

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 31, 2012, 4:36 pm
BY RONALD R. CARPENTER
CLERK

No. 86793-3

RECEIVED BY EMAIL

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN

PEREZ-FARIAS, et al.,
Plaintiffs-Appellants,

v.

GLOBAL HORIZONS, INC., et al.,
Defendants-Appellees.

No. 10-35397

**BRIEF OF APPELLEES VALLEY FRUIT ORCHARDS, LLC AND
GREEN ACRE FARMS, LLC**

Brendan V. Monahan (WSBA #22315)
Justo G. Gonzalez (WSBA #39127)
STOKES LAWRENCE VELIKANJE
MOORE & SHORE, P.S.
120 N. Naches Avenue
Yakima, Washington 98901
(509) 853-3000

Attorneys for Valley Fruit Orchards,
LLC and Green Acre Farms, LLC

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. CERTIFIED QUESTIONS 2

III. STATEMENT OF THE CASE 3

 A. Background on Farm Labor Contractor Actions 3

 B. The Workers File This Class Action Against Global and the Growers 6

 C. The Workers Move for Summary Judgment 7

 D. The Court Reconsiders and Holds a Bench Trial 8

IV. ARGUMENT 11

 A. Summary of Argument 11

 B. Question One: FLCA Provides Discretion to Award a Range of Statutory Damages From \$0 to \$500 Per Plaintiff Per Violation 13

 1. Rules of Statutory Construction 14

 2. An Interpretation That Confers Discretion Will Provide Meaning to All Statutory Language and Avoid Absurd Results 15

 3. Analogous Federal Law Confers Discretion 23

 4. Legislative History Provides Little Guidance 26

 5. Oregon Law Fails to Support a Rigid Interpretation 28

 6. Conclusion 30

 C. Question Two: An Automatic \$500 Award Per Plaintiff Per Violation Would Be Arbitrary and Excessive In Violation of Due Process and Public Policy 30

 1. Due Process Protects Against Excessive Awards 30

 2. An “Automatic” Award of \$500 Per Plaintiff Per Violation Would Violate Due Process 34

 3. An Automatic \$500 Award Per Violation Per Plaintiff Would Undermine Washington Public Policy 40

 D. Question Three: A Party Cannot Recover Damages Without Showing That He or She Was “Aggrieved” 42

V. CONCLUSION 46

TABLE OF AUTHORITIES

Washington Cases

<i>Amunrud v. Board of Appeals</i> , 158 Wn.2d 208, 143 P.3d 571 (2006).....	31
<i>Associated Gen. Contractors v. King County</i> , 124 Wn.2d 855, 881 P.2d 996 (1994).....	14
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	3, 26
<i>Dailey v. N. Coast Life Ins. Co.</i> , 129 Wn.2d 572, 919 P.2d 589 (1996).....	40
<i>Davis v. State ex rel. Dep't of Licensing</i> , 137 Wn.2d 957, 977 P.2d 554 (1999).....	15, 18
<i>Grimwood v. Univ. of Puget Sound</i> , 110 Wn.2d 355, 753 P.2d 517 (1988).....	23
<i>In re Custody of RRB</i> , 108 Wn. App. 602, 31 P.3d 1212 (2001), review denied, 151 Wn.2d 1017 (2002).....	31
<i>In re Personal Restraint of Dyer</i> , 143 Wn. 2d 384, 20 P.3d 907 (2001).....	31
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	14, 21
<i>King County v. Taxpayers of King County</i> , 104 Wn.2d 1, 700 P.2d 1143 (1985).....	26
<i>Limstrom v. Ladenburg</i> , 136 Wn.2d 595, 963 P.2d 869 (1998).....	14
<i>Progressive Animal Welfare Soc'y v. Univ. of Wash.</i> , 114 Wn.2d 677, 790 P.2d 604 (1990).....	14
<i>Rudolph v. Empirical Research Sys., Inc.</i> , 107 Wn. App. 861, 28 P.3d 813 (2001).....	16
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 648 P.2d 435, 656 P.2d 1083 (1982)	16
<i>State v. Keller</i> , 143 Wn.2d 267, 19 P.3d 1030 (2001).....	14, 18
<i>State v. WWJ Corp.</i> , 138 Wn. 2d 595, 980 P.2d 1257 (1999).....	33, 35
<i>Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.</i> , 133 Wn.2d 894, 949 P.2d 1291 (1997).....	14
<i>Wilmot v. Kaiser Aluminum and Chemical Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	16
<i>ZDI Gaming Inc. v. State ex rel. Wash. State Gambling Comm'n</i> , — Wn.2d —, 2012 WL 90164 (Jan. 12, 2012)	15, 30

Additional Cases

<i>Alvarez v. Longboy</i> , 697 F.2d 1333 (9th Cir. 1983)	passim
--	--------

<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).....	43
<i>Beliz v. W.H. McLeod & Sons Packing Co.</i> , 765 F.2d 1317 (5th Cir. 1985)	38
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d. 809 (1996).....	31, 34
<i>Broussard v. Meineke Disc. Muffler Shops, Inc.</i> , 155 F.3d 331 (4th Cir. 1998)	43
<i>Clair v. Harris Trust & Sav. Bank</i> , 190 F.3d 495 (7th Cir. 1999)	17
<i>Day v. Woodworth</i> , 13 How. 363, 14 L. Ed. 181 (1852).....	32
<i>Escobar v. Baker</i> , 814 F. Supp. 1491, 1501 (W.D. Wash. 1983)	23
<i>First Nat'l Collection Bureau, Inc. v. Walker</i> , 348 S.W.3d 329 (Tex. App. 2011)	22
<i>Goddard v. Farmers Ins. Co. of Oregon</i> , 202 Or. App. 79, 120 P. 3d 1260 (2005)	39
<i>Griffin v. Oceanic Contractors, Inc.</i> , 458 U.S. 564, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982).....	38
<i>Hall v. Farmers Alliance Mut. Ins. Co.</i> , 145 Idaho 313, 179 P. 3d 276 (2008)	39
<i>Honda Motor Co. v. Oberg</i> , 512 U.S. 415, 114 S.Ct. 2331, 129 L. Ed. 2d 336 (1994).....	31
<i>Kehoe v. Fidelity Federal Bank & Trust</i> , 421 F.3d 1209 (11th Cir. 2005)	22
<i>Leatherman Tool Group, Inc. v. Cooper Indus., Inc.</i> , 285 F. 3d 1146 (9th Cir. 2002)	35
<i>May Dep't Stores Co. v. Fed. Ins. Co.</i> , 305 F.3d 597 (7th Cir.2002)	17
<i>Mayfly Group, Inc. v. Ruiz</i> , 208 Or. App. 219, 144 P.3d 1025 (2006)	29
<i>Mendez v. County of San Bernardino</i> , 540 F.3d 1109 (9th Cir. 2008)	37
<i>Pacific Mut. Life Ins. Co. v. Haslip</i> , 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).....	37
<i>Perez v. Coast to Coast Reforestation Corp.</i> , 100 Or. App. 115, 785 P.2d 365 (1990)	29
<i>Phillip Morris U.S.A. v. Williams</i> , 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007).....	31
<i>Planned Parenthood of Columbia/Willamette, Inc., v. Am. Coalition of Life Activists</i> , 422 F.3d 949 (9th Cir. 2005)	33, 35, 36
<i>Rivera v. Adams Packing Ass'n</i> , 707 F.2d 1278 (11th Cir. 1983)	38
<i>Robinson v. Fulliton</i> , 140 S.W.3d 312 (Tenn. App. 2003)	22

<i>Sandoval v. Rizzuti Farms, Ltd.</i> , 656 F. Supp. 2d 1265 (E.D. Wash. 2009).....	44
<i>Six (6) Mexican Workers v. Arizona Citrus Growers</i> , 904 F.2d 1301 (9th Cir. 1990).....	passim
<i>Southern Union Co. v. Irvin</i> , 563 F.3d 788 (9th Cir. 2009).....	34, 36
<i>St. Louis, I.M. & S. Ry. Co. v. Williams</i> , 251 U.S. 63, 40 S. Ct. 71, 64 L.Ed. 139 (1919).....	31, 33
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).....	30, 37
<i>TXO Prod. Corp., v. Alliance Res. Corp.</i> , 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993).....	31
<i>United States v. Citrin</i> , 972 F.2d 1044 (9th Cir. 1992).....	38
<i>Vasudeva v. United States</i> , 3 F. Supp. 2d 1138 (W.D. Wash. 1998).....	33
<i>Washington v. Miller</i> , 721 F.2d 797 (11th Cir. 1983).....	38
<i>Zomba Enterprises, Inc. v. Panorama Records, Inc.</i> , 491 F.3d 574 (6th Cir. 2007).....	33

