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No. 86793-3

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs-Appellants,

v.

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

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--	------------

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---	--------------------

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<i>Steering Clear of the “Road to Nowhere”: Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards</i> , 63 Rutgers L. Rev. 327 (2010).....	27
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I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit has certified three questions to this Court in this class action brought on behalf of 650 farm workers (the “Workers”) against the farm labor contractor, Global Horizons, Inc. (“Global”), and the agricultural employers (the “Growers”) who violated the Workers’ rights under the Washington Farm Labor Contractors Act (“FLCA”), RCW § 19.30.110 *et seq.* This case is about the all-too-familiar story of a labor contractor’s broken promises, the wholesale violation of important farm worker rights, and how the Washington Legislature amended FLCA in 1985 to create a private right of action to protect those rights. These Workers seek the fixed amount of \$500 in statutory damages as provided by the Legislature to enforce and vindicate their rights.

In particular, the federal court has asked this Court to interpret RCW 19.30.170(2), the civil remedies provision of FLCA. FLCA was amended in 1985 to provide farm workers with a private right of action and fixed statutory damages to deter violations by contractors and those who use their services, and to compensate workers for violations often difficult to measure economically. The FLCA amendments were modeled after Oregon’s comparable law that provides fixed statutory damages. Both Oregon and Washington broadened protections for farm workers by

rejecting the limits on worker protections contained in the federal farm labor statute — a statute that specifically states it is intended to be supplemented by state law.

Consistent with FLCA's purpose to protect farm workers, the plain language of FLCA, FLCA's legislative history, and the public policy of this State, this Court should hold, just as the Ninth Circuit Court of Appeals held before certifying the question, that under FLCA the Workers are entitled to fixed statutory damages of \$500 per violation. This conclusion is compelled by the plain language of FLCA.

II. CERTIFIED QUESTIONS

The Ninth Circuit certified the following three questions of law:

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

III. STATEMENT OF THE CASE

In its original ruling (now withdrawn upon certification of the questions to this Court), the Ninth Circuit held that the district court erred when it did not award statutory damages of \$500 per worker, per violation and that the full amount of mandatory statutory damages did not violate the due process rights of the Growers under U.S. Supreme Court case law. Dkt. Entry 65-1 at 5. The Ninth Circuit’s order certifying these questions to this Court sets forth a statement of facts, which is incorporated here by reference. Dkt. Entry 76 at 4-10. The Workers submit the following additional facts relevant to the certified questions and the procedural history of this case.

The Growers admitted liability for the statutory violations of FLCA established at summary judgment. Dkt. Entry 76 at 6. In the summary judgment order, the district court found that the Growers failed to investigate whether Global had a valid Washington Farm Labor Contractor license prior to engaging Global’s services in January of 2004. ER 169. After the Growers were advised that Global was not licensed in July 2004, they both continued to use the services of Global through

October 2004. *Id.* The district court also found that both Growers exercised control and oversight over the day-to-day working conditions of Global's workers. ER 166-68.

IV. SUMMARY OF ARGUMENT

The Ninth Circuit's first certified question asks:

“(1) Does FLCA, and 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?”

Answer: FLCA provides that a court choosing to award statutory damages must award fixed statutory damages of \$500 per plaintiff, per violation. FLCA provides:

[I]f the court finds that the respondent has violated this chapter . . . it may award damages *up to* and including an amount equal to the amount of actual damages, *or* statutory damages of five hundred dollars per plaintiff per violation, *whichever is greater*, or other equitable relief.

RCW 19.30.170(2) (emphasis added). The meaning of the statute is demonstrated by its plain language and grammar, which separate the phrase “up to” from the statutory damages clause by a disjunctive comma coupled with the disjunctive word “or”; and by the statutory phrase “whichever is greater,” which limits a court’s discretion to choose between “up to” actual damages, *or* statutory damages of \$500; and by the

absence from the statute of a second “up to” modifying statutory damages.

Moreover, FLCA is a remedial statute with the purpose of protecting exploited farm workers. The statute’s plain meaning is further supported by its legislative history which demonstrates that the Legislature intentionally removed the second “up to” that had modified the phrase statutory damages in an earlier draft of the statute; that it intended to provide for liquidated statutory damages; and that it modeled the provision after Oregon law, which unlike federal law, limits a court’s discretion to award less than the statutory damages provided by including the phrase “whichever is greater.” *See infra* at Part V. B.

The Ninth Circuit’s second certified question asks:

“(2) If 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?”

Answer: Awarding fixed statutory damages of \$500 per plaintiff per violation as provided in FLCA is consistent with Washington’s public policy and its constitutional guarantees of due process. Washington’s public policy supports the protection of exploited farm workers. The Legislature’s selection of a liquidated statutory damage amount of \$500 per statutory violation to protect the rights of farm workers is not “so severe and oppressive as to be wholly disproportionate or obviously

unreasonable” and therefore does not violate Washington’s constitutional guarantees of due process which are equal to, but not greater than, the due process protections afforded under the U.S. Constitution. *See infra* at Part V. C.

The Ninth Circuit’s third certified question asks:

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

Answer: The language of FLCA providing that “any person aggrieved by a violation of this chapter” may seek relief, RCW 19.30.170(1), is a term of art expressing the conventional standing requirement permitting any person “aggrieved” by a violation of the statute to seek relief. All that is required is a showing that a person seeking relief falls within the group of persons or zone of interests that the statute was created to protect and that a defendant violated his or her rights under FLCA. Indeed, by imposing statutory liquidated damages the Legislature acknowledged that it is difficult to quantify the injury to workers whose rights have been violated under the statute. A person who has not been “aggrieved” by a statutory violation under this standing provision cannot be awarded statutory damages under FLCA. *See infra* at Part V. D.

