**

Rob Wyles, NW Management's former president, summarized his former company's business model as follows: "[NW Management] never put any money into anything."<sup>21</sup> NW Management did not own any orchards, nor did it own anything at the orchards it managed.<sup>22</sup> It never took out crop insurance.<sup>23</sup> In fact, Mr. Wyles confirmed that NW

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<sup>17</sup> ER 268 ¶ 34; ER 269 ¶ 35.

<sup>18</sup> *Id.*; ESR 37-38.

<sup>19</sup> ER 499 ¶ 11; ER 269 ¶ 36; ESR 43 ¶ 11.

<sup>20</sup> ER 501 ¶ 15.

<sup>21</sup> ER 286 ¶ 79; ER 349.

<sup>22</sup> ER 285 ¶¶ 76-77.

<sup>23</sup> ER 286 ¶ 83.

Management would have received its fee even if Hancock's apples rotted in the warehouse.<sup>24</sup> NW Management has no insurance to pay the claims in this case<sup>25</sup>, and, as of May 2013, was out of business as it no longer employed anyone and no longer worked for Farmland.<sup>26</sup>

**D. Hancock And Farmland Failed To Take Either One Of Two Simple Steps To Determine Whether NW Management Was Licensed.**

Hancock's contract with Farmland required Farmland to ensure compliance with all laws and licensing requirements.<sup>27</sup> NW Management admitted it never obtained a Washington State farm labor contractor license and never gave written disclosures to farm workers.<sup>28</sup> Hancock conducted yearly on-site inspections with Farmland to review the various apple crops and ensure compliance with the law; these inspections included the use of a form checklist prepared by Hancock to determine whether all required permits and licenses were in place.<sup>29</sup> It is undisputed that both Hancock and Farmland failed to either (1) review NW

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<sup>24</sup> ER 287; ER 350.

<sup>25</sup> ER 249 ¶ 88; ER 288 ¶ 88; ER 359.

<sup>26</sup> WER 37 ll. 5-13; WER 45-46 ¶ 2. Farmland posted the bonds for this appeal. ER 696.

<sup>27</sup> ER 296 ¶ 4; ESR 25 ¶ 14. Each of Hancock's contracts with Farmland contains a full indemnity provision which reads: "[Farmland] shall indemnify and hold [Hancock] harmless from all claims" backed by a \$1 million liability policy. ESR 28, 105 & 130-31 ¶¶ 20-21.

<sup>28</sup> ER 253 ¶ 1; ER 254 ¶ 2.

<sup>29</sup> ER 278 ¶¶ 57-58; ESR 81-91; ER 279 ¶¶ 59 & 60.

Management’s labor contractor license; or (2) obtain confirmation of licensure from the Department of Labor & Industries.<sup>30</sup>

### III. SUMMARY OF ARGUMENT

#### **The Ninth Circuit’s first certified question asks:**

(1) Does the 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?

**Answer:** Yes. The plain meaning of farm labor contractor includes entities that are paid a “per acre” fee to employ agricultural workers on land owned by a third party whether or not they perform additional farming activities. FLCA defines fee as “any valuable consideration received . . . by a farm labor contractor for or in connection with any [farm labor contracting activities]” which include hiring or employing farm workers. RCW 19.30.010(7)(b) & (3). FLCA puts no limitation or qualification on the type of fee, including whether a fee is labeled “per-acre” or something else. FLCA does not require that an entity “only” provide farm labor contracting services. FLCA also does not categorically exclude entities that are engaged in agricultural activities from the

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<sup>30</sup> ER 47.

definition of farm labor contractor. FLCA's overall statutory scheme to protect farm workers fully supports the Workers' arguments.

**The Ninth Circuit's second certified question asks:**

(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?

**Answer:** Yes. The plain meaning of FLCA's joint liability provision requires users to take either one of two steps (check the license or confirm licensure with the Director of L&I) to determine whether a farm labor contractor is licensed. Requiring "actual knowledge" would create an incentive for users of labor contractors to not make either inquiry and remain ignorant of a contractor's licensure status, thus avoiding liability in contradiction of FLCA's remedial purpose. When a user takes either one of the two specified steps, it will know whether or not a contractor is licensed.