State Statutes

RCW 19.30.020	16
RCW 19.30.030(6).....	16
RCW 19.30.040	16
RCW 19.30.070	16
RCW 19.30.090	16
RCW 19.30.110	16
RCW 19.30.170	passim
RCW 19.30.200	4, 17
RCW 39.12.065	18
RCW 49.52.070	18
RCW 51.48.017	18
RCW 59.18.085	19
RCW 82.38.170	19

Additional Laws/Regulations

20 C.F.R. § 655.150-153	4
20 C.F.R. § 655.103.....	4
29 U.S.C. § 1854.....	8, 23
7 U.S.C. § 2050a(b).....	23
ORS § 658.453(4).....	28

Additional Authorities

Black's Law Dictionary 77 (9th ed. 2009)43
DUE PROCESS FORGOTTEN: THE PROBLEM OF STATUTORY DAMAGES AND CLASS ACTIONS,
74 Mo. L. Rev. 103 (2009)33
Washington House Commerce & Labor Committee (Jan. 22, 1985 House Bill 1999 -
audio archive)
[http://www.digitalarchives.wa.gov/Record/View/C48DC697A84DAAA9BFB09DA08
CECA2D1](http://www.digitalarchives.wa.gov/Record/View/C48DC697A84DAAA9BFB09DA08CECA2D1)29

I. INTRODUCTION

The Ninth Circuit certified to this Court three legal questions that explore whether Washington's Farm Labor Contractor Act ("FLCA") requires rigid \$500 statutory damages per plaintiff and per violation, even for technical violations that cause no harm. It does not. FLCA, like its federal counterpart, confers discretion on trial judges to craft damages awards appropriate for the specific cases before them.

FLCA's language dictates such a result. It says courts "may" impose damages "up to and including" particular amounts. RCW 19.30.170(2). Federal decisions interpreting a parallel statute, which the Appellants ("Workers") studiously ignore, conclude that similar language confers discretion on trial courts. Just as with the federal act, the Workers cannot add mandatory obligations to the permissive language the Washington legislature chose.

Constitutional due process principles and public policy also require discretion in statutory damages. Under the Workers' interpretation of FLCA, Appellees (the "Growers") would face nearly \$2 million in statutory damages for acts committed by a third-party contractor (not the Growers themselves), including \$126,000 just because the contractor did not place its address on pay stubs — an omission that even the Workers do not contend caused any harm to any person. Washington's constitution

and public policy do not allow such inherently unfair results, nor are such onerous fines necessary to fulfill FLCA's purposes.

Finally, FLCA requires an individual showing that each violation "aggrieved" each plaintiff. The statute does not provide a windfall. Individuals must prove that the particular violation affected them before recovering statutory damages.

II. CERTIFIED QUESTIONS

The U.S. Court of Appeals for the Ninth Circuit certified the following three questions of first impression under Washington law:

(1) Does the FLCA, in particular Washington Revised Code 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?

(2) If the FLCA provides that a court, choosing to award statutory damages, must award statutory damages of \$500 per plaintiff per violation, does that violate Washington's public policy or its constitutional guarantees of due process?

(3) Does the FLCA provide for awarding statutory damages to persons who have not been shown to have been “aggrieved” by a particular violation?

The certified questions raise issues of law that are reviewed *de novo*. *Cerrillo v. Esparza*, 158 Wn.2d 194, 199, 142 P.3d 155 (2006).

III. STATEMENT OF THE CASE

A. Background on Farm Labor Contractor Actions

Valley Fruit Orchards, LLC and Green Acre Farms (collectively the “Growers”) operate fruit orchards in the Yakima Valley. The Growers experienced labor shortages in 2003 and suffered reduced value of their crops as a consequence. SER 9-11, 13, 36. The next year, the Growers contracted with Global Horizons (“Global”), a farm labor contractor, to furnish agricultural workers for seasonal orchard work such as pruning, thinning, and harvest. ER 349, ER 274-79, 288; SER 10-11, 15-19.

Global expressly represented it had a farm labor contractor license under both California and federal law, as well as “any other license that may be required by any other governmental agency.” ER 275, 350; SER 218. Washington imposes comprehensive duties and obligations on any person who engages in “farm labor contracting activity,” not the least of which is to obtain a farm labor contractor license before starting work. RCW 19.30.020. As the Growers later learned, anyone who knowingly

uses the services of an unlicensed farm labor contractor becomes jointly and severally liable for the contractor's FLCA violations.

RCW 19.30.200.

Global anticipated a need to use temporary foreign workers on H-2A visas to satisfy the Growers' labor demand in 2004. Under the H-2A program, Global was required to accept referrals from WorkSource¹ and to advertise for domestic employees.² SER 28, 37; *see* 20 C.F.R. § 655.150-153. The challenge for Global (and by extension the Growers) was that domestic workers hired through local recruitment and referral efforts were not always well suited for orchard labor. Many of the domestic workers referred by WorkSource had no prior orchard experience. SER 39-40, 59. A "large percentage" of the domestic workers applied for the job to qualify for unemployment compensation. SER 38. Some of the domestic workers failed to report for work after being offered a hiring commitment. SER 54. Many quit because of the weather, because the job was not what they expected, or because the work was too hard. SER 34-35, 53, 58-59, 66-67.

¹ WorkSource is Washington's Employment Security Department, a division that attempts to find work for the unemployed and recruits local workers for the H-2A process. SER 68-70.

² These requirements are part of the regulatory scheme to insure that guest workers do not displace local workers. Employers must demonstrate that there are no sufficient U.S. workers able, willing and qualified to perform the work, and they must demonstrate that local wages will not be adversely impacted. *See* 20 C.F.R. § 655.103, et seq.

After the Growers expressed concern about the quality of work, Global promised to eliminate workers who were unable to adequately perform the orchard work. ER 290, 291. Global took steps to improve productivity and eliminate unsuitable workers. SER 32-33, 56-64. Global ultimately completed its first 2004 contract with Valley Fruit by hiring only domestic workers. SER 48-50. Global also continued to hire additional domestic workers for Green Acre Farms. SER 30, 65-66.

Despite the documented efforts to hire domestic workers, Global ultimately needed to bring in foreign guest workers. Global applied to the Department of Labor to employ temporary foreign workers from Thailand under H-2A visas at both Valley Fruit and Green Acre Farms, and the Department of Labor granted those applications. ER 354. Unfortunately, Global recruited and hired Thai guest workers before obtaining permission from DOL and without first obtaining a farm labor contractor's license from the state of Washington. ER 349, 354-55.

Global, of course, made many other mistakes as well. The Growers stipulated to a wide range of Global's transgressions. ER 349-383. While some transgressions were significant (such as employing guest workers in amounts and during times that were not authorized by DOL), others can be fairly characterized as harmless, clerical oversights. The most illustrative example of a harmless error has to do with wage

stubs. Global neglected to print its address and phone number on the detachable wage stub provided to the workers, ER 55-56, even though the information appeared on the paychecks themselves. Global also wrongfully deducted a total of \$4,386.51 from domestic worker paychecks. ER 53. The payroll transgressions were reimbursed in 2005, ER 53, but still formed the basis of FLCA violations in this case. ER 160-61.

B. The Workers File This Class Action Against Global and the Growers

The Workers initiated this case on July 12, 2005. They relied heavily on evidence compiled by Washington's Department of Labor and Industries ("WDLI") during an earlier investigation of Global. ER 5, 43-44, n.6. WDLI found that Global had committed multiple violations of FLCA, and it imposed over \$10,000 in penalties and \$216,000 in wage assessments. ER 5, 43-44. Global stipulated and acknowledged that it had committed multiple violations of FLCA, including operating as a farm labor contractor in Washington without a license in 2004. SER 183, 205-211.