V. ARGUMENT

A. Legal Standards Governing Review of Certified Questions.

Certified questions are questions of law that are reviewed *de novo*. *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). This Court considers certified questions not in the abstract but based on the certified record provided by the federal court. *Id.* (citing RCW 2.60.030(2)). The Court lacks jurisdiction to go beyond the questions certified. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000). The Court will not speculate about assumptions that the federal court might have made but chose not to articulate in a certified question. *American Continental Insurance Co. v. Steen*, 151 Wn.2d 512, 524 n.6, 91 P.3d 864 (2004).

B. FLCA Provides that a Court Choosing to Award Statutory Damages Must Award Statutory Damages of \$500 Per Plaintiff, Per Violation.

When it is called upon to interpret a statute, the Court's "primary obligation is to give effect to the legislature's intent." *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 681-82, 80 P.3d 598 (2003). If a statute is susceptible to more than one reasonable interpretation, this Court "may look to the legislative history of the statute and the circumstances surrounding its enactment to determine legislative intent." *Id.* at 602.

The only Washington court that has addressed the purpose of FLCA has found the Legislature intended FLCA to protect exploited agricultural workers. *Cascade Floral Products, Inc. v. Dept. of Labor and Industries*, 142 Wn. App. 613, 621 n. 13, 177 P.3d 124 (2008).¹ This Court should find, consistent with FLCA’s statutory purpose and the Legislature’s concern for the welfare of Washington’s farm labor workforce and worker rights generally, that FLCA provides fixed statutory damages of \$500 for each violation. *Id.*; *see also Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (finding that Washington’s legislation providing workers with a minimum wage was consistent with “Washington’s long and proud history of being a pioneer in the protection of employee rights”).

1. When a Court Chooses to Award Statutory Damages the Plain Language of FLCA Requires an Award of \$500 Per Plaintiff, Per Violation.

In determining the plain meaning of a statute, this Court considers “the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228

¹ The Legislature’s intent to protect farm workers is further evidenced by the fact that FLCA was modeled on the Oregon Farm Labor Contractors Act, which is also intended to protect farm workers. *See* Part B. 2. c., *infra*.

(2007). In this context, the Court should find that the plain meaning of RCW 19.30.170(2) provides fixed statutory damages of \$500 per plaintiff, per violation.

FLCA’s civil remedies provision, RCW 19.30.170(2), states in pertinent part:

[I]f the court finds that the respondent has violated this chapter . . . it may award damages *up to* and including an amount equal to the amount of actual damages, *or* statutory damages of five hundred dollars per plaintiff per violation, *whichever is greater*, or other equitable relief.

RCW 19.30.170(2) (emphasis added). The qualifying phrase “up to” modifies the term “actual damages,” but it does *not* modify the term “statutory damages,” which is in a separate clause separated by a comma and the disjunctive word, “*or*.”

Courts employ traditional rules of grammar in discerning the plain language of a statute. *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010). The purpose of a comma is always to set a phrase apart from the rest of the sentence. *East Gig Harbor Imp. Ass’n v. Pierce County*, 106 Wn.2d 707, 713, 724 P.2d 1009 (1986). In addition, the word “or” is presumed to be used disjunctively. *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006). Based on the text and grammatical structure of the statute, the phrase “up to” only modifies the adjacent phrase, “actual damages,” and does not modify the grammatically separate phrase,

“statutory damages.” Thus, when statutory damages are chosen, the section requires an award of \$500 per violation.

“Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous.” *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). By including the phrase “*whichever is greater*,” FLCA provides that a court may choose between *two* options for awarding damages: 1) up to the full amount of actual damages, or 2) statutory damages of \$500, *whichever is greater*. Courts interpreting analogous provisions have held that a court’s discretion is not unfettered, but rather is limited to the options the statute provides. In *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), where the statute provided “[t]he court *may* award – (1) actual damages, but not less than liquidated damages in the amount of \$2,500,” the Eleventh Circuit held that a court’s option under this provision was to award actual damages, *but not less than* liquidated statutory damages in the amount specified. *Kehoe*, 421 F.3d at 1216-17.

Similarly, in *Robinson v. Fulliton*, 140 S.W.3d 312, 314 (Tenn. App. 2003), the court concluded the trial court was required to award fixed, minimum statutory damages, where the statute provided:

[A]ny aggrieved person . . . may in a civil action recover . . .
(1) The greater of . . . (A) The sum of the actual damages . . . ; or

(B) Statutory damages of one hundred dollars (\$100) a day for each day of violation or ten thousand dollars (\$10,000), *whichever is greater*.

Robinson, 140 S.W.3d at 314 (emphasis added). The court held that the plain language of the statute states that a person may recover actual damages or statutory damages, whichever is greater, but does not provide for an award of less than statutory damages. *Id.* at 318. The court also considered the legislative history, and found that while “the legislative history does not state directly that the word “may” . . . is intended to be mandatory rather than permissive, the overall tenor of the discussion strongly supports such an interpretation.” *Id.* at 324. The court therefore concluded that because actual damages were less than statutory damages, the court was required to award the statutory damages provided by statute. *Id.*

Finally, in *First Nat. Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329, 346 (Tex. App. 2011), the court rejected the proposition that statutory damages were discretionary under the following provision:

[a] person . . . may . . . bring . . . an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, *whichever is greater*.