#### IV. ARGUMENT

**A. The Answer To The First Certified Question Is “Yes”: The Plain Meaning Of “Farm Labor Contractor” Under RCW 19.30.010(2) Includes An Entity That Is Paid A Fee, Including A “Per-Acre” Fee, To Hire and Employ Farm Workers And To Perform Other Farming Activities On Land Owned By A Third Party.**

To ascertain the plain meaning of FLCA, the court’s “fundamental objective is to determine and carry out the intent of the Legislature, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of the legislative intent.” *State Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Using this analysis, the answer to the Ninth Circuit’s first question is yes: an entity like NW Management that is paid a fee to hire or employ agricultural workers is a farm labor contractor, even if a portion of that fee represents compensation for additional farming activities performed on land owned by a third party.

1. The plain meaning of “Farm Labor Contractor” includes an entity that is paid a fee in connection with *any* farm labor contracting services, including hiring and employing farm workers.

FLCA provides only two requirements for “any person”<sup>31</sup> to be a farm labor contractor (“FLC”). RCW 19.30.010(2). First, the person must perform “any farm labor contracting activity,” and hiring and employing agricultural employees are two of the six explicitly listed FLC activities. RCW 19.30.010(2)-(3)<sup>32</sup>

Second, a farm labor contractor is “any person, . . . who, for a fee, performs any farm labor contracting activity.” RCW 19.30.010(2). FLCA broadly defines “fee” to include:

[A]ny valuable consideration received . . . by a farm labor contractor for or in connection with *any of the services described in RCW 19.30.010(3)* [FLCA subsection listing six services that constitute farm labor contracting activity].

RCW 19.30.010(7)(b) (emphasis added). Even the reimbursement of expenses constitutes a fee under FLCA; no profit is necessary. *Escobar v. Baker*, 814 F. Supp. 1491, 1499 (W.D. Wash.1993) (holding that providing gasoline to transport workers was a “fee”).

The Ninth Circuit seeks input as to whether the fact that a fee is labeled a “per acre” fee or the fact that the entity provides other services

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<sup>31</sup> Pursuant to RCW 19.30.010(1) “person” includes a corporation, and NW Management was a corporation. ER 556 ¶ 11; WER 50 ¶ 11.

<sup>32</sup> RCW 19.30.010(3) defines FLC activity as: “recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees.”

affects FLCA coverage. Because FLCA broadly defines a fee to include “*any* valuable consideration . . . for or in connection with *any* of the [farm labor contracting] services described in [subsection (3)]” the particular label used by contracting parties to describe the fee is not determinative. *See* RCW 19.30.010(7)(b) (emphasis added). Contracting parties may not avoid FLCA coverage by labeling a fee with any myriad of terms including: “management fee,” “consulting fee,” or “tonnage fee.” In addition, FLCA also does not require that a person “only” provide farm labor contracting services. As long as some portion of the fee is received in connection with *any* farm labor contracting activity, the person is a farm labor contractor.

The facts in this case demonstrate that NW Management was a farm labor contractor under FLCA. NW Management received a monthly fee for performing a variety of services for Hancock and Farmland, including hiring and employing all agricultural workers at the orchards. The Orchard Management contract sets forth all the duties NW Management “shall perform” under the heading, “Manager’s Duties.”<sup>33</sup> The *very first* duty listed in the contract required NW Management to: **“hire [and] employ . . . all employees . . . performing labor . . . on**

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<sup>33</sup> ESR 37 & ER 269 ¶ 35.