In the class action, the Workers alleged that Global had committed illegal race and national origin discrimination, violated FLCA, and violated the federal Migrant and Seasonal Agricultural Worker Protection

Act ("AWPA"). ER 347. The Workers also alleged that the Growers were jointly and severally liable for Global's violations of FLCA because they had knowingly used Global's services after learning that Global was an unlicensed farm labor contractor. ER 459. The trial court certified three subclasses: 1) the Valley Fruit Subclass (146 U.S. resident workers who were employed by Global during 2004 to work at Valley Fruit's orchards); 2) the Green Acre Subclass (107 U.S. resident workers who were employed by Global during 2004 to work at Green Acre Farms' orchards); and 3) the Denied Work Subclass (397 U.S. resident workers who sought work with Global in Washington state during 2004, but who were not subsequently employed). ER 35-38.

C. The Workers Move for Summary Judgment

The Workers moved for partial summary judgment on the FLCA claims on May 25, 2007. SER 223-24. The Growers had no basis to deny that Global had in fact violated FLCA and did not oppose the motion.³ The trial court summarily found the Growers jointly and severally liable for Global's FLCA violations because the Growers continued to use

³ This should not suggest that it was prudent for the Growers to fail to respond to the motion at all. The Growers' trial counsel, Ryan Edgley, was ultimately found to have committed excusable neglect when he failed to respond to the summary judgment motion during a period of illness. ER 125-27.

Global's services after they learned in July 2004 that Global did not have a Washington farm labor contractor's license. ER 169.

The Workers' summary judgment brief conspicuously omitted any citation to "relevant Ninth Circuit case law" regarding the award of statutory damages. ER 34; SER 141-43. In the absence of any response from the Growers, the trial court summarily agreed with the Workers' contention that FLCA provides for an "*automatic* \$500 award for each violation." ER 171, fn. 6 (emphasis added); ER 172-73; SER 143. The trial court noted that while the "more modest damage structure under AWPAs"⁴ was reasonable under the circumstances, the Growers' failure to file any opposition to the motion dictated the court's action. ER 171. The court summarily awarded the Workers \$1,875,000 in statutory damages under FLCA. ER 173-74.

D. The Court Reconsiders and Holds a Bench Trial

The Growers moved for reconsideration of the summary imposition of \$500 in statutory damages for each violation. The Growers conceded that Global had violated FLCA and did not contest their liability for such violations. ER 124-25. But they asked the Court to reconsider whether the automatic imposition of \$500 for each violation, and for each class member, was proper. *Id.* The trial court granted reconsideration and

⁴ AWPAs limits damages where there are multiple violations and when cases are brought on behalf of a class of plaintiffs. ER 171, fn. 7; 29 U.S.C. § 1854(c).

vacated the portion of the order that imposed automatic statutory damages. It set a bench trial to determine damages. ER 133-34.

On April 15, 2009, following a bench trial, the district court entered Findings of Fact and Conclusions of Law regarding the Workers' request for \$1,998,000 in statutory damages for FLCA violations. ER 33-66. First, the district court confirmed its holding that FLCA granted the Court discretion to award no statutory damages for a violation, or to award an amount between \$0 and \$500 per violation. ER 38, 129-31. The Court reasoned that the Workers' request for \$500 per violation, per class member, would result in an amount of damages "having no relationship to the harm caused by the wrongful conduct." ER 40, fn.5. The court further reasoned that "any damage award must meet both procedural and substantive constitutional requirements," and that the Workers' proposed construction would deprive the court of discretion, mandate the award of "exorbitant amounts of statutory damages," and "violate all notions of fairness inherent in our judicial system." ER 41-43.

The district court went on to illustrate the technical and harmless nature of many of the FLCA violations:

For instance, Global put its address and phone number [on] the paycheck that was given to its employees, but did not place its name, address, and phone number on the detached pay stub. Plaintiffs are seeking over \$126,000.00 in statutory damages

for Global's failure to put its name and address on the pay stub, even when no class member complained or was prejudiced by this omission.

Plaintiffs are seeking over \$225,000.00 in statutory damages for Global's failure to explicitly⁵ provide production standards that in all practicality would have been technically useless given that production standards change daily based on [a] wide variety of factors that are unique to the orchard industry. These violations are technical violations and are in no way proportional [related] to the harm that the Washington statute intended to prevent."

Id.

The district court distinguished between technical and substantive FLCA violations, defining a technical violation as one that violates the plain language of the statute but does not necessarily result in actual or specific harm to the worker. ER 41. The district court expressly determined "many of these [FLCA] violations were technical and there was no proof of actual damages." ER 8. As an example, the trial court noted even though there were 397 members of the Denied Work Subclass, not every person who applied for a job with Global would have been hired if Global chose not to utilize the Thai workers. ER 57. Based on its discretion, the trial court awarded a total of \$228,150 in statutory damages. ER 58-59.

⁵ Global did provide prior written notice that there would be performance requirements communicated on a daily basis by the workers' supervisors, and workers were orally informed of production requirements. ER 236.

The Growers asked the trial court to reconsider its imposition of statutory damages. The Growers argued that statutory damages were unavailable to any class member absent a showing that such class member was “aggrieved” by a particular violation. *See* RCW 19.30.170(1). ER 27. The trial court confirmed that it had calculated statutory damages in an effort to promote enforcement of the act and deter future violations, and that even in the absence of actual damages the awards did not constitute a “penalty disproportionate to the offense.” ER 28.

The Workers appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit issued a split, unpublished decision but then withdrew the decision and certified questions to this Court.

IV. ARGUMENT

A. Summary of Argument

First, FLCA’s damages provision provides courts with discretion to award a range of statutory damages. The provision states that courts “may” award damages “up to and including” actual damages, \$500 in statutory damages, or other equitable relief. RCW 19.30.170(2). When the Washington legislature wants to impose a mandatory award, it uses the imperative word “shall.” If the Washington legislature had wanted to mandate an automatic award of no less than \$500 for each and every violation of FLCA, it would have simply said so. The only way to give

force to all the statutory language is to find that courts choosing statutory damages can award a range from \$0 to \$500.

Courts interpreting a similar federal statute have reached the same conclusion. In *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983), the Ninth Circuit found it would be anomalous to grant the trial courts discretion with respect to actual damages but to deprive them of discretion when it came to statutory damages. The Ninth Circuit also reasoned that a mandatory imposition of \$500 per violation might actually defeat the remedial purpose of the statute, as rigid enforcement might make trial courts less inclined to find that violations had occurred.

The Workers attempt to compel a different conclusion by referencing documents labeled as "legislative history." The documents are not legislative history; rather, several were created by legal services lawyers or summarize the opinions of legal services lawyers. They tell us nothing about what the legislature intended. The Workers are trying to create new law, rather than interpret existing language.

Second, mandatory \$500 statutory damages per person, per violation would conflict with constitutional due process and public policy. Due process prohibits grossly excessive awards. If FLCA imposed automatic \$500 awards per person per violation, even for technical violations committed by a third party that never caused harm, it would run

afoul of due process. A court must possess the discretion necessary to ensure that statutory damages remain proportionate to the offense.

Rigid statutory damages also would undermine the interests FLCA exists to protect. As federal courts have recognized, mandatory statutory damages, especially in farmworker class actions, would discourage courts from finding liability and could ultimately harm workers. Discretion in damages allows courts to fully enforce the statute, while choosing a penalty that will deter defendants appropriately.

Third, any plaintiff must show he or she was individually “aggrieved” by a particular violation. FLCA requires such a showing, rather than allowing an award of damages to unharmed absent class members. Any other interpretation could result in excessive statutory damages awards for workers unaffected by violations.

B. Question One: FLCA Provides Discretion to Award a Range of Statutory Damages From \$0 to \$500 Per Plaintiff Per Violation

The FLCA’s remedy provision provides that a 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, or other equitable relief.

RCW 19.30.170(2). The language vests trial courts with broad discretion to award a range of actual damages, statutory damages, equitable relief, or

no damages whatsoever. This interpretation gives force to all the statutory language and harmonizes Washington's FLCA with its federal counterparts. Such an interpretation also will prevent anomalous results that unfairly punish farmers and frustrate the statute's purpose.