Walker, 348 S.W.3d at 335 (emphasis added). The court distinguished the provision from another subsection which did *not* include the phrase “whichever is greater” and found “[t]here would be no point in including

the language ‘whichever is greater’ if the statutory damages provision was meant to be discretionary.” *Id.* at 346. The court held that it was thus appropriate for the trial court to refuse to instruct the jury that it could award “up to” \$500 in damages per violation, since the statute provides for the specific damage amount of \$500. *Id.*

In this context, in order for FLCA to grant a court discretion to award a range of statutory damages between \$0 and \$500, one would have to insert the phrase “up to” in front of the phrase “five hundred dollars per plaintiff per violation.” However, courts do not add language where the Legislature has not done so. *Cananwill*, 150 Wn.2d at 682.²

When the Legislature has wanted to modify two different types of damages with the phrase “up to,” it has so provided. *See, e.g.*, RCW 48.83.160 (providing for a “fine of *up to* three times the amount of the commission paid for each policy involved in the violation or *up to* ten thousand dollars . . .) (emphasis added). Similarly, when it has wanted to apply that phrase only to statutory damages, again it has expressly included the modifier in the statute. *See* RCW 19.190.090(1) (providing

² This omission is particularly significant because in an earlier draft of the FCLA amendments, the words “up to” appeared *twice* and separately modified both “actual damages” *and* “statutory damages,” but in the final revisions to the draft legislation and then the final bill as enacted, the Legislature intentionally *removed* the second “up to” that would have modified statutory damages. *See* Part B.1.a, *infra* (discussing legislative history of FLCA amendments).

that a plaintiff may “seek *up to* five hundred dollars per violation, or actual damages, whichever is greater”) (emphasis added).

As these statutes demonstrate, the Legislature will explicitly provide for statutory damages “up to” a specified amount when it wants to, which makes its refusal to do so in RCW 19.30.170(2) decisive. *See In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 842, 215 P.3d 166 (2009) (“Where the legislature uses certain statutory language in one statute and different language in another, a difference in legislative intent is evidenced.”).

Finally, a close examination of other FLCA provisions confirms that the Legislature wanted \$500 to be a fixed statutory damages award for farm workers who prove statutory violations. In the two subsections of FLCA preceding the civil remedies provision, one relating to criminal penalties (RCW 19.30.150) and the other relating to civil penalties imposed by the Department of Labor and Industries (RCW 19.30.160(1)), the Legislature specifically granted penalty-setting discretion by inserting the phrase “*not more than*” in front of the penalty amount, thus allowing for a range of damages. *See* RCW 19.30.150 (“Any person who violates any provision of this chapter . . . shall be guilty of a misdemeanor punishable by a fine of *not more than* five thousand dollars”); RCW 19.30.160(1) (“the director may assess . . . a civil penalty of *not*

more than one thousand dollars”) (emphasis added). Had the Legislature wanted to provide similar discretion to a court in a civil private right of action, it would have either added the words “up to” or “not more than” directly before the words “five hundred dollars” in RCW 19.30.170(2), as it did in these other provisions. The Legislature chose not to insert those words, and Washington courts will not usurp the Legislature’s function by adding them. Therefore, the plain meaning of FLCA’s civil remedies provision requires that a court choosing statutory damages award fixed statutory damages of \$500 per violation.

2. FLCA’s Legislative History Confirms the Legislature Chose Statutory Damages of \$500 Per Violation.

Based on this plain language, it is unnecessary for the Court to consider the legislative history of the statute. Should the Court find, however, that the civil remedies provision of FLCA is susceptible to more than one reasonable interpretation, and thus ambiguous, the Court should interpret it consistent with FLCA’s legislative history. That history further demonstrates that the Legislature intended to increase the protections available to Washington farm workers and specifically to provide them with a fixed, statutory damages remedy providing \$500 per violation.³

³ The Workers submitted excerpts from the legislative history of FLCA to the Ninth Circuit. Dkt. Entry 40-3, 40-4, 40-5 & 55-3. The audio recording of the January 22, 1985, House Commerce & Labor

a. The Legislature intentionally removed the phrase “up to” as applied to statutory damages.

“In determining legislative intent, it is appropriate to consider sequential drafts.” *Spokane County Health Dist. v. Brockett*, 120 Wn.2d 140, 153, 839 P.2d 324 (1992). “Various drafts of a proposed bill can be *very revealing* as to the legislature’s intent . . .” Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev. 179, 204 (2001) (emphasis added). Here, while a second “up to” modifying statutory damages was included in an initial draft of the FLCA amendments, that phrase was intentionally removed and *not* included in subsequent drafts or the final legislation.

In the initial draft circulated to the public by the Washington House Commerce and Labor Committee on November 14, 1984, the civil remedies provision included the phrase “up to” *twice*, which would have allowed a court to award damages *up to* the amount of actual damages or statutory damages of *up to* \$500. Dkt. Entry 40-3 at 13. At its November 30, 1984, public hearing, the House Labor Committee received written comments and public urging it to remove the phrase “up to” as applied to statutory damages in order to make statutory damages a nondiscretionary,

Committee hearing, is available at:
<http://www.digitalarchives.wa.gov/Record/View/C48DC697A84DAAA9BFB09DA08CECA2D1> (hereafter referenced as <http://tinyurl.com/cf5ylyh>).

fixed amount. *Id.* at 3, 18, 24 & 26; *see also Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304-06, 149 P.3d 666 (2006) (testimony offered to a committee, as well as drafting history, were probative of legislative intent); *State v. Turner*, 98 Wn.2d 731, 735-37, 658 P.2d 658 (1983) (changes made in bill revisions and comments laid to rest all doubts about legislative intent).

On January 23, 1985, House Bill No. 199 was introduced and referred to the House Labor Committee. This bill removed the phrase “up to” as applied to statutory damages — a change that continued throughout all subsequent drafts and the final amended statute. Dkt. Entry 40-4 at 63 & 71; Dkt. Entry 40-5 at 78 & 99 (March 27, 1985, Engrossed Substitute House Bill No. 199 enacted and codified as RCW 19.30.010 - .902). This change, and the legislative testimony in support of the change, further demonstrate that the Legislature intended to provide fixed statutory damages of \$500.

b. The Legislature intended statutory damages to function as “liquidated damages” for violations that were “difficult to evaluate in dollar amounts.”

The Legislature’s intent to provide for fixed statutory damages of \$500 per violation is also seen in the legislative history which contains documents indicating that the statutory damages provision was intended to function as “liquidated damages” for violations that were “difficult to

evaluate in dollar amounts.” It is appropriate to determine legislative intent from a broad range of legislative history including testimony provided to committees and committee memorandum. *Cosmopolitan Engineering Group*, 159 Wn.2d at 305-06; *State v. Turner*, 98 Wn.2d at 737-38.

