

NO. 86793-3

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SUPREME COURT
STATE OF WASHINGTON

JOSE GUADALUPE PEREZ-FARIAS, *et al.*,

Plaintiffs – Appellants,

vs.

GLOBAL HORIZONS, INC., *et al.*,

Defendants – Appellees.

On Certified Questions from the United States Court of Appeals
for the Ninth Circuit
No. 10-35397

On Appeal from the United States District Court
for the Eastern District of Washington
No. 2:05-cv-03061-RHW

BRIEF OF “AGRICULTURAL AMICI:”
WASHINGTON STATE HORTICULTURAL ASSOCIATION,
YAKIMA VALLEY GROWERS-SHIPPERS ASSOCIATION,
WENATCHEE VALLEY TRAFFIC ASSOCIATION,
WASHINGTON FARM LABOR ASSOCIATION, AND
WASHINGTON GROWERS LEAGUE

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I. INTRODUCTION

The Ninth Circuit certified to this Court three questions regarding the Washington Farm Labor Contractors Act (“FLCA”), RCW 19.30.170(2). This amicus brief addresses the first certified question and the need to recognize trial court discretion in any award of statutory damages. To avoid repetition of arguments already made, amici (“Agricultural Amici”) incorporate the arguments made by Appellees Valley Fruit Orchards, LLC and Green Acre Farms, LLC (“Growers”) regarding the appropriate interpretation of the FLCA. The Agricultural Amici offer policy reasons that support the Growers’ proposed interpretation and also rebut mischaracterizations made by Appellants (“Workers”) regarding the effect of judicial discretion on damage awards.

II. STATEMENT OF THE CASE

The facts and procedure relevant to the issues presented for review have already been thoroughly covered by the briefs previously filed in this case.

III. IDENTITY AND INTEREST OF AMICUS PARTIES

Washington State Horticultural Association (“Horticulture Association”):

The Washington State Horticultural Association is the tree fruit industry’s educational and governmental affairs organization. In existence

continuously for 108 years, it represents over 2,500 growers, packers, marketers and allied industry groups.

Yakima Valley Growers-Shippers Association (“YVGSA”):

The Yakima Valley Growers-Shippers Association is a non-profit trade association established in 1917 to serve the Yakima Valley tree fruit industry. YVGSA specializes in providing extensive data on the movement, holdings, and marketing of Washington State tree fruit commodities (apples, pears, cherries, apricots, peaches, nectarines and plums). The membership of YVGSA pack and ship approximately two-thirds of the apples produced in Washington State.

Wenatchee Valley Traffic Association (“WVTA”):

The Wenatchee Valley Traffic Association is a non-profit trade association established in 1917 to serve the Wenatchee and Okanogan Valley tree fruit industry. The member firms of the WVTA include tree fruit packers, shippers, marketing firms and allied industry companies. These firms provide annually over 50,000 semi truckloads of fresh tree fruit to all 50 states in America and over 50 foreign countries. This represents approximately 40% of all tree fruit grown in Washington State.

Washington Farm Labor Association (“WFLA”):

Formed in 2007, the Washington Farm Labor Association is a 501(c)(6) non-profit membership association incorporated in Washington

state and serving the interests of labor intensive seasonal employers and workers. The mission is to facilitate a legal and stable workforce for seasonal employers in the Pacific Northwest. To that end, the association writes approximately 75 percent of the approved H-2A guest worker applications in the state. In 2011, the association provided employment to approximately 2,000 legal foreign workers through the H-2A program.

Washington Growers League (“WGL”):

The Washington Growers League is a non-profit, voluntary membership organization formed in 1987 which is exclusively dedicated to providing services and advocacy for agricultural employers in Washington State. The Washington Growers League represents approximately 400 members who produce tree fruit, vegetables, hops, dairy, nursery and other specialty crops.

Interest of Agricultural Amici

Washington State’s farmers grow well over 100 million boxes of fresh apples; 14 million boxes of pears; and 15 million cartons of fresh cherries annually. The industry adds nearly \$1.3 billion of direct value to the Washington State economy, and nearly \$2.3 billion of total value. The number of state-wide jobs associated with the industry was 23,535 directly

and 38,756 total in 2008. State and local taxes raised by the industry amount to approximately \$133 million.¹

Agricultural Amici and their members maintain a strong interest in all agricultural legislation. The amici and members make up a diverse group with interests in interpreting the FLCA correctly. Any court decision on farm labor statutes directly impacts them. This Court's decision in this case will do more than impact amici; it will impact the entire industry. A mandatory monetary sanction of at least a \$500 fine per person and per violation would have extensive negative effects on the industry, including both employers and employees.