1. Rules of Statutory Construction

A court interpreting a Washington statute must ascertain and give effect to the intent and purpose of the Legislature. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 607, 963 P.2d 869 (1998). If a statute is clear on its face, courts derive its meaning from the language of the statute alone. *State v. Keller*, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001). A court must construe statutes "so that all language is given effect with no portion rendered meaningless or superfluous." *Id.*

A court cannot add language to an unambiguous statute even if it believes the legislature intended something else. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002), *citing Wash. State Coalition for the Homeless v. Dep't of Soc. & Health Servs.*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997). Courts may not read into a statute matters that are not in it. *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). They cannot create new legislation under the guise of interpreting a statute. *Associated Gen. Contractors v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996 (1994).

Finally, courts must avoid constructions that yield unlikely, absurd or strained consequences. *Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). In doing so, they must interpret statutes in ways that are constitutional, if possible. *ZDI Gaming Inc. v. State ex rel. Wash. State Gambling Comm'n*, — Wn.2d —, 2012 WL 90164, *5 (Jan. 12, 2012).

2. An Interpretation That Confers Discretion Will Provide Meaning to All Statutory Language and Avoid Absurd Results

FLCA's damages provision contains three key words and phrases: "may," "or" and "up to and including." The Workers' proposed interpretation, which would require a court to award at least \$500 in statutory damages per person for every violation, renders these words meaningless. The only way to give force to all words is to interpret the statute as conferring discretion to award a range of statutory damages, from \$0 to \$500 per violation per plaintiff.

a. The Term "May" Confers Discretion

The Workers entirely ignore the term "may," but the legislature's use of such a discretionary word is dispositive. Where a Washington statutory provision contains both the words "shall" and "may," it is presumed that the lawmaker intended to distinguish between them. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d

1083 (1982). The word “shall” is construed as mandatory and “may” as permissive. *Id.* Since *Scannell*, Washington courts have routinely held that “will” and “shall” are mandatory, while words like “may” are permissive and discretionary. See *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 56, 821 P.2d 18 (1991); *Rudolph v. Empirical Research Sys., Inc.*, 107 Wn. App. 861, 866, 28 P.3d 813 (2001).

The word “shall” appears repeatedly in FLCA. For example, the director “shall” issue a monthly list of licensed farm labor contractors and “shall” require the deposit of security bonds. RCW 19.30.020; 040(1). Security deposits “shall not be less than \$5,000.” RCW 19.30.040(5). Applications for farm labor contractor licenses “shall” include specified declarations and “shall” state the names of all persons financially interested in the entity. RCW 19.30.030(6); 19.30.090. Licenses “shall contain” specified information. RCW 19.30.070.

RCW 19.30.110 identifies nine distinct obligations that each farm labor contractor must satisfy. Pursuant to this provision, a farm labor contractor “shall” carry a license, disclose terms and conditions of employment, promptly pay wages, comply with contracts, and properly maintain records. These are the very mandatory obligations that Global failed to satisfy in this case, and they form the basis for the Workers’

relief. And when an employer knowingly uses the services of an unlicensed farm labor contractor, it “shall” be liable to the same extent as the farm labor contractor. RCW 19.30.200. This mandatory imposition of liability is the solitary thread that ties the Growers to Global’s multiple violations of FLCA.

When it came to imposing damages, however, the legislature made a clear departure from the language it uses to impose mandatory obligations. RCW 19.30.170(2) instead states that a court “may” award damages. “May” modifies all three types of damages that can be awarded (actual, statutory and equitable), such that the trial court can choose whether or not to award any type of damages, even when violations are uncontested.⁶ The use of “may” in RCW 19.30.170(2) is even more compelling because the Washington legislature used the word “shall” elsewhere in the *same* section. *See* RCW 19.30.170(4) (action on the bond “shall be commenced” within three years); RCW 19.30.170(5) (summons and complaint “shall be served on the director”); RCW 19.30.170(7) (claims on bond “shall be satisfied” in statutorily prescribed order);

⁶ “Other equitable relief” can include monetary damages. *See May Dep’t Stores Co. v. Fed. Ins. Co.*, 305 F.3d 597, 602-03 (7th Cir.2002) (allowing equitable suitor under ERISA to obtain incidental money damages); *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 498 (7th Cir. 1999) (“[N]ot all monetary relief is damages. Equity sometimes awards monetary relief, or the equivalent.”).

RCW 19.30.170(8) (director of WDLI “shall suspend the license” of contractor with impaired bond).

It would, of course, be illogical for the legislature to confer discretion in whether to award damages at all, but then dictate a mandatory statutory damages amount in the same breath. *See Davis v. State ex rel. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (interpretations must avoid absurd results); *see also* Section IV.B.3. below (federal interpretation of similar language). Such an interpretation would render the “may” language meaningless, which courts cannot do. *Keller*, 143 Wn.2d at 276. The only conclusion is that the legislature used “may” to confer discretion on the range of damages.

Washington’s legislature has not been shy about using the word “shall” to impose mandatory damages on litigants in other contexts. A sampling includes the following:

RCW 39.12.065: A contractor who violates the prevailing wage statute “shall be subject to a civil penalty of not less than one thousand dollars or an amount equal to twenty percent of the total prevailing wage violation found on the contract, whichever is greater.”

RCW 49.52.070: An employer “shall be liable” for exemplary damages of twice the amount of any unlawfully withheld wages.

RCW 51.48.017: A self-insured employer “shall” pay “five hundred dollars or twenty-

five percent of the amount then due” in the event of an unreasonable delay in benefits.

RCW 59.18.085: Tenants “shall recover” either three months of rent or treble the actual damages in the event of a landlord’s knowing rental of condemned property.

RCW 82.38.170: Persons who do not timely pay excise taxes “shall” pay a penalty of ten percent.

Unlike these statutory schemes, FLCA allows a trial court to choose the amount and type of damages — or none at all — appropriate for the particular case.⁷ If the legislature had intended to remove discretion in the amount of statutory damages under FLCA, it would have said courts “shall” impose \$500 in statutory damages. It chose, instead, to provide flexibility.

b. The Phrases “Up To and Including” and “Or” Confirm Discretion Exists on Damages Amounts

The legislature buttressed this discretionary language by using “or” and “up to and including” in the same provision. “Or” links the three potential types of remedies: actual, statutory, and equitable.

RCW 19.30.170(2). Thus, a court “may” award any of the three types of remedies (or none at all). Contrary to the Workers’ position, one cannot

⁷ These mandatory damages are also expressly related to the actual harm suffered by the aggrieved party, which is relevant to the due process issues discussed in Section IV(C)(2)(b).

read “may” as applying solely to actual damages when the balance of the sentence links types of damages by “or.”

The Workers also misinterpret the phrase “up to and including.” They argue that this language applies only to actual damages, while statutory damages remain rigid at \$500 per violation per plaintiff. But such an interpretation would render the “up to and including” language meaningless in cases involving little or no actual damages.

An example shows the illogical result of the Workers’ interpretation. If a plaintiff proves \$400 in actual damages for a violation, the Workers’ interpretation would require the trial court to assess \$500 in statutory damages. The Workers’ logic says (a) “up to and including” applies only to actual damages; (b) the “whichever is greater” language requires an award of the larger number between actual and statutory damages; and (c) a court therefore must award \$500 in statutory damages because there is no discretion in that provision. They would set a floor of \$500 in damages per violation per plaintiff for every case. Doing so renders “up to and including” superfluous because a court would always have to pick the largest amount. Principles of statutory construction prohibit a result that deprives “up to and including” of meaning.

c. “Whichever Is Greater” Supports Discretion
in Statutory Damages Awards

The Workers place great emphasis on the “whichever is greater” language, but this phrase simply defines the range from which a court can exercise its discretion in selecting an appropriate amount of damages. For example, if a plaintiff proves \$600 in actual damages, the court could award anywhere from \$0 to \$600 for the violation. This is because the actual damages amount is larger than the maximum statutory damages amount, and the court may award any amount “up to and including” the “greater” number. On the other hand, if a plaintiff proves \$0 in actual damages, the court may award from \$0 to \$500 for the violation. In this situation, the maximum statutory damages amount is larger, so the court may award any amount up to the larger number. This interpretation gives force to “whichever is greater” as a ceiling, while also preserving the discretion conferred by “may” and “up to and including” as a floor.