[Hancock's orchards]."<sup>34</sup> The same contract, in paragraph 11 titled, "Compensation," states:

**As compensation for the services rendered by [NW Management] under this Agreement, Manager shall be entitled to [a] fee . . . [which] shall be paid out in equal installments during the period of this Agreement.**<sup>35</sup>

Thus, NW Management received a fee "in connection with" hiring and employing agricultural workers because the fee covered all the services NW Management provided pursuant to the contract. The district court succinctly captured the true essence of the fee payment:

In short, farm labor was a line-item expense which was funded and paid by John Hancock. *Supplying* this labor was one of the services for which NW Management received a "management fee." And while this was by no means the only service for which NW Management was paid, it was a crucial component of its agreement with Farmland (and, by extension, Farmland's agreement with John Hancock). For obvious reasons, had NW Management chosen not to hire farm laborers to farm the orchards, the entire operation would have come to a grinding halt.<sup>36</sup>

Two of FLCA's related provisions support this analysis. First, agricultural employers are not categorically excluded from FLCA's definition of farm labor contractor. A side-by-side comparison of FLCA's definition and the definition used in the federal Agricultural Worker

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<sup>34</sup> ER 269 ¶ 35; ESR 37-38 (emphasis added).

<sup>35</sup> ER 269 ¶ 36 (emphasis added).

<sup>36</sup> ER 45-46 (emphasis in original).

Protection Act (AWPA) demonstrates that FLCA’s definition is broader and does not exclude agricultural employers.

Federal AWPA – Enacted 1983	State FLCA - Amended 1985
<p>The term “farm labor contractor” means any person, <i>other than an agricultural employer</i>, 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.</p> <p>29 U.S.C. § 1802(7) (emphasis added).</p>	<p>“Farm labor contractor” means any person, or his or her agent or subcontractor, who, for a fee, performs any farm labor contracting activity.</p> <p>RCW 19.30.010(2).</p>

As this Court noted, FLCA’s divergence from AWPA indicates the Legislature “intended the FLCA to provide farm workers protections greater than those provided under the federal scheme.” *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 528-29, 286 P.3d 46 (2012).

Second, in contrast to AWPA’s “blanket’ exemption of agricultural employers, FLCA instead has a narrow “hire for one’s own employer” exemption. FLCA provides:

This chapter shall not apply to . . . any person who performs any of the [six] services enumerated in [the definition of “farm labor contracting activity” found in] subsection (3) . . . *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 . . . .

RCW 19.30.010(6) (emphasis added). Under this exemption, not all agricultural employers are required to be licensed farm labor contractors. Any person who engages in farm labor contracting activity, including hiring and employing farm workers, “only within the scope of his or her regular employment for one agricultural employer’ is exempt unless he or she receives a commission based on the number of workers recruited.<sup>37</sup> In contrast, agricultural employers, like NW Management, who hire and employ farm workers on behalf of a paying third party, are farm labor contractors under FLCA. The Growers concede this exemption did not apply to NW Management and identify no other exemption that would apply. *See Growers’ Brief* at 22-23.<sup>38</sup>

Finally, FLCA’s overall statutory scheme to protect farm workers from exploitation, dictates that a non-exempt entity that is paid a fee to hire and employ farm workers, even if the owner of the land and operation also paid it to perform other agricultural activities, is a farm labor

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<sup>37</sup> This exemption also demonstrates that when the Legislature intended to limit the type of fee FLCA regulates it did so explicitly, as here describing a fee based on the number of workers recruited.

<sup>38</sup> NW Management never pled the exemption. WER 57 & 73; *see* ER 113-14. The district court found Farmland’s arguments related to the application of this exemption “highly suspect” and “entirely lacking in factual support.” ER 113-14. In any event, NW Management would not have qualified for the exemption because it was an independent contractor, not an employee of Farmland, and it provided services to at least one other additional, independent agricultural employer. ER 270 ¶ 37; ESR 44 ¶ 14; ER 42 at n.1; ER 480 ¶ 2; ER 482 ¶ 9.

contractor. The Legislature passed FLCA to protect agricultural workers from exploitation. *Perez-Farias*, 175 Wn.2d at 521 & 530; *Cascade Floral Prods., Inc. v. Dept. of Labor & Indus.*, 142 Wn.App. 613, 621 n.13, 177 P.3d 124 (2008). This Court ruled that FLCA must be liberally construed to further its purposes, including enforcement and deterrence. *Perez-Farias*, 174 Wn.2d at 530. In contrast, the Growers' analysis is premised on the false assumption that FLCA was enacted to protect farmers in addition to farm workers. *Growers' Brief* at 2 & 11.