Throughout the 1985 hearings on the FLCA amendments, worker advocates provided written comments and public testimony to the both House and Senate Labor Committees urging the inclusion of a state law private right of action with a liquidated damages clause “to curb violations and provide a quick, sure remedy for victims of contractor abuse.” Dkt. Entry 40-4 at 31; Dkt. Entry 40-5 at 74-77. The Senate’s legislative history file also contains a memorandum summarizing the amendments to FLCA which states: “Liquidated damages of \$500 per worker per violation deter violations and compensate for violations difficult to evaluate in dollar amounts.” Dkt. Entry 40-5 at 104. This legislative history demonstrates that the Legislature intended statutory damages to function as fixed, liquidated damages for violations which are not easily evaluated in monetary terms.

- c. **The Legislature modeled FLCA after the Oregon Act which protects farm workers by providing for actual damages or fixed statutory damages of \$1,000 per violation, whichever is greater.**

The legislative history also demonstrates that FLCA was modeled

after the Oregon Farm Labor Contractors Act, ORS § 658.405 *et seq.*, which similarly provides for fixed statutory damages. In interpreting statutes, courts may presume that the legislature is aware of prior law, including judicial interpretations of statutes. *See Dep't of Transp. v. State Employee Ins. Bd.*, 97 Wn.2d 454, 462, 645 P.2d 1076 (1982).

The Legislature's adoption of multiple provisions from the Oregon Act, including the discretion limiting phrase "whichever is greater," further demonstrates the FLCA was modeled after Oregon's statute. The Oregon law provides: (1) a private right of action with actual damages *or* statutory damages of \$1,000, *whichever amount is greater*, ORS § 658.453(4); (2) liability for using unlicensed farm labor contractors, ORS § 658.465(1); (3) mandatory disclosures to workers, ORS § 658.440(1)(f); (4) mandatory bonding requirements for contractors, ORS § 658.415(3)-(5); and (5) coverage for forestry workers providing them the same protection as farm workers, ORS § 658.405(4)^{4, 5}. The legislative history of the 1985 FLCA amendments demonstrates that these same five core worker protections found in the Oregon law were

⁴ Formerly ORS § 658.405(1). *See* Dkt. Entry 55-3 at 4.

⁵ Based on these provisions, Oregon courts have found the purpose of the Oregon act is to protect workers and ensure their compensation. *See Perez v. Coast to Coast Reforestation Corp.*, 785 P.2d 365, 366 (Or. App. 1990); *see also Mayfly Group, Inc. v. Ruiz*, 144 P.3d 1025 (Or. App. 2006) (citing *Perez*).

incorporated into FLCA. Dkt. Entries 40-4 at 30-32; 40-5 at 75-77, 79, 83-86, 91, 96-99 & 104-05; *see also* House Commerce & Labor Committee Meeting Audio Record, January 22, 1985, at <http://tinyurl.com/cf5ylyh> (staff counsel summary of amendments, the majority of which are found in Oregon law (60:45-65:26⁶)).

The legislative history further demonstrates that the Legislature extensively reviewed the Oregon law during the 1984-85 FLCA amendment process. *See* Dkt. Entry 55-3 at 1-10 (House Commerce and Labor Committee Staff Counsel Memorandum comparing FLCA amendments and Oregon law, and marked-up version of Oregon Farm Labor Contractor law); House Commerce & Labor Committee Meeting Audio Record, January 22, 1985, at <http://tinyurl.com/cf5ylyh> (Committee members' questions related to the Oregon law and Chair agrees to provide copy of the Oregon law (85:18-85:52, 87:07-88:43, 89:26-90:03, 107:17-107:29); bill sponsor compares FLCA amendments to "almost identical" Oregon law (98:20-99:22)); Dkt. Entry 40 at 104 (Senate committee file Summary of Proposed Amendments states provisions on forestry workers, disclosure and bonding requirements are comparable to the Oregon law); Dkt. Entry 40-3 at 24-28 (handwritten notes from the November 30, 1984,

⁶ These references identify the specific portions of the Audio Record of the House Committee hearings in minutes and seconds.

public hearing in Vancouver summarizing testimony by Oregon Legal Services about the impact of the Oregon law). Consistent with the purpose of the Oregon law, the lead sponsor of the FLCA amendments, Representative King, also described his concerns that protections for workers were paramount. House Commerce & Labor Committee Meeting Audio Record, January 22, 1985, at <http://tinyurl.com/cf5ylyh> (85:18-88:14).

The Legislature is also presumed to have been aware of federal law related to the FLCA civil damage remedies, including federal statutory changes and case law.⁷ *See Dep't of Transp. v. State Employee Ins. Bd.*, 97 Wn.2d at 462. Two years *before* the 1985 FLCA amendments, the Farm Labor Contractor Registration Act (“FLCRA”), 7 U.S.C. §§ 2041-2055, was repealed and replaced by the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), 29 U.S.C. §§ 1801-1872. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1303 n.1 (1990). Unlike its predecessor⁸, AWPA *added* a second “up to” phrase to allow a

⁷ This presumption is buttressed here where the Legislature was provided written testimony related to the failures of federal law. *See* Dkt. Entry 40-4 at 29-30 & 40-5 at 74-75 (farm worker attorney written testimony).

⁸ The statutory damages provision of the federal FLCRA was interpreted based on different statutory language and different legislative history to provide “up to” \$500 in statutory damages. *See Alvarez v.*

court to award a range of statutory damages. 29 U.S.C. § 1854(c)(1). Instead of adopting the language of AWPAs, however, the Washington Legislature *eliminated* the second “up to” phrase and *adopted* Oregon’s “whichever is greater” phrase to provide a fixed statutory damage amount to protect the basic rights of farm workers. Neither of the federal statutes contains the phrase “whichever is greater” in the civil remedies provisions.⁹ 29 U.S.C. § 1854(c)(1); *see Alvarez*, 697 F.2d at 1338 (quoting now-repealed FLCRA civil remedies provision).