The Workers would interpret “whichever is greater” as mandating a rigid floor of at least \$500 per violation per plaintiff. This interpretation, however, also would change “may” to “must” and would remove the phrase “up to and including.” A court cannot remove or substitute language when interpreting a statute. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

The Workers rely on inapposite cases from other jurisdictions. The statute in *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), required damages “not less than” a specific liquidated damages amount — a far cry from FLCA’s permissive “up to and including” language. *Robinson v. Fulliton*, 140 S.W.3d 312 (Tenn. App. 2003), allowed an award of “the greater of” two sums, again without “up to and including” language. Moreover, the Tennessee legislative history indicated that the legislature meant “shall” when it wrote “may.” No such unusual legislative history exists here. The statute in *First Nat’l Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 346 (Tex. App. 2011), again lacked the “up to and including” language, something the *Walker* court explicitly noted.⁸

Washington’s legislature knows how to create mandatory damages provisions, and it has done so in other statutes. It chose not to here.

While the Workers may believe a court should award at least \$500 per violation per plaintiff, they cannot alter the statute to do so.

⁸ The Workers also point to FLCA provisions that set a ceiling on fines by using the phrase “not more than.” They argue that the legislature would have used such language in the civil remedies section if it meant to allow discretion on statutory damages. The Ninth Circuit rejected a similar argument in *Alvarez v. Longboy*, 697 F.2d 1333, 1339 (9th Cir. 1983), when interpreting FLCA’s federal counterpart. As the *Alvarez* court explained, “the provisions referred to impose fines or penalties. In that context the commonly understood rule of strict construction requires greater specificity.” *Id.* The same reasoning applies to FLCA. There is no reason to believe that the “not more than” language in the penalty provisions indicates a lack of discretion on statutory damages.

3. Analogous Federal Law Confers Discretion

The Workers flatly ignore the most persuasive authority on the statutory language: interpretations of FLCA's federal counterpart, the Farm Labor Contractor Registration Act ("FLCRA"). FLCRA contains similar damages language, including the infamous comma on which the Workers base much of their proposed interpretation:

. . . may award damages up to and including an amount equal to the amount of actual damages, or \$500 for each violation, or other equitable relief.

7 U.S.C. § 2050a(b),⁹ Washington courts turn to federal case law for guidance "construing a state law that substantially parallels a federal law." *Escobar v. Baker*, 814 F. Supp. 1491 (W.D. Wash. 1983), *citing Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 361-62, 753 P.2d 517 (1988). Federal decisions therefore provide valuable guidance here.

The Ninth Circuit has repeatedly interpreted FLCRA as providing discretion in statutory damages awards, despite the comma. In *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983), the United States District Court for the Central District of California awarded a group of farmworkers \$150 for each violation of FLCRA. The workers appealed, arguing that

⁹ Congress has since repealed this provision and replaced it with a provision in the Agricultural Worker Protection Act ("AWPA"), in which it makes crystal clear that statutory damages are discretionary: ". . . may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to \$500 per plaintiff per violation . . ." 29 U.S.C. § 1854.

FLCRA's statutory damages provision required the automatic imposition of \$500 per violation, and that the trial court abused its discretion by awarding less. *Id.* at 1339. Like this case, the workers argued that the term "up to" applied only to actual damages and did not modify the statutory penalty because of the presence of a single comma. *Id.*

The Ninth Circuit believed that the words were equally subject to the construction that the term "up to" also modified the \$500 statutory penalty. As the Ninth Circuit noted (and as is the case here), the workers' argument "rest(ed) entirely on the placement of the commas." *Id.*

The Ninth Circuit then turned to FLCRA's legislative history, in particular to the modifications that the provision underwent in the legislative process. Just like this case, a prior draft of the bill used the language "up to \$500," or "up to and including \$500." *Id.*, fn. 9. The modifying language in the prior drafts obviously did not make it into the final bill, and the workers argued that this history evidenced a clear legislative intent to mandate a minimum statutory award of \$500 per violation. *Id.*

The Ninth Circuit was not persuaded. Because FLCRA clearly allowed discretion to award less than the amount of actual damages, the Ninth Circuit held that it would be anomalous to deprive the trial courts of discretion when there were no actual damages. The Ninth Circuit

recognized that if it were to multiply mandatory \$500 awards among large groups of workers it could create “a result Congress could not have intended,” and the “imposition of a penalty disproportionate to the offense.” *Alvarez*, 697 F.2d at 1339-40. The *Alvarez* court reasoned that the workers’ proposed construction would require a rigidity that might impede effective enforcement and frustrate the statute’s remedial intent. *Id.*

In *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), the Ninth Circuit confirmed that FLCRA authorizes awards of “up to \$500” in statutory damages, and it cited *Alvarez* for the proposition that FLCRA will not permit “the imposition of a ‘penalty disproportionate to the offense.’” *Id.* at 1309-10.

The Ninth Circuit reversed the trial court’s award of between \$400 and \$1,600 for class members, noting that many class members would not be able to show injuries approaching \$400. *Id.* In doing so, the Court noted that statutory damage awards should be reduced in large class actions so that the award is not disproportionate to the offense, and so that it is not larger than necessary to deter future violations. *Id.*

FLCA’s language differs slightly from FLCRA, as it contains “whichever is greater” language that identifies a ceiling for the range of potential damages. But the same principles of statutory construction, due

process concerns and policy issues apply here. Although the Ninth Circuit interpretations do not bind this Court, they provide persuasive, reasoned authority on a complementary statute. There is no reason to reject this reasoned analysis in favor of the Workers' strained reliance on a comma.

4. Legislative History Provides Little Guidance

The Workers point repeatedly to purported legislative history, but use of legislative history is inappropriate when interpreting an unambiguous statute. *Cerrillo v. Esparza*, 158 Wn.2d 194, 202, 142 P.3d 155 (2006). Even if review of the legislative record were appropriate, the history provides little assistance. The information available is inconclusive.

The Workers misleadingly cite documents that they say represent legislative history. They are wrong. The submissions (which the Ninth Circuit declined to take judicial notice of) are advocacy memoranda from legal services attorneys, affidavits from farm laborers, anonymous handwritten notes, and a "discussion draft" purportedly circulated to members of the House of Representatives Labor Committee. These are not the kind of materials a court may rely upon to discern legislative intent. *See King County v. Taxpayers of King County*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985). As this Court has said, "[t]he intent of the

legislative body was not some vocal proponents of the program but the language of the legislation itself.” *Id.*

Even so, the legislative “history” cited by the Workers merely shows that, just as in *Alvarez*, an early draft of FLCA included an additional “up to” phrase before the statutory damages language. There is no explanation of how or why the state legislature removed it. The Workers posit that the legislature must have removed the language to create a fixed statutory damages provision. There is no evidence, however, that legislators acted on or even reviewed the materials the Workers cite.

It is just as likely that the legislature removed the language because it was superfluous. Federal courts interpreting the same language in the FLCRA already had held that the federal statute provided discretion on statutory damages, even without a second “up to” reference. *Alvarez*, 697 F.2d at 1339-40. Thus, there was no need to insert an additional “up to” phrase in Washington’s FLCA either.

In the end, there is no testimony or statement of intent on the issue from any legislator who supported or opposed the bill. This Court is left with a statute that lacks explanation but mirrors the language of its federal counterpart. In the absence of direct, persuasive history, this Court should

reject the Workers' effort to invent a legislative intent that would contradict the statutory language.

5. Oregon Law Fails to Support a Rigid Interpretation

The Workers incorrectly argue that Washington modeled its remedy language on Oregon's farmworker law and that the Oregon statute requires fixed statutory damages awards. Neither is true. If anything, the Oregon statute confirms that Washington took a different approach.

The Workers conspicuously neglect to provide the text of the Oregon statute. It states in pertinent part:

The amount of damages recoverable for each violation under this subsection is actual damages or \$1,000, whichever amount is greater. In any such action the court may award to the prevailing party, in addition to costs and disbursements, reasonable attorney fees at trial and appeal.

ORS § 658.453(4).¹⁰ Unlike FLCA, the Oregon statute lacks the key "may" and "up to and including" phrases regarding damages, and it does not refer to "other equitable relief." *Id.* Oregon only uses "may" for awards of attorney's fees. *Id.* Washington's legislature might have modeled some provisions of FLCA on the Oregon farmworker statutes, but it clearly chose not to follow Oregon's lead regarding damages. The

¹⁰ Although Oregon has revised its statute over the years, this language has been in place since at least 1983. ORS § 658.453(4) (1983).

Workers' misleading reliance on Oregon law does little more than highlight how FLCA is far more similar to its federal counterparts.