This case illustrates the wisdom of FLCA's approach. Hancock financed the entire orchard operation and identified itself as the farmer, yet chose through contractual arrangements to delegate the hiring and employment of workers to NW Management. While NW Management was the face of Hancock's operation in Washington, Hancock held all of the operation's assets (the land, the crop, even the harvest tools) and reaped all the profits.

NW Management, on the other hand, was dependent on Hancock to stay afloat and is now defunct. Hancock is fully indemnified based on its own contractual protections and, in fact, Farmland posted the bond to secure the judgment on appeal. FLCA's basic worker protections, including the provisions violated here, which require licensing, bonding, and written disclosures for Workers, are not provided by any other

statutory scheme. FLCA intended to protect Washington farm workers from contractual arrangements creating shell entities that violate basic worker rights, yet have no assets to compensate farm workers for those labor law violations. The Workers are entitled to those basic FLCA protections here.

2. The Court should reject the Growers' arguments, including their resort to extrinsic canons of construction that misstate the history of federal law and conflict with FLCA's purpose.

The Growers' plain meaning arguments should be rejected, as set forth above, because: 1) FLCA's definition of "farm labor contractor" includes an entity that receives *any* consideration in connection with *any* farm labor contracting activity, including hiring and employing farm workers; 2) whether an entity is also an "agricultural employer" is of no consequence because agricultural employers are not categorically excluded from FLCA's definition of farm labor contractor; 3) the "hire for one's own employer" exemption demonstrates only certain agricultural employers were excluded; and 4) their argument is built on the false premise that FLCA is intended to protect farmers.

Because the plain meaning of "farm labor contractor" can be determined as the Workers set forth above, there is no need to turn to legislative history or other extrinsic canons. *See Dep't of Ecology*, 146

Wn.2d at 12. Even if the Court did resort to this analysis, the Growers' arguments should be rejected because their legislative history argument relies on a misstated history of federal law and the rule of lenity does not apply.

The Growers' cite to no Washington legislative history related to the Ninth Circuit's first question about FLCA's definition of "farm labor contractor." *Growers' Brief* at 29-34. Instead they attempt to rely on the history of federal law and make numerous errors in its application. First, the Growers' erroneously assert that AWPAs federal predecessor, the Farm Labor Contractor Registration Act (FLCRA) was the predecessor to FLCA. *Id.* at 24 & 29. To the contrary, FLCA was first enacted in 1955. *See* Laws of 1955, ch. 392, § 1. FLCRA was enacted in 1964 and later repealed and replaced by AWPAs in 1983. *See* 7 U.S.C. § 2042(b) (1964) (Pub. L. No. 88-582, 78 Stat. 920 (1964)); *Perez-Farias*, 175 Wn.2d at 527-28. Second, contrary to the distinction made by the Growers, FLCRA had been interpreted and enforced against farmers and other fixed-situs employers like NW Management. *Compare Growers' Brief* at 30-32 with *Mendoza v. Wight Vineyard Mgmt.*, 783 F.2d 941, 944 (9th Cir. 1986) (farmers and other fixed-situs employers were required to be licensed under FLCRA); *see also Marshall v. Silver Creek Packing Co.*, 615 F.2d 848, 849-50 (9th Cir. 1980) (corporate entity that hired workers and

engaged in other agricultural activities for the benefit of farmers who owned the fruit required to be licensed and provide disclosures).<sup>39</sup> Finally, the Growers ignore the fundamental changes in federal law. In 1983, in response to farmers being required to be licensed farm labor contractors, Congress expressly excluded “agricultural employers” from the definition of “farm labor contractor.” *See Mendoza*, 783 F.2d at 944; *see also Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (at the same time, AWPAs imposed new substantive duties on agricultural employers).