IV. ISSUE PRESENTED

Does the FLCA, and in particular RCW 19.30.170(2), provide that a court choosing to award statutory damages: (a) must award statutory damages of \$500 per plaintiff per violation; or (b) has discretion to determine the appropriate amount to award in damages from among a range of amounts, up to and including statutory damages of \$500 per plaintiff per violation?

¹ D. Patrick Jones, Ph.D, *The Economic Impact Of The Washington Tree Fruit Industry On Washington State And Seven Washington Counties* (2011).

V. SUMMARY OF ARGUMENT

The Growers correctly argue that the FLCA provides trial courts discretion to impose a range of damages “up to and including” \$500 in statutory damages per person per violation. RCW 19.301.70(2). Discretion allows the trial court to ensure both that the workers receive compensation and that the amount of damages remains appropriate under the circumstances. This discretion furthers the purpose of the FLCA by deterring farm labor contractors from abusing workers, without unduly punishing growers. A rigid interpretation that eliminates discretion will only result in punitive awards that do not further the FLCA’s purposes and ultimately will harm the industry, the farmers, and the farm workers.

Discretion in damage awards also provides growers confidence when utilizing labor contractors as a source for labor. There are currently few other options available for growers. If the FLCA were to require a mandatory penalty of at least \$500 per plaintiff per violation against growers based on the acts of these third-party contractors, then growers might be unwilling to risk using labor contractors for fear of large awards against them. This could result in more labor shortages and harm to the agricultural industry.

The Workers misleadingly argue that farm laborers will go without any compensation unless this Court requires automatic \$500 minimum

awards per person per violation. The Workers' proposed interpretation not only misreads the statutory language but would actually undermine the policies supporting the FLCA and cause harm to farm workers. The trial courts must be allowed to use their sound discretion to craft awards that protect workers without unduly punishing growers.

VI. ARGUMENT

A. **The Proper Interpretation Of RCW 19.30.170(2) Grants The Trial Court Discretion In Awarding Statutory Damages.**

The FLCA's language provides discretion for a trial court to determine whether to award monetary damages or equitable relief, or some combination thereof. The focus of the legislature on the word "may" indicates the discretion inherent within the statute, including whether the trial court will award actual or statutory damages. When it chooses to award actual damages, the trial court has the discretion to award "up to and including" the amount of actual damages. Similarly, where the trial court chooses a statutory award, the language confers discretion regarding the range of damages. This interpretation is consistent with the language and with the parallel federal law. This interpretation also makes good sound public policy. As a result, the Agricultural Amici support the interpretation provided to this Court by the Growers.

1. Allowing Discretion For Trial Courts In Determining Statutory Damages Effectuates FLCA's Purpose By Focusing On Deterring Labor Contractors, Not Punishing Growers.

The main thrust of the FLCA is to create a vehicle that deters farm labor contractors from taking advantage of farm laborers. Mandatory exponential damages awards against growers who hired the contractors would not further this purpose. Discretion is required to ensure that labor contractors are deterred but growers are not unduly punished for labor contractor violations.

The FLCA places restrictions and requirements on farm labor contractors to deter them from causing harm to farm workers. For example, the farm labor contractor is required to furnish the employees with information regarding compensation, conditions of employment, and other work related information, along with keeping accurate employment records. The FLCA creates liability for anyone who uses the services of an unlicensed farm labor contractor, whether or not fault lies with the user. As this case demonstrates, growers are liable even if they were unaware of any violations by the contractor.

This third-party liability, which is the only reason the Growers in this case are liable, shows the illogical nature of the Workers' proposed statutory interpretation. A statutory damages provision that required

mandatory minimum damages of \$500 per violation per person against growers — even for technical violations that a third-party contractor committed — would lead to extreme results. Rather than deterring unethical farm labor contractors, such an interpretation would simply result (as it has in this case) in awards of millions of dollars assessed on growers that did not actually commit the wrongful acts.

Providing discretion to the trial court, on the other hand, allows those who are familiar with the facts regarding the parties and their respective culpability to make sure that the award is focused on deterrence of labor contractor abuse. The trial court can fashion a remedy that focuses on making labor contractors accountable.

The interpretation offered by Workers would harm the agricultural industry as a whole, rather than deterring labor contractors from abusing farm workers. On the other hand, a proper interpretation of the statute, which provides judicial discretion to craft awards appropriate to the situation before the court, will ensure damage awards for workers but will prevent devastating economic blows to growers and to the agricultural industry overall. Such an interpretation of the FLCA will further the purpose of deterring labor contractor abuse while also protecting the interests of innocent growers.