The Workers also fail to provide any authority for their conclusion that Oregon requires fixed statutory damages. This is because there are no cases analyzing the remedy provision, much less holding that the statute requires fixed statutory damages. The cases they cite never address damages; the cases merely state the purpose of the statute to protect workers. *Perez v. Coast to Coast Reforestation Corp.*, 100 Or. App. 115, 785 P.2d 365, 366 (1990); *Mayfly Group, Inc. v. Ruiz*, 208 Or. App. 219, 144 P.3d 1025 (2006). There is no indication that damages "shall" be awarded, or that there is any minimum amount; only that the amounts "recoverable" are the greater of actual damages or \$1,000. The Workers' attempt to bootstrap non-existent interpretations of a very different statute into Washington law should be rejected.¹¹

¹¹ The Workers also point to a legislative hearing in which witnesses discussed the Oregon statute and legislators inquired about how the Oregon statute affected farmers. If one listens to the hearing recording, however, it becomes clear at approximately minute forty-six that committee members had not even seen the Oregon statute before drafting Washington's FLCA. Further, much of the discussion involved lawmaker concerns about holding farmers jointly liable for wages (something in the original FLCA draft). The statute did not include a provision that holds farmers jointly liable for wages, and the reasonable inference is that lawmakers omitted such a section in order to protect farmers.
Available at
<http://www.digitalarchives.wa.gov/Record/View/C48DC697A84DAAA9BFB09DA08CECA2D1>.

6. Conclusion

FLCA's remedy provision gives trial courts sound discretion to award a variety of relief, including statutory damages ranging from \$0 to \$500 per violation per plaintiff. This is the only interpretation that provides meaning to all the statutory language, leads to fair results, and harmonizes FLCA with its federal counterparts. The Workers' arguments about non-existent legislative history cannot alter the existing statutory language.

C. **Question Two: An Automatic \$500 Award Per Plaintiff Per Violation Would Be Arbitrary and Excessive In Violation of Due Process and Public Policy**

Courts must interpret statutes in ways that are constitutional whenever possible. *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, — Wn.2d —, 2012 WL 90164, *5 (Jan. 12, 2012). The only way to ensure constitutionality of FLCA's remedy provision is to conclude that it confers discretion to trial courts on the amount of statutory damages. Any other reading would violate due process and public policy.

1. Due Process Protects Against Excessive Awards

Constitutional due process prohibits imposition of "grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). Although state courts have "considerable flexibility"

to impose punitive fines or penalties, damages awards must be reviewed to ensure compliance with the Due Process Clause of the Fourteenth Amendment and its Washington counterpart.¹² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 569, 116 S. Ct. 1589, 134 L. Ed. 2d. 809 (1996) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993)). “[T]he Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive.’” *Phillip Morris U.S.A. v. Williams*, 549 U.S. 346, 353, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007) (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432, 114 S.Ct. 2331, 129 L. Ed. 2d 336 (1994)).

The Workers’ discussion of due process is misguided and incomplete. While the United States Supreme Court did first review the issue of excessive punitive damages in *St. Louis, I.M. & S. Ry. Co. v. Williams*, which the Workers rely on, the relevant analysis has since evolved. 251 U.S. 63, 66-67, 40 S. Ct. 71, 73, 64 L.Ed. 139 (1919).

The United States Supreme Court promulgated a more nuanced test for review of damages awards in *BMW v. Gore*, where a jury awarded

¹² Washington courts have held the Washington State Constitution provides “equal, but not greater due process protection” than the United States Constitution. *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 216 n.9, 143 P.3d 571 (2006) (citing *In re Personal Restraint of Dyer*, 143 Wn. 2d 384, 394, 20 P.3d 907 (2001)); *In re Custody of RRB*, 108 Wn. App. 602, 618 n.10, 31 P.3d 1212 (2001), *review denied*, 151 Wn.2d 1017 (2002).

a plaintiff \$4 million in punitive damages against a car dealership that sold a repainted car as “new.” 517 U.S. at 575-76. Alabama’s high court reduced the punitive award to \$2 million. *Id.* at 567. On review, the United States Supreme Court examined its previous decisions, including *St. Louis*, and concluded that exemplary damages must be proportionate and related to the “enormity of the offense.” *Id.* at 575 (quoting *Day v. Woodworth*, 13 How. 363, 371, 14 L. Ed. 181 (1852)).

The Court adopted three “guideposts” to review the constitutionality of damages awards: (1) the degree of the defendant’s reprehensibility; (2) the ratio between the plaintiffs’ actual or potential harm and punitive damages awarded; and (3) relevant measures of damages and penalties in comparable cases. *Id.* at 575. Emphasizing the dealership had not engaged in deliberate misconduct or trickery, and the plaintiff’s harm was purely economic in nature, the Court reversed the \$2 million award as an excessive penalty in violation of due process, and remanded the case for further proceedings. *Id.* at 586.

Years later in *Campbell*, the United States Supreme Court reviewed another excessive fine, where a jury awarded a plaintiff \$1 million in compensatory damages, and \$145 million in punitive damages against an insurance company. 538 U.S. at 416. The Court looked at the ratio of the punitive award compared to the actual harm done, noting

“courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *Id.* at 426. The Court deemed unconstitutional the ratio of 146-to-1 for punitive damages in light of the actual harm and reversed the damages award as a violation of due process. *Id.* at 428.¹³

Although this Court has not explicitly adopted the guidepost test under Washington law, it has utilized these guideposts when analyzing excessive civil penalties and statutory damage awards. *See, e.g., State v. WWJ Corp.*, 138 Wn. 2d 595, 604-06, 980 P.2d 1257 (1999); *Planned Parenthood of Columbia/Willamette, Inc., v. Am. Coalition of Life Activists*, 422 F.3d 949, 952 (9th Cir. 2005) (examining aggregate statutory, compensatory, and punitive damages); *Vasudeva v. United States*, 3 F. Supp. 2d 1138, 1139 (W.D. Wash. 1998) (finding statutory fines were not “grossly disproportionate”). In fact, the case relied upon by the Workers, *WWJ*, conducted such an analysis, although the court ruled on other grounds. 138 Wn. 2d at 604-06. The guideposts are therefore

¹³ Despite the United States Supreme Court’s decisions, some lower courts are inconsistent on whether the *BMW* and *Campbell* analyses apply to statutory damages. *See generally* Sheila B. Scheuerman, DUE PROCESS FORGOTTEN: THE PROBLEM OF STATUTORY DAMAGES AND CLASS ACTIONS, 74 Mo. L. Rev. 103 (2009). At least one court has instead looked to *St. Louis, I.M. & S. Ry. Co. v. Williams* for the standard for determining whether statutory-award damages violate the due process clause. *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (citing *St. Louis*, 251 U.S. at 66-67). This approach is inconsistent with current Supreme Court precedent and has not been adopted by Washington state, which, as explained in the text, has utilized the *BMW* guideposts.

appropriate for analyzing due process concerns raised by the Workers' proposed interpretation of FLCA.

2. An "Automatic" Award of \$500 Per Plaintiff Per Violation Would Violate Due Process

The three guideposts discussed in *BMW*, *Campbell* and *WWJ* confirm that an automatic \$500 statutory damages award per violation per person would be unconstitutional as arbitrary and disproportionate. Although under some circumstances an FLCA violation may warrant a \$500 award, due process considerations require a more nuanced analysis to ensure damages awards are both reasonable and proportionate to the defendant's acts. An automatic \$2 million aggregate damages award against the Growers would bear no relationship to the Growers' conduct or the Workers' harm. Such a result is precisely what the due process protections seek to avoid.

a. The Growers' Acts Were Not Reprehensible

The degree of the defendant's reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Courts consider whether a defendant's conduct caused physical or economic harm, the defendant's indifference to health or safety, financial vulnerability, recidivism, and/or whether the acts were intentional. See *Southern Union Co. v. Irvin*, 563 F.3d 788, 792 (9th Cir. 2009) (noting defendant's behavior was not "commendable," but

that conduct still did not result in “indicia of reprehensibility”); *Planned Parenthood of Columbia/Willamette*, 422 F.3d at 958-59 (examining factors to determine reprehensibility of defendants’ acts, finding conduct intentional and “significantly blameworthy” but still reducing unconstitutional punitive award); *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F. 3d 1146, 1150-51 (9th Cir. 2002) (reducing damages award in large part based on dearth of evidence of “any significant actual harm . . . [defendant’s] conduct was more foolish than reprehensible”).