The legislative history of FLCA strongly supports the Workers’ interpretation that the Legislature amended FLCA to increase protections for farm workers and to specifically provide fixed statutory damages of \$500, per plaintiff per violation.

Longboy, 697 F.2d 1333, 1340 (9th Cir. 1983). *Alvarez* was similarly decided two years prior to the FLCA amendments.

⁹ Similarly, Washington’s FLCA and the Oregon law both provide attorney’s fees for prevailing parties. RCW § 19.30.170(1); ORS § 658.453(4). Fees are not available under federal law. In addition, FLCA and the Oregon law omit damage limiting provisions of federal law including: prohibition on statutory damages for multiple infractions of a single provision, caps on class action damages and consideration of pre-litigation attempts to resolve issues in dispute as a factor in awarding damages. 29 U.S.C. § 1854(c)(1)(A) & (B) & (2). AWPAs are also intended to *supplement* State law. 29 U.S.C. § 1871.

C. **Awarding Fixed Statutory Damages of \$500 Per Plaintiff Per Violation as Provided in FLCA Is Consistent with Washington's Public Policy and Its Constitutional Guarantees of Due Process.**

Before withdrawing its original decision and certifying the three questions presently before this Court, the Ninth Circuit ruled that awarding the “full amount of statutory damages” did not violate the U.S. Constitution’s Fourteenth Amendment due process protections based on the U.S. Supreme Court’s deferential standard of review set forth in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). Dkt. Entry 65-1 at 5. The Washington Legislature’s decision to value the public harm caused by violating the rights of farm workers at \$500 per violation is supported by Washington’s public policy and consistent with our State’s constitutional guarantees of due process.

1. The State of Washington Has Established a Public Policy Mandating Protection of Exploited Farm Workers

To determine the existence of public policy, this Court has ruled that “statutes and case law are ‘primary sources of Washington public policy,’ [however,] public policy may come from other sources” such as the Washington Constitution and state statutes. *Danny v. Laidlaw Transit Services, Inc*, 165 Wn.2d 200, 216, 193 P.3d 128 (2008) (citation omitted).

The Washington Legislature has expressed a public policy of protecting workers from abusive farm labor contractors. Since 1955, the Washington Legislature has determined that workers needed protection from farm labor contractors, including criminal penalties for violations of the Act, punishable by a fine of “not more than” \$5,000, or “not more than” six months in jail, or both. RCW 19.30.150.

In 1985, after receiving testimony from farm workers that federal laws were inadequate to protect them from unscrupulous farm labor contractors, the Legislature substantially overhauled the State’s FLCA. See Dkt. Entry 40-4 at 33-56 (declarations from eight farm workers describing abusive farm labor contractor practices and that workers have filed suit to no avail); Dkt. Entry 40-3 at 14-19 & Dkt. Entry 40-4 at 29-30 (written testimony from farm worker attorney describing “federal act’s failure” to protect her clients’ rights and that “these gaps [need to] be addressed by state law.”). In so doing, the Legislature added civil penalties of “not more than” \$1,000 which could be enforced by the director of the Department of Labor and Industries. RCW 19.30.160(1). The Legislature also added a private right of action to allow “any person” to file suit for monetary damages or equitable relief. RCW 19.30.170(1)-(2). In addition, the Legislature made it clear that those who “knowingly” hired unlicensed contractors should be held fully liable “*to the same*

extent and in the same manner” for the contractor’s misdeeds.

RCW 19.30.200 (emphasis added).¹⁰ The plain language of these FLCA provisions demonstrates that the Legislature intended to protect farm workers and hold contractors and third parties who use their services, in this case the Growers, accountable for violations of FLCA.

The Washington Constitution expresses a public policy concern to protect workers. Article II, Section 35 of the Washington Constitution, entitled “Protection of employees,” states that, “The legislature shall pass necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of same.” Wash. Const. art. II, § 35. This constitutional expression of public policy encourages the Legislature to act and provide remedies in order to hold violators accountable and thus promote the rights of workers.

Judicial decisions also point toward a public policy of protecting farm workers. A Washington appellate court interpreting the FLCA ruled that, “[The] legislative history shows that the Legislature intended the Act

¹⁰ All three defendants are equally liable in this case. The Growers are liable because they failed to investigate whether Global had a valid Washington Farm Labor Contractor license. ER 169. Moreover, after the Growers were advised in July 2004 that Global was unlicensed, they both continued to use the services of Global through the end of the 2004 harvest season. *Id.*

[FLCA] to protect exploited agricultural workers.” *Cascade Floral Products*, 142 Wn. App. at 621 n. 13. In short, far from violating Washington’s public policy, this Court would be upholding the public policy of the State by enforcing the Legislature’s decision to protect the rights of farm workers by imposing fixed statutory damages for violations of FLCA.

2. Providing Statutory Damages of \$500 Per Violation Does Not Violate Constitutional Guarantees of Due Process.

Before turning to the Ninth Circuit’s constitutional question, it is first necessary to determine whether Washington’s constitution provides more protection than the U.S. Constitution. This Court has repeatedly held that the due process protections under Washington’s Constitution are equal to, but not greater than, the due process protections afforded under the U.S. Constitution. *State v. McCormick*, 166 Wn.2d 689, 699, 213 P.3d 32 (2009); *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 217, 143 P.3d 571 (2006); *In re Dyer*, 143 Wn.2d 384, 393-94, 20 P.3d 907 (2001).

Additionally, because the due process provision in Washington’s constitution is virtually identical to the corresponding provision of the federal constitution, “federal cases while not necessarily controlling should be given ‘great weight’ in construing our own due process

provision.” *Petstel, Inc. v. King County*, 77 Wn.2d 144, 153, 459 P.2d 937 (1969) (citation omitted).