In contrast, Washington never excluded agricultural employers from the definition of “farm labor contractor,” and chose not to do so when FLCA was overhauled in 1985; just two short years after Congress did so in AWPAs. *See* Laws of 1955, ch. 392, § 1; Laws of 1985, ch. 280, § 1; *see also* ER 639-40 (showing changes in FLC definition section made in 1985). As set forth above, the most relevant comparison is Congress’s approach in AWPAs with the Washington Legislature’s approach in FLCA. *See Perez-Farias*, 175 Wn.2d at 528-29; *supra* section IV.A.1. Contrary to the Growers’ arguments, the federal legislative history and comparison to

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<sup>39</sup> FLCRA originally defined “farm labor contractor” to include only *interstate* operators, thereby exempting from coverage nearly *all fixed-situs* agricultural employers. *See* 7 U.S.C. § 2042(b) (1964) (Farm Labor Contractor Registration Act, Pub. L. No. 88-582, 78 Stat. 920 (1964)). Ten years later, Congress broadened coverage to fixed-situs employers by striking the word “interstate.” *See* Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. No. 93-518, 88 Stat. 1652 (1974) (amending 7 U.S.C. § 2042 (1970)).

FLCA supports the Workers' analysis that the Washington Legislature took a different path and chose not to categorically exempt all agricultural employers from the definition of farm labor contractor.

Finally, the rule of lenity also does not apply. The Growers do not cite, and the Workers are unaware of, any precedent of this Court applying the rule of lenity to interpret a civil statute. *Cf.* Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 199 (2001) (referencing lenity as an extrinsic canon to address constitutional problems in the criminal context which are not at issue here); *see also In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 343, 126 P.3d 1262 (2006) (majority interprets rules of professional conduct without applying the rule of lenity; concurring opinion would have reached the same result, but through application of lenity based on the quasi-criminal nature of disbarment). Other Washington labor laws which are part of the statutory scheme to guarantee minimum working conditions and payment of wages are consistently construed liberally to effectuate these remedial purposes even where violations could result in criminal penalties. *See Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157-59, 961 P.2d 371 (1998) (civil statute prohibiting willful withholding of wages and making violations a misdemeanor, must be liberally construed to protect workers' wages); *see also Drinkwitz v. Alliant*

*Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (recognizing Washington’s “long and proud history of being a pioneer in the protection of employee rights” and interpreting the Minimum Wage Act (MWA), chapter 49.46 RCW, broadly to protect workers); RCW 49.46.100(2) (retaliation against a worker making a complaint under the MWA is a misdemeanor).

Even if this Court were to conclude the rule of lenity could apply to civil statutes, it would not apply here because the meaning of FLCA can be determined from its plain language. *See State v. Evans*, 177 Wn.2d 186, 192-94, 298 P.3d 724 (2013); *Internet Cmty. & Entm't Corp. v. Washington State Gambling Comm'n*, 169 Wn.2d 687, 693-94, 238 P.3d 1163 (2010) (unanimously reversing Court of Appeals decision that applied the rule of lenity because meaning of statute was clear).

**B. The Answer To The Second Certified Question Is “Yes”: The Plain Meaning of RCW 19.30.200 Makes Any Person Who Uses The Services Of An Unlicensed Farm Labor Contractor Jointly And Severally Liable Unless The Person Takes Either One Of The Two Specified Steps To Obtain Knowledge of Licensure.**

1. The plain meaning of FLCA’s joint liability provision requires any person who uses a farm labor contractor to determine whether a contractor is licensed in one of two specified ways: either review the actual license, or obtain confirmation from L&I.

The plain meaning of FLCA's joint liability provision can be discerned from the ordinary meaning of its language, the context and related provisions, and the overall statutory scheme to protect farm workers from exploitation. *See Lake*, 169 Wn.2d at 526. FLCA 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.

RCW 19.30.200 (emphasis added).

Both sentences must be read together in order to derive the ordinary meaning of the statute:

[C]ourts should read the statute in its entirety, rather than isolating individual phrases. Construction that would render a portion of a statute meaningless or superfluous should be avoided, as should a construction that would yield unlikely or absurd results.