The Growers’ acts are entirely distinguishable from those committed by the defendant in *WWJ*, the case cited by the Workers. 138 Wn.2d at 604-06, 980 P.2d 1257. In that case, a defendant had committed 250 violations of the Mortgage Broker Practices Act by diverting funds from borrowers, commingling his accounts with his clients’ funds, and demonstrating “an extreme lack of good faith and pattern of disregard for the law.” *Id.* at 600. The trial court imposed a civil fine of \$500,000. *Id.* On review, this Court reviewed the defendant’s illegal mishandling of client and third-party deposits in light of the *BMW* guideposts, and concluded the defendant’s acts were “egregious, willful, and repetitive.” *Id.* at 607.

In contrast, the district court here found that many of the acts constituted technical and harmless violations of FLCA, such as failing to

place contact information on pay stubs. ER 41-43. The plaintiffs suffered no actual or potential harm, and the Growers engaged in no deceitful or intentionally misleading conduct. Because the Growers are liable for behavior of a third-party contractor, the Growers did not commit the improper acts at all. The indicia of reprehensibility is non-existent, and weighs heavily against exemplary damages.

b. The Ratio of Statutory Damages to Actual Harm Would Be Overly Punitive

The second guidepost is the disparity between the actual or potential harm suffered by plaintiffs and the punitive damages award. In *Southern Union*, the Ninth Circuit reviewed a punitive damages award of \$60 million, which the district court reduced to \$4 million on remittitur. 563 F.3d at 791. Noting the compensatory harm amounted to \$395,072.38, the court determined in that particular case, “the Constitution permits a three to one ratio of punitive to compensatory damages.” *Id.* at 792. In *Planned Parenthood of Columbia/Willamette*, the court measured the actual harm done to each plaintiff, and assessed punitive damages at a 9-to-1 ratio, significantly reducing the original ratios of up to 50-to-1. 422 F.3d at 963. The United States Supreme Court has held that “[o]ur jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio

between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 425 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991)).

Although plaintiffs need not prove actual damages to collect statutory damages under FLCA, the actual or potential harm done is still relevant to the analysis. The trial court found that the Growers’ technical violations of the FLCA provisions caused no harm to the Workers. Under these circumstances, an award of \$500 per violation per person would be irrational and arbitrary. This automatic award would be entirely unrelated to any harm to individual plaintiffs, and would violate due process.

c. An Automatic \$500 Award Would Be Inconsistent with Comparable Cases

Under the final guidepost, courts compare the punitive damages award to penalties imposed in comparable cases. *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1122 (9th Cir. 2008). Courts have found that the similar FLCRA is remedial; its damages provisions should not impose penalties “disproportionate to the offense[s].” *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d at 1309 (citing *Alvarez v. Longboy*, 697 F.2d 1333, 1340 (9th Cir. 1990)). As a result, courts have tailored the statutory damages awarded under FLCRA to compensate plaintiffs and

serve as deterrence, rather than punish defendants.¹⁴ See e.g. *Longboy*, 697 F.2d at 1340 (recovery of \$150 per plaintiff for written notice violations); *Rivera v. Adams Packing Ass'n*, 707 F.2d 1278, 1283 (11th Cir. 1983); (\$500 for each of two recording violations to 7 plaintiffs); *Washington v. Miller*, 721 F.2d 797, 803 (11th Cir. 1983) (\$500 award to 7 plaintiffs for housing violations).

Many of the FLCA violations here were unintentional and technical, causing no actual or potential harm to the Workers. An automatic award of \$500 per violation per person would be inconsistent with awards for FLCRA violations in comparable cases. This guidepost also weighs against the imposition of an automatic statutory award.

The Workers' analysis oversimplifies the relevant standard. They ignore the *BMW* and *Campbell* guideposts and cite irrelevant legal authorities.¹⁵ Contrary to the Workers' citation of cherry-picked Illinois

¹⁴ Courts consider (1) the amount of award to each plaintiff; (2) the total award; (3) the nature and persistence of the violations; (4) the extent of the defendant's culpability; (5) damage awards in similar cases; (6) the substantive or technical nature of the violations; and (7) the circumstances of each case. *Six (6) Mexican Workers*, 904 F.2d at 1309 (quoting *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985)).

¹⁵ The Workers cite *United States v. Citrin* in support of the uncontroversial premise that statutory damages in the form of a civil fine may be upheld as long as they are reasonable. 972 F.2d 1044, 1051 (9th Cir. 1992). The *Citrin* decision pre-dates *BMW*, and conducts only the most cursory review of a statutory penalty. The Workers' reliance on *Griffin v. Oceanic Contractors, Inc.* also is misplaced, as *Griffin* likewise pre-dates *BMW* and merely states that statutory damages may be out of proportion to actual harm. 458 U.S. 564, 575-76, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982). These cases do not

and Missouri cases, other states are in accord with the *BMW* and *Campbell* standards. See e.g. *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 322-24, 179 P. 3d 276 (2008) (affirming trial court's remittance of punitive award down to constitutional 4-to-1 standard); *Goddard v. Farmers Ins. Co. of Oregon*, 202 Or. App. 79, 120 P. 3d 1260 (2005) (vacating and remanding punitive award for insurance bad faith claim, suggesting a 3-to-1 ratio of punitive to compensatory damages). The Workers' cursory analysis would produce arbitrary and disproportionate punishments.¹⁶

Such a result is contrary to the due process provisions of the Washington and United States Constitutions. Under the appropriate standards, an automatic imposition of \$500 per violation per plaintiff — regardless of the nature of the violation itself — would constitute an excessive and arbitrary damages award. FLCA should be interpreted to provide trial courts discretion in the amount of statutory damages awards, ensuring that the statute remains on solid constitutional ground.

address post-*BMW* considerations that arise where damages awards are grossly excessive as to implicate Constitutional due process concerns.

¹⁶ The Workers list statutes with \$500 penalties that supposedly would be unconstitutional if this Court holds that due process considerations require discretion in FLCA damages. Their parade of horrors misrepresents due process. The due process analysis weighs the award compared to the actions/harm; it does not turn on a magic number. A penalty could be \$10 and still unconstitutional if disproportionate to the actions/harm, or it could be \$10,000 and perfectly constitutional if proportionate to the actions/harm. Even the *Williams* standard that the Workers cite looks at whether a fine is unreasonable, rather than looking at a magic number.

3. An Automatic \$500 ward Per Violation Per Plaintiff
Would Undermine Washington Public Policy

A rigid, non-discretionary interpretation of FLCA would run afoul of Washington's strong public policy against punitive damages. *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996).

Washington courts condemn punitive damages for imposing "a penalty generally reserved for criminal sanctions . . . [while] award[ing] the plaintiff with a windfall beyond full compensation." *Id. at 575*. FLCA statutory damages are available to a plaintiff even absent proof of actual damages, as a combination of both punitive and compensatory damages. *See Six (6) Mexican Workers*, 904 F.2d at 1306. To remain non-punitive in nature, the statutory damages must bear some resemblance to the harm alleged. Otherwise, the imposition of an automatic award would be unrelated to any realistic measure of damage. Such an award would constitute a punitive damage in violation of public policy.

The Workers fail to address punitive damages concerns and instead focus on public policy favoring protection of workers. The Growers agree that Washington has policies ensuring fair treatment of workers. The issue, however, is whether interpreting FLCA to require an automatic \$500 statutory damages award per plaintiff per violation would violate any Washington policy. As explained above, it would.

The Workers' proposed statutory interpretation also would jeopardize the very employee-protection policies that the Workers cite. Federal courts interpreting the parallel FLCRA have recognized that a rigid statutory damages structure could undermine the statute's purposes of compensation and deterrence. *See Six (6) Mexican Workers*, 904 F.2d at 1309-11. As the *Six Mexican Workers* court explained, in class actions involving a large number of workers, courts "have achieved deterrence objectives with substantially lower aggregate awards" than in individual cases. *Id.* at 1310. The same reasoning applies here. Public policy requires courts to craft larger or smaller awards in class action cases like this one so courts can "adequately balance[] the need for deterrence with the inequity of disproportionate punishment." *Id.* at 1310-11.