- a. **Statutory damage awards are constitutional unless they are so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable.**

The seminal U.S. Supreme Court decision concerning the constitutionality of a state-mandated statutory damages award is *St. Louis, Iron Mt. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). In *Williams*, two passengers were overcharged 66 cents each on their purchases of rail tickets. To prevent such overcharges, the Arkansas Legislature had authorized a private right of action with an award of statutory damages of “not less than fifty dollars nor more than three hundred dollars.” *Id.* at 64. The trial court awarded each sister \$75 and the railroad appealed, contending that the award violated due process and was grossly disproportionate to the suffered injury. *Id.* The Court rejected the argument and deferred to the Arkansas Legislature to set the amount of statutory damages to protect the public good:

[G]iving the penalty to the aggrieved passenger [does not] require that it be confined or proportioned to [her] loss or damages; for, *as it is imposed as a punishment for the violation of public law, the Legislature may adjust its amount to the public wrong rather than the private injury*, just as if it were going to the state.

Id. at 66 (emphasis added).

Turning to whether the statutory damages range chosen by the Arkansas Legislature (between \$50 and \$300 per violation) conflicted with the Fourteenth Amendment's due process protections, the Court ruled:

When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, *its validity is not to be tested in that way. When it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.*

Id. at 67 (emphasis added); *see also Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007), *cert. denied*, 553 U.S. 1032 (2008) (upholding a \$31,000 per violation statutory damages award based on *Williams* and rejecting defendant's due process arguments and attempts to apply punitive damage case law to \$806,000 judgment¹¹); *U.S. v. Citrin*, 972 F.2d 1044, 1048 (9th Cir. 1992) (applying *Williams* analysis to uphold

¹¹ For an excellent discussion as to why punitive damage case law does not apply when reviewing statutory damage awards, *see* D. R. LeCours, *Steering Clear of the "Road to Nowhere": Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 Rutgers L. Rev. 327, 335 (2010) ("Stretching the [punitive damage] 'guideposts' to enable their use to review statutory penalty award review would not only render them unrecognizable, but would constitute an impermissible invasion into the domain of the legislature.").

a \$176,026 statutory damages award against a doctor who breached his scholarship agreement by refusing to work in an underserved area).

The U.S. Supreme Court upheld the same principle in *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). In *Griffin*, an employer illegally withheld \$412 in wages from a fired worker. The worker brought suit under federal law which provided for statutory damages of “two days’ pay for each day payment is delayed.” *Id.* at 569. The district court refused to award full statutory damages. On appeal, the employer argued that a literal application of the statute would result in a \$300,000 windfall to the worker “which Congress could not have intended . . . without regard to the equities of the case.” *Id.* 575.

The Supreme Court disagreed. It ruled that the statute was “not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages.” *Id.* at 575. Moreover, the Court upheld Congress’s right to set statutory remedies that “*may be out of proportion to actual injury*,” noting that “the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter.” *Id.* at 576 (emphasis added); *see also Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 37, 100 P.3d 814 (2004) (stating that courts should not “question the wisdom of a statute even through its results seem unduly harsh,” and that “there is no judicial authority to do so

[because] [s]uch is the province of the legislative branch”) (citations omitted).

- b. This Court has similarly ruled that a statute providing statutory damages of \$2,000 per violation and resulting in a considerable award did not violate due process guarantees.**

In *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999), this Court found that a \$2,000 per violation civil penalty did not violate due process under the Fourteenth Amendment to the U.S. Constitution, even though it applied the more stringent punitive damage case law analysis instead of applying the U.S. Supreme Court’s *Williams* test (which it the applicable test here).¹² In *WWJ Corp.*, the Attorney General filed a civil action against a mortgage broker and his company for 250 separate violations of the Mortgage Broker Practices Act, RCW 19.146.005 *et seq.* (“MBPA”). Each violation of the MBPA is subject to a \$2,000 penalty pursuant to the Consumer Protection Act, RCW 19.86.010 *et seq.* (“CPA”). *Id.* at 598.

The suit alleged 249 separate violations of the MBPA based on the broker’s failure to deposit client funds in a trust account pursuant to RCW 19.146.050. *Id.* The remaining MBPA violation was for failure to

¹² This Court specifically ruled in *WWJ Corp.* that, “We decline to decide at this time whether *BMW* applies to statutorily imposed civil penalties.” *Id.* at 606, n.8.

maintain proper business records pursuant to RCW 19.146.060. *Id.* at 598-99. Two years after filing suit, the Attorney General moved for, and was granted, summary judgment after the defendants failed to file a response. *Id.*

Based on 250 proven violations, the State requested the maximum civil monetary penalty (250 violations x \$2,000 per violation = \$500,000) pursuant to RCW 19.86.140 of the CPA. *Id.* at 598. The trial court entered a judgment for \$500,000 along with a \$30,000 award for attorney fees and costs, and \$32,254 in restitution payments. *Id.* The defendants appealed, claiming that the \$500,000 civil penalty violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 600.

While this Court ultimately ruled that review was not warranted pursuant to RAP 2.5(a)(3), before reaching that conclusion it applied the U.S. Supreme Court's more stringent three-prong punitive damage analysis based on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *Id.* at 606-07. After analyzing each prong, this Court concluded, "If *BMW* applied to [the] \$500,000 civil fine, [the defendant] has not shown how the fine is unconstitutional." *Id.* at 607.

It follows that if this Court determined that a statute with a \$2,000 per violation penalty resulting in a half million dollar award was constitutional, it should similarly conclude, based on the U.S. Supreme

Court's more deferential *Williams* test, that the Legislature's choice of "five hundred dollars per plaintiff per violation" under FLCA, RCW 19.30.170(2), easily passes constitutional muster under the Due Process Clause.