*Seto v. Am. Elevator, Inc.*, 159 Wn.2d 767, 774, 154 P.3d 189 (2007)

(internal citations and quotations omitted) (reversing interpretation of court rule which ignored second sentence). In harmonizing the language of both sentences, the district court concluded users must make a determination by either one of the two methods specified in the statute:

In this case, interpreting the statute to require *actual knowledge* that a particular contractor is unlicensed would render the second sentence of the statute superfluous. The second sentence begins, ‘*In making determinations under this section, any user may rely upon . . .*’ This language clearly contemplates that users will make a ‘determination’ of some kind. When read in context of the entire statute, the ‘determination’ to be made is whether a particular farm labor contractor is properly licensed. And while the use of the phrase ‘in making determinations’ is admittedly awkward given that the first sentence does not introduce a determination to be made, the only fair reading of the statute as a whole is that a determination must, in fact, be made.<sup>40</sup>

The ordinary language of FLCA requires users to investigate the licensure of farm labor contractors “in *either* of [two] ways specified in the statute (i.e. being furnished with a copy of the actual license *or* obtaining confirmation of licensure from [L&I]).”<sup>41</sup> “Either-or” is defined as “an unavoidable choice or exclusive division between only two alternatives.” Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/either-or> (last visited Sept. 30, 2015). This Court recently considered the use of disjunctive language when construing the jeopardy element of the tort of wrongful discharge against public policy:

[T]he plaintiff establishes jeopardy by demonstrating that his or her conduct was *either* directly related to the public policy *or* necessary for effective enforcement. The disjunctive language creates two options for establishing

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<sup>40</sup> ER 121 (emphasis in original).

<sup>41</sup> ER 47 (emphasis added).

jeopardy, and the plaintiff satisfies the jeopardy element by either means.

*Rose v. Anderson Hay & Grain Co.*, No. 90975-0, 2015 WL 5455681, at \*8 (Wash. Sept. 17, 2015) (emphasis in original). Other courts interpreting statutes including an either-or phrase similarly conclude that one of the two options must be exercised. *See In re Dumont*, 383 B.R. 481, 487 (B.A.P. 9th Cir. 2008) *aff'd*, 581 F.3d 1104 (9th Cir. 2009) (where statute provides a debtor may either reaffirm or redeem, the debtor's choice is limited to one of the two specified options); *Fort Worth St. Ry. Co. v. Rosedale St. Ry. Co.*, 4 S.W. 534, 538 (Tex. 1887) (“The word ‘either’ . . . mean[s] one or the other of two or more specified things.”).

Consequently, “knowingly” in this context has a distinct meaning. A user is required to make a determination based on one of two options. After that determination is made, the user will *know* whether the labor contractor possesses a valid Washington license. It is incumbent upon a user to obtain this knowledge and the statute expressly directs the user as to the means to obtain it.

Both Hancock and Farmland had ample means to comply with FLCA's requirement to determine whether a contractor is licensed in one of two simple ways. Both entities engaged in similar agricultural operations and contracts all over the United States and developed standard

forms to document proper licensing. Moreover, Farmland was no stranger to investigating and complying with state farm labor contractor laws as it has been a licensed and bonded farm labor contractor in California since at least 2010.

FLCA's related provision on statutory damages as interpreted in *Perez-Farias* is also instructive as to the meaning of the word "may" in the FLCA's joint liability provision. FLCA's statutory damage provision provides:

if the court finds that the respondent has violated this chapter . . . it *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) (emphasis added). This Court considered the language of the statute and FLCA's remedial purpose and adopted the Workers' reading, holding that a trial court choosing to award statutory damages must award statutory damages of \$500. *Perez-Farias*, 175 Wn.2d at 530. Similarly, the use of the word "may" in the either-or clause of RCW 19.30.200, means a user *must* make a determination in one of the two specified ways.

Finally, FLCA's statutory scheme is determinative. Requiring a user to have "actual knowledge" cannot be reconciled with FLCA's purpose to protect farm workers. As the district court reasoned:

[E]quating “knowing use” with “actual knowledge” would give users of farm labor contractors a perverse incentive to remain deliberately ignorant of a contractor’s licensure status. Such a result would be plainly inconsistent with the FLCA’s remedial purpose, which is to protect farm laborers from abuse at the hands of farm labor contractors.<sup>42</sup>

Based on each of the above arguments, this Court should hold that the plain meaning of FLCA requires users to make an affirmative determination as to whether a labor contractor is licensed.

2. The Court should reject the Growers’ arguments, including their unnecessary resort to legislative history that more fully supports the Workers’ arguments.