2. Rigid Mandatory Minimum Awards Would Discourage Use Of One Of The Few Remaining Labor Options.

A rigid interpretation of the statutory damages provision also would make for bad public policy because it could exacerbate labor shortages in the agricultural industry. The agricultural industry is a significant source of value to the state economy, and a significant source of employment. Because of this, any agricultural labor shortage is a major concern for the entire state.

The Washington State Labor, Markets, and Economic Analysis Unit (“LMEA”) began tracking an agricultural labor shortage in 2007. The LMEA tracks the agricultural labor shortage through monthly surveys and publishes its reports. In August 2011, the labor shortage in the agricultural market was 4.8%. *See* John Wines, Washington State Employment Security Department, Agricultural Labor Employment and Wages, August, p.3 (2011). By September 2011 the labor shortage had spiked to 8.6% according to LMEA. *See* John Wines, Washington State Employment Security Department, Agricultural Labor Employment and Wages, September, p.4 (2011).

The jump in labor shortage caused Governor Gregoire to declare a State of Emergency and authorize the use of prison labor to pick fruit in the Fall of 2011. The Governor was quoted as saying at that time “We are

sitting on the potential of having the third largest (apple) crop, at around 105 million boxes, and we can't get them picked." *See, Harvest Dilemma Spotlights Immigrant Labor Crisis*, The Olympian, November 25, 2011. The State Legislature recently recognized the shortage of agricultural labor and identified a limited option (*See Proposed House Bill 2408*). Further, the nation continues to struggle with immigration reform issues that relate to agriculture. In the meantime, the growers are left with very few choices in their efforts to find laborers.

One of the limited options relied upon by growers is the federal H2-A guest worker program. *See generally*, 20 CFR 655. The H2-A program includes many regulations that include built-in costs and benefits designed to eliminate any possible adverse affects on the domestic workforce and to protect the interest of foreign workers. The program includes requirements to provide benefits such as transportation and housing of workers, and mandates an Adverse Effect Wage Rate (AEWR). In 2012, the minimum AEWR for Washington is set at \$10.92, considerably higher than the State's minimum wage rate.

In addition to higher costs, the employers participating in the H2-A program are subject to much higher levels of scrutiny from government regulators. A recent statistical survey of agricultural employers found that the biggest problems with the program include program costs and

administrative burdens. *See* Danna L. Moore & Kent Miller, Soc. & Econ. Sciences Research Ctr., Technical Report 11-67, *H-2A Temporary Agricultural Employee Program*, p. 25 (2011). The new regulations regarding this program are considered to be even more burdensome and costly for employers. *Id.* at p. 27-28. Nearly 40% of those surveyed indicated that despite these burdens they will continue to use this program because they have no legal alternative. *Id.* at p. 29-30.

The number of H2-A workers approved and hired in Washington State continuously rises, from 814 in 2006 to 3,182 in 2011. The difficulties related to the H2-A program and the increased reliance upon this program indicates that employers are choosing to use the H2-A program because it is one of the last means available to them. Even though growers are using this program, there are still labor shortages.

A statutory interpretation that would remove the trial courts' discretion in awarding FLCA damages would discourage use of labor contractors. Growers would become fearful of onerous damage awards based on the acts of third-party labor contractors (such as in this case). As a result, growers would be left with even fewer options for finding labor. The FLCA, like its federal counterpart, must provide discretion for trial judges in determining statutory awards. Any other interpretation would put at risk one of the last remaining options the industry has for obtaining

farm workers. Washington State cannot sustain greater losses in its already strained labor market.

3. Discretion Is Required To Prevent Harm To The Agricultural Industry, Including Farm Laborers.

As seen in this case, a minimum requirement of \$500 per employee per violation could result in significant damage awards against growers. Where large awards are levied against growers, fewer financial resources exist for crops, affecting the agricultural economy and the economy of the State.

The welfare of farm workers is linked to the strength of the region's fruit-growing industry, and excessive damage awards against growers ultimately would harm the workers. The extreme penalties would result in reduced financial resources for the growers to maintain their crops and maintain the high level of work force used to work their crops. Where there are fewer resources, there are fewer opportunities for workers.

There will also be fewer opportunities for workers because growers will no longer utilize sharing arrangements. A common practice between growers that is utilized to maximize labor is a shared use of workers. For example, on days where a grower will not be using the labor force gathered it will allow the workers to be used by a different grower at

a different facility. This process allows the workers a chance to work that day and earn wages. Because of the broad language of the FLCA the employer who shares his workers with another grower could be considered a "farm labor contractor", thus triggering filing and compliance requirements not otherwise present for the grower as an employer. Mandatory minimum penalties will discourage growers from using this type of sharing arrangements for fear that significant penalties could be levied against them. This will result in fewer opportunities for workers to find the daily work that they desperately seek.