Moreover, were this Court to determine there were due process implications involving the Legislature's choice of a \$500 statutory damage award with regard to FLCA, it would immediately throw into question the constitutional validity of scores of other Washington statutes that contain fixed statutory damage provisions that protect the public good. *See, e.g.*, RCW 62A.9A-625(e) (effective July 1, 2013) (\$500 statutory damage provision for violations of secured party transactions); RCW 9.35.010(6) (\$500 or actual damages, whichever is greater, for illegally obtaining financial information); RCW 9.35.030(3) (\$500 or actual damages, whichever is greater, for stealing identity of another to solicit undesired mail); RCW 27.44.050(3)(c) (\$500 or actual damages, whichever is greater, for illegally obtaining Indian artifacts by disturbing ancestral graves); RCW 19.162.070 (three times actual damages or \$500 per violation for violation of pay-per-call services and advertising); RCW 19.190.040 (\$500 or actual damages, whichever is greater, for each commercial text message received); RCW 19.320.040 (between \$200 and \$500 or actual damages, whichever is greater, for human trafficking

statutory violations); RCW 80.36.390(6) (\$100 per violation for illegal telephone solicitation); RCW 71.05.440(1) (\$1,000 for willful release of confidential mental health records); RCW 9.26A.140(4) (actual damages or \$5,000 per violation, whichever is greater, for unauthorized sale of telephone records); RCW 19.270.060(1) (actual damages or \$100,000 per violation, whichever is greater, for computer spyware statutory violations).

c. Other states have held that mandatory statutory damages provisions do not violate due process.

In a unanimous decision, the Illinois Supreme Court ruled there was no due process violation where the Legislature chose a \$100 per day penalty to encourage prompt payment of child support withholdings which resulted in a \$1,172,100 judgment against an employer. *In re Marriage of Miller*, 879 N.E.2d 292 (Ill. 2007). In *Miller*, the employer appealed claiming the statutory penalty violated his due process rights under both the federal and state constitutions because the judgment was “grossly exaggerated and out of proportion to the severity of his conduct.” *Id.* at 300.

The Illinois Supreme Court followed the U.S. Supreme Court’s decision in *Williams* concluding that:

In determining the ultimate question of whether the [Legislature’s \$100 per day] statutory penalty conflicted with the due process clause, *the Supreme Court acknowledged the ‘wide latitude of*

discretion' states possess in prescribing penalties for violations of their laws

Id. at 301 (citation omitted; emphasis added). The Illinois Supreme Court then directly addressed the employer's claim that the penalty was excessive.

We recognize that the individual daily penalties amassed by [the employer] produce a weighty sum when aggregated. *[The employer], however, could have avoided the imposition of any penalties simply by complying with his statutory obligation*

Id. at 302 (emphasis added). Again, the Growers could have avoided liability in this case had they investigated whether Global had a valid Washington Farm Labor Contractor license, and refused to hire Global after determining that it did not. ER 169.

Lastly, the Illinois Supreme Court expressly refused to consider the financial impact the judgment would have on the employer.

[The employer] alludes to the dire financial consequences to him if the circuit court's judgment is upheld, but he offered no evidence on this issue in the trial court. This aside, *we decline to judge the constitutionality of the penalty here with reference to [the employer's] assets. Our lawmakers are under no obligation to make unlawful conduct affordable, particularly where multiple statutory violations are at issue.*

Id. at 302-03 (emphasis added). Here, likewise, the Growers' financial circumstances or the consequences to them of being held accountable as required by FLCA are not appropriate considerations in evaluating the constitutional due process protections. Moreover, it bears noting that the

\$1.1 million penalty upheld by the Illinois court went to *one* plaintiff, while the \$1.9 million statutory damage award would be *divided* among 650 farm workers, each of whose rights under FLCA were repeatedly violated.

Similarly, the Missouri Supreme Court unanimously upheld the Missouri Legislature's right to impose a statutorily mandated \$5,000 per violation award for violating Medicaid billing laws. In *State v. Spilton*, 315 S.W.3d 350 (Mo. 2010), an individual appealed a \$1.6 million civil penalty (325 statutory violations x \$5,000 per violation) claiming, in part, that it violated due process under the Missouri and U.S. Constitutions. *Id.* at 353.

The Missouri Court also ruled that the state legislature has "wide latitude to decide the severity of civil penalties for violations of the law" and that statutory civil penalties are "different than jury-imposed punitive damages because statutes define, *in advance*, 'the prohibited conduct and . . . the legislative prescribed penalty.'" *Id.* (citations omitted; emphasis added).

Based on the deferential standard set forth in the Supreme Court's *Williams* decision and the multiple federal and state court decisions outlined above, the Workers respectfully request that this Court answer the second certified question in the negative. Upholding the Legislature's

decision to protect Washington farm workers by providing for mandatory statutory damages of \$500 per violation per person is consistent with Washington public policy and does not violate due process under the Washington constitution.

D. **FLCA's "Aggrieved by a Violation" Language Under RCW 19.130.170(1) Is a Minimal Standing Requirement.**

The language of FLCA providing that "any person aggrieved by a violation of this chapter" may seek relief, RCW 19.30.170(1), is a term of art expressing the conventional standing requirement permitting any person "aggrieved" by a violation of the statute to seek relief. All that is required is a showing that a person seeking relief falls within the group of persons or zone of interests that the statute was created to protect and that a defendant violated his or her rights under FLCA. A person who has not been "aggrieved" by a statutory violation under this standing provision cannot be awarded statutory damages under FLCA.

RCW 19.30.170(1) deals with standing to sue, venue, and the statute of limitations for civil actions under FLCA. It provides in pertinent part that "any person *aggrieved* by a violation of this chapter . . . may bring suit in any court of competent jurisdiction of the county in which the claim arose, or in which either the plaintiff or respondent resides . . ."

RCW 19.30.170(1) (emphasis added). It is followed by the provision in

FLCA dealing with civil remedies, RCW 19.30.170(2), which, as discussed above, provides for “damages up to and including an amount equal to the amount of actual damages, *or* statutory damages of five hundred dollars per plaintiff per violation, *whichever is greater.*” RCW 19.30.170(2) (emphasis added). Significantly, the term “aggrieved” does not appear in the remedies language of subparagraph (2), but rather, it is only used in subparagraph (1) in connection with standing. RCW 19.30.170(1) & (2).