The Growers’ plain meaning arguments should be rejected, as set forth above, because the arguments: 1) fail to harmonize both sentences of the language in the provision, including the requirement to make a determination in either one of two specified ways; 2) would impose an “actual knowledge” requirement that is not included in the specific language of the provision; and 3) are contrary to FLCA’s overall legislative scheme to protect farm workers from exploitation.

The Growers’ argument that the second sentence creates a discretionary “safe harbor” makes no sense in light of FLCA’s requirement to make a determination and its overall statutory scheme.<sup>43</sup>

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<sup>42</sup> ER 47.

<sup>43</sup> The Growers’ reliance on *Yapuna v. Global Horizons Manpower Inc.*, No. CV-06-3048-RHW, 2008 WL 4224454, at \*2 (E.D. Wash. Sept. 10, 2008) is unavailing as the analysis of RCW 19.30.200 is scant and no statutory interpretation analysis was

The Legislature would not create a road map to escape liability by permitting an entity to simply avoid obtaining any knowledge about whether a contractor was licensed, when FLCA's purpose is to protect farm workers. *See Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 605, 257 P.3d 532 (2011) (rejecting interpretation of industrial insurance immunity provision which would have allowed design professionals to escape liability by avoiding writing down their plans).

There is also no need to turn to the legislative history as the statute is unambiguous and should be decided on the plain meaning as set forth above. *See Dep't of Ecology*, 146 Wn.2d at 12. However, even assuming this Court finds the legislative history to be relevant, the following is undisputed and fully supports the Workers' reading of the statute: 1) the word "knowingly" and the entire second sentence of RCW 19.30.200 were added to the legislation on the same day; 2) staff counsel for the committee mentioned the additions were linked; and, 3) there was no discussion of these amendments by any member of the committee during the hearing or at any subsequent floor vote. *Growers' Brief* at 43 & 48-52; *see also* ER 591-94.

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conducted. FLCA rulings that attempted to protect growers over farm workers were unanimously rejected by this Court two years later, so the district court lacked that guidance. *See Perez-Farias*, 175 Wn.2d 518. Similarly, *Valley Fruit Orchards, LLC v. Global Horizons Manpower, Inc.*, No. CV-09-3071-RMP, 2010 WL 1286367, at \*4 (E.D. Wash. Mar. 26, 2010), does not provide any analysis of the provision and contains no mention of it providing a "safe harbor."

The absence of any statements, let alone discussion by committee members about the joint amendments, renders purely speculative the Growers' argument as to how and why the amendments were adopted. *See Perez-Farias*, 175 Wn.2d at 529 (where "there is no [legislative] history indicating the change was specifically based on such an intent . . . we are hesitant to speculate as to the reasons for the change."). In addition, the fact that the language "knowingly" and "in making a determination" were added at the same time, supports the Workers' interpretation of the joint liability provision. Because the specific intent of the legislature may not be determined by reviewing the legislative history, this Court should determine the plain meaning of the provision in light of FLCA's remedial purpose as it did in *Perez-Farias*.

Lastly, for the same reasons set forth above, it is not appropriate to apply the rule of lenity to construe FLCA's joint liability provision. *See supra* section IV.A.2.

## V. CONCLUSION

The Workers respectfully request that this Court answer both certified questions in the affirmative. FLCA provides that an entity, like NW Management, that is paid a fee to employ farm workers and to engage in other farming activities on land owned by a third party is a farm labor contractor. FLCA also requires entities that use farm labor contractors to

obtain knowledge about whether a contractor is licensed by making a determination in either one of two simple ways. These two answers are imperative to fulfill FLCA's promise to protect all Washington farm workers from exploitation.

Dated this 1st day of October, 2015.

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**CERTIFICATE OF SERVICE**

I certify that on the 1st day of October, 2015, I caused a true and correct copy of the Answering Brief of Plaintiffs-Respondents to be served on the following persons via U.S. First Class Mail:

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Attached for filing please find Answering Brief of Plaintiffs-Respondents in *Saucedo v. John Hancock Life & Health Insurance, Co., et al.*, Case No. 91945-3. Please contact me if you have any questions or concerns.

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