In turn, a diminished labor supply would result in a greater difficulty in staffing harvests and the loss of perishable commodities. Without the available workers, the crops would not be picked at all or would not be picked at optimum time for proper storage. The failure to timely move fruit into appropriate storage facilities could result in fruit lost in storage (as a complete loss) or lesser quality fruit, which would mean losses to growers for lower prices.

The FLCA was not created to harm the entire industry. The statutory damages provision provides a range and allows for discretion so the trial court can review the circumstances regarding the violations and identify an award appropriate to compensate the workers. Discretion allows the trial court to ensure that the award does not unduly punish

growers (that did not even commit the acts), the industry overall, or the farm workers themselves.

4. The Workers Mischaracterize the Effect of Discretion on Damage Awards.

The Workers' briefs imply that discretion in statutory damages awards would leave farm laborers without recourse. This is flatly incorrect. The Growers have urged this Court to recognize that FLCA allows trial courts to choose from a *range* of statutory damages or actual damages. Discretion does not eliminate the workers' right to recover damages. It merely ensures that the trial courts have discretion to determine an amount of recovery appropriate for the circumstances.

The trial court has the discretion to award statutory damages up to \$500 per violation per plaintiff based on how grievous the action may be against the worker. For more grievous violations, the trial court may award the full \$500; it can award less for violations that are purely technical and cause no individual harm.

Judge Whaley engaged in precisely such an analysis in this case. He reviewed each of the violations in detail, weighed their magnitudes, and awarded varying amounts of statutory damages appropriate for the particular violations. For example, Judge Whaley recognized that instances where the farm labor contractor put its address and phone

number on the employees' paycheck but did not place the contractor's name, address, and phone number on attached paystubs were technical violations that caused no harm. As such, he awarded modest amounts of statutory damages for these instances but much more significant damages for substantive violations. ER 41-43.

This was a classic use of judicial discretion. It resulted in a six-figure damages award for the Workers that appropriately reflected the magnitude of the wrongs. The Workers' rigid approach would result in a mandatory award of nearly \$2 million dollars for the same violations — an oppressively punitive award against the Growers for actions they did not commit, many of which undisputedly caused no harm whatsoever.

Moreover, farm laborers have additional options for compensation if they dislike the discretionary range of FLCA statutory damages. They can sue the farm labor contractor for unpaid wages. Under appropriate circumstances, they can assert that growers are joint employers under FLSA or under the Agricultural Worker Protection Act. Where harmed by the actions of the farm labor contractor they can seek actual damages under FLCA.

The bottom line is that FLCA's damages provision does protect workers, and it does provide them with necessary compensation. It does not, however, do so through a rigid statutory damages scheme. Like its

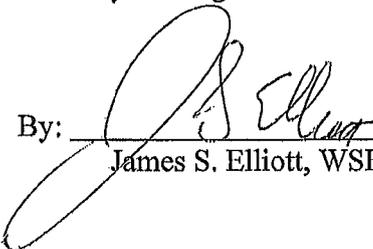
federal counterpart, FLCA allows the trial judge most familiar with the facts to use sound discretion when assessing damages.

VII. CONCLUSION

The proper interpretation of the statutory damages provision of the FLCA includes discretion for trial judges to impose a range of statutory damages “up to and including” \$500 per person per violation. This interpretation allows the trial court to effectuate the purpose of the FLCA and deter farm labor contractor abuse but also ensure that growers who did not commit the acts are not unduly punished. This interpretation also will allow growers to continue to confidently utilize one of the last remaining options available for obtaining qualified workers. By interpreting the statute to provide discretion in awards, this Court will prevent harm to the agricultural industry, including harm to farm laborers, and ensure appropriate recoveries for workers.

Respectfully submitted this 6th day of April, 2012.

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CERTIFICATE OF SERVICE

I, hereby certify that on the 6th day of April, 2012, I caused a true and correct copy of the foregoing document, *Brief of Agricultural Amici*, to be served on the following persons in the manner indicated below:

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Attached for filing in the matter of *Jose Guadalupe Perez-Farias, et al. v. Global Horizons, et al.*, Supreme Court Cause No. 86793-3, please find the **Motion to File Brief of Agricultural Amici** and the **Brief of Agricultural Amici**, complete with attached Certificates of Service.

The attorney filing these documents is James S. Elliott, WSBA# 28420, and he can be reached at 509.248.6030, or jelliott@vhlegal.com.

Please confirm receipt and filing of the attached Motion and Brief. Thank you.

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