FLCA’s standing provision is no different from the standing provisions in any number of other Washington statutes that use virtually identical language to allow “any person aggrieved” to bring a court action or seek other legal relief. *See, e.g.*, RCW 13.04.033(1) (Basic Juvenile Court Act – providing that “[*a*]ny person *aggrieved* by a final order of the court” may appeal) (emphasis added); RCW 15.58.345 (Washington Pesticide Control Act – providing that “*any person aggrieved* by a violation of this chapter” may sue in a court of competent jurisdiction) (emphasis added); RCW 17.21.340(2) (Washington Pesticide Application Act – providing that “*any person aggrieved* by a violation of this chapter” may bring a civil action) (emphasis added); RCW 19.58.050 (Motion Picture Fair Competition Act – providing that “[*a*]ny person *aggrieved* by a violation of this chapter may bring a civil action in superior court”)

(emphasis added); RCW 70.24.084(1) (Control and Treatment of Sexually Transmitted Diseases Act – “*Any person aggrieved* by a violation of this chapter shall have a right of action in superior court”) (emphasis added).

As with these other virtually identical standing provisions, RCW 19.30.170(1)’s provision is a standing requirement, and nothing more. As such, all the statute requires is that persons suing for statutory damages or other relief under FLCA be able to show that they were “deni[ed] some personal or property right [created by the statute], legal or equitable.” *State of Washington v. A.M.R., B.D. 03-15-83*, 147 Wn.2d 91, 95 (2002) (discussing meaning of “aggrieved” as used in Basic Juvenile Court Act, RCW 13.04.033(1), and holding that all that “aggrieved” required was “denial of some personal or property right, legal or equitable”) (citations omitted); *see also FEC v. Atkins*, 524 U.S. 11, 19 (1998) (noting that “*History associates the word ‘aggrieved’ with a congressional intent to cast the standing net broadly*” and holding that voters were “aggrieved” within meaning of the Federal Election Campaign Act and had standing to challenge an organization’s failure to meet registration and reporting requirements, despite their failure to show any injury to them, because as citizens they were “aggrieved” by the organization’s lack of registration and reporting and they were within the zone of interests protected by the statute) (emphasis added); *State of*

Washington v. A.M.R., 147 Wn.2d at 95 (noting “[t]he breadth of the phrase ‘any person aggrieved’”).

The decision in *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983), is particularly instructive in terms of standing requirements to protect the statutory rights of farm workers. The statute at issue there, the Farm Labor Contractor Registration Act (“FLCRA”), had a standing provision similar to the provision in Washington’s FLCA which “authorize[d] suit by ‘[a]ny person claiming to be aggrieved’ by a violation of the Act.” *Id.* at 1336. The defendant admitted that it had failed to give replacement farm workers written notice of a strike as required by the statute, but argued that the striking workers, the ones who filed suit, had not shown they were injured by the statutory violation and thus lacked standing to sue. *Id.* at 1336-38. The Ninth Circuit rejected that argument, holding: “***The striking farm workers] were in the group of persons the right was created to protect. Invasion of the right was sufficient injury to establish standing in such persons; no other injury was required.***” *Id.* at 1338 (emphasis added); *see also Davis Forestry Corp. v. Smith*, 707 F.2d 1325, 1327-29 (11th Cir. 1983) (“aggrieved” language in FLCRA is a standing issue and farm labor contractor did not fall within the zone of protection because “FLCRA was designed to alleviate a parade of horrors being inflicted upon farm laborers” not contractors); *Alvarez v. Joan of Arc, Inc.*,

658 F.2d 1217, 1223-24 (7th Cir. 1981) (farm workers alleged damages for violations of the federal FLCRA and the district court found merit in their claims so they were persons “claiming to be aggrieved” and had standing to sue).

Mendoza v. Wight Vineyard Management, 579 F. Supp. 268 (N.D. Cal. 1984), is also on point. The statute at issue there, the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”), allowed farm workers to sue as “aggrieved parties” based on violations of the statute. *Id.* at 269. The *Mendoza* court held that the farm workers had standing to sue for statutory violations by virtue of the fact that they were within the group of persons specifically protected by the statute and they alleged violations of their statutory rights. As the court stated, “[s]ince the [farm workers] fall within the group of persons who are protected under the Act, we find that they have standing to sue under the Act.” *Id.* at 270.¹³

¹³ See also, e.g., *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (“[t]he actual or threatened injury required . . . may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing”); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973) (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute”); *Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 656 (9th Cir. 2011) (“It is well established that less tangible forms of injury, such as the deprivation of an individual right conferred by statute, may be sufficiently particularized” to confer standing).

In short, based on well-established standing jurisprudence, FLCA's "aggrieved by a violation" language is a minimal standing requirement which is fully met by showing that the persons suing are within the group or zone of interests intended to be protected by FLCA, and that a right or rights created for their benefit under the statute have been violated.

VI. CONCLUSION

The Washington Legislature amended FLCA to provide fixed statutory damages for violations of the statute, just as it has done in a host of other statutes, and it made a policy decision to hold users of unlicensed farm labor contractors liable to the same extent as the contractors themselves. The Workers respectfully request that this Court uphold those policy decisions by the Legislature and answer these certified questions by holding that: (1) FLCA requires a court choosing the remedy of statutory damages to award fixed statutory damages of \$500 per violation; (2) the Legislature's choice of statutory damages of \$500 per violation to protect the rights of farm workers is supported by the public policy of this State and is consistent with due process under the State Constitution; and (3) the language of FLCA permitting "any person aggrieved" by a violation of the statute to obtain relief is a conventional standing requirement that simply requires that persons seeking relief fall within the zone of interests that the

statute was created to protect and demonstrate a violation of their rights
under FLCA.

DATED this 11th day of January, 2012.

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