The Ninth Circuit in *Alvarez* similarly reasoned that:

Plaintiffs' construction would require a rigidity in enforcement of the statute that . . . might well create anomalous results Congress could not have intended, and which might impede effective enforcement of the Act.

697 F.2d at 1339-40. The *Alvarez* court noted that courts faced with a rigid, automatic \$500 award for even technical violations "would inevitably interpret the substantive requirements strictly and impose a

stringent standard of proof, thus making achievement of the statute's remedial purpose more difficult." *Id.* at 1340.

A rigid interpretation of FLCA could actually result in less enforcement and more harm to workers. An interpretation that recognizes discretion, on the other hand, provides courts with the flexibility to deter violations but also ensure that awards remain proportionate to the harm.

D. Question Three: A Party Cannot Recover Damages Without Showing That He or She Was "Aggrieved"

The Ninth Circuit's third question shifts focus to who can obtain damages awards, rather than the trial court's discretion to determine the amount of an award. FLCA allows a private right of action only to:

any person *aggrieved* by a violation of this chapter or any rule adopted under this chapter.

RCW 19.30.170(1) (emphasis added). The trial court in this case concluded without analysis that the Workers had met their burden to show "class wide damages" and, instead of examining whether absent class members were aggrieved by a particular violation, it calculated awards for the class as a whole. ER 47. The Growers maintain that a trial court cannot award any form of damages to a worker without an evidentiary showing that a particular violation "aggrieved" the worker.

The Workers agree that a plaintiff must be "aggrieved" before recovering. But they cite numerous standing cases and conclude that the

plaintiffs here had standing to file the lawsuit and therefore were aggrieved. Their analysis avoids the real issue in this case, which involves hundreds of absent class members about whom plaintiffs provided no evidence whatsoever, and for whom there is no basis to claim that they had any complaints about Global's technical violations of FLCA.¹⁷

The Workers assume, as did the trial court, that absent class members need not make any showing and can obtain damages simply because violations occurred, even if those violations aggrieved someone else (or no one else), and even if the absent class member was unaware of the violation. This conclusory approach fails to comply with the statute, which does not allow a plaintiff (named or absent) to proceed unless "aggrieved." RCW 19.30.170(1). Parties cannot use the class action device to evade the requirements of the statute. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) (stating that rules of procedure cannot modify or enlarge substantive rights); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) ("It is axiomatic that the procedural device of Rule 23 cannot be allowed to expand the substance of the claims of class members."). Class or no class, each worker must make an individual showing before obtaining damages.

¹⁷ "Aggrieved" is defined as "having legal rights that are adversely affected; having been harmed by an infringement of legal rights. Black's Law Dictionary 77 (9th ed. 2009).

Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1990), explains the showing required in a class action. The Ninth Circuit, in interpreting FLCRA, did hold that statutory damages claims are not dependent upon proof of actual injury. *Id.* at 1306. But this did not mean that each class member automatically became entitled to an award. The award of individual damages turned on proof that the claimant was “qualified as a member of the class and *was affected by the particular violation.*” *Id.* at 1306, n.3 (emphasis added); *see also Sandoval v. Rizzuti Farms, Ltd.*, 656 F. Supp. 2d 1265, 1277 (E.D. Wash. 2009) (denying summary judgment on a federal AWP class action claim because “while some unnamed class members may have been recruited, remaining factual disputes make this determination difficult”). The same principle applies under Washington’s FLCA. Absent class members seeking to recover statutory damages must show that the particular violation affected them, *i.e.*, that they were “aggrieved.”

Any other interpretation would create extreme punitive results for defendants such as the Growers, who are liable only for a third party’s improper acts. As noted previously, the farm labor contractor in this case failed to put its address and phone number on pay stubs. ER 43. This omission violated an obscure Washington Administrative Code provision, WAC 296-131-015, which in turn violated Global’s written promise (in its

H-2A Clearance Order) to comply with all applicable employment laws. By failing to fulfill its written promise to comply with all applicable employment laws, Global violated RCW 19.30.110(5) — which requires contractors to comply with its contracts and agreements. There is simply no evidence that this technical violation affected any or all of the absent class members. There is no record that a single worker ever complained or claimed to have suffered harm, and it is likely true that the only persons who were aware of the omission were the Workers' lawyers. Under the Workers' approach, the Growers would pay \$126,000 in fixed statutory damages for a technical violation committed by a third party that affected no one.

Such a result would be grossly unfair. If courts lack any discretion in awarding statutory damages (as the Workers insist), and also must award damages to individuals unaffected by and otherwise unaware of violations, defendants like the Growers will be forced to pay millions of dollars without any showing of harm. The due process and policy concerns discussed above apply equally to this issue and prevent such punitive results.

This Court should adopt the reasoning of *Six Mexican Workers* and interpret the statute to require a showing that all plaintiffs were

individually aggrieved by each violation before they can obtain statutory damages.

V. CONCLUSION

FLCA's language, context and history point to an interpretation that provides trial courts with discretion to award the appropriate amount of statutory damages in a particular case. This approach protects the due process rights of defendants and promotes the public policies underlying FLCA. The statute requires individuals to show a violation aggrieved them, and then allows the trial court to appropriately choose from the range of available remedies. Such an interpretation will prevent punitive, unfair results throughout this state's agricultural industry.

By: 

Brendan V. Monahan (WSBA #22315)
Justo G. Gonzalez (WSBA #39127)
STOKES LAWRENCE VELIKANJE
MOORE & SHORE, P.S.
120 N. Naches Avenue
Yakima, Washington 98901
(509) 853-3000

Attorneys for Appellees

67731.doc

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 31st day of January, 2012, I caused a true and correct copy of the foregoing document, "Brief Of Appellees Valley Fruit Orchards, LLC And Green Acre Farms, LLC," to be delivered by First Class U.S. Mail to the following counsel of record:

Unrepresented Parties Global Horizons, Inc., Mordechai Oriain & Yun Ru:

Mordechai Oriain & Yun Ru
Global Horizons, Inc.
23458 West Moon Shadows Dr.
Malibu, CA 90264

Mordechai Oriain
Global Horizons, Inc.
468 North Camden Dr., Suite 200
Beverly Hills, CA 90210

Previous Counsel for Global Horizons, Inc., Mordechai Oriain & Yun Ru, & Platte River Insurance Company:

Matthew S. Gibbs
137 North Larchmont Blvd., Suite 193
Los Angeles, CA 90004

Counsel for Mr. Oriain in other proceedings:

Michael Jay Green
841 Bishop Street, Suite 2201
Honolulu, HI 96813

William James Kopeny
8001 Irvine Center Dr., Suite 400
Irvine, CA 92618

I. Randolph S. Shiner
11150 Santa Monica Blvd.,
Suite 1470
Los Angeles, CA 90025

I. Randolph S. Shiner
Global Horizons, Inc.
2355 Westwood Blvd., Suite 722
Los Angeles, CA 90064

Counsel for Amicus Curiae:

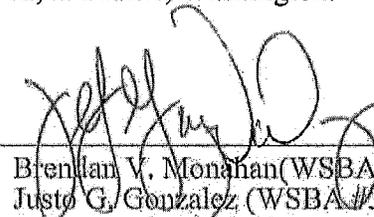
Washington State Horticultural Association, Yakima Valley Growers-Shippers Association, Wenatchee Valley Traffic Association, Washington Farm Labor Association and Washington Growers League

James Elliot
Velikanje Halverson
405 East Lincoln Ave.
Yakima, WA 98901

Pineros y Campesinos Unidos del Noroeste ("PCUN"), National Employment Law Project ("NELP"), and California Rural Legal Assistance Foundation ("CRLAF")

Cynthia L. Rice
California Rural Legal Assistance Foundation
2210 K Street, Suite 200
Sacramento, CA 95816

Dated this 31st day of January, 2012, at Seattle, Washington.



Brenlan V. Monahan (WSBA #22315)
Justo G. Gonzalez (WSBA #39127)
Attorneys for Defendants
Stokes Lawrence Velikanje Moore &
Shore, P.S.
120 N. Naches Avenue
Yakima, Washington 98901
Phone: (509) 853-3000
Fax: (509) 895-0060
jgg@stokeslaw.com

PLEASE DO NOT SEPARATE THIS PAGE
IT CONTAINS THE DOC ID NUMBER

File: 46806-001

67731.doc