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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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I. INTRODUCTION

The Workers respectfully ask this Court to answer the certified questions by finding (1) that the plain language of FLCA provides that a court choosing to award statutory damages must award statutory damages of \$500 per plaintiff, per violation; (2) that such awards are consistent with Washington's public policy to protect exploited farm workers and comport with due process; and (3) that in order to recover statutory damages under FLCA, a person must be "aggrieved" by a violation of the statute which merely requires that a person fall within the group of persons that the statute was created to protect and that a defendant violated his or her rights under the statute.

Farm workers perform back-breaking work under harsh conditions. Most live paycheck-to-paycheck, and steady, year-round work is rare. Here, Global violated the rights of farm workers, embodied in FLCA, by engaging in an elimination scheme, the goal of which was to replace the Workers with captive H-2A workers from Thailand. This appeal is not about a pay stub violation, as the Growers would have this Court believe. Global's unlawful practices were multiple and compound, and eliminated the Workers from the work force based on fabricated reasons and unattainable work standards. Through its violations, Global also sought to prevent the Workers from receiving information they needed to question

these practices. Global did not simply violate the law — they deprived the Workers of their livelihood and their dignity. FLCA appropriately and constitutionally mandates that the Workers are entitled to statutory damages of \$500 for each of the undisputed violations.

II. ARGUMENT

A. **The Certified Questions Are Questions of Law that Should Be Answered Based on the Certified Record and the Pertinent Facts Which Are Undisputed.**

Certified questions are questions of law that should be answered based on the certified record provided by the federal court. *See Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011). Here, the pertinent facts are undisputed. The Growers knowingly hired an unlicensed farm labor contractor, Global Horizons, which committed multiple violations of FLCA. However, in an attempt to garner sympathy to bolster their weak legal arguments, the Growers offer a lengthy “Background” discussion that re-writes the record by portraying the Growers as innocent bystanders and the Workers as lazy and undeserving. *See Growers’ Opp.* at 4-5. While the Ninth Circuit’s statement of facts fully frames the certified questions, *see Dkt. Entry 76* at 4-10, the Workers

are compelled to respond to the distortion of the factual record, lest the Court misunderstand the extent of the Growers' culpability in this case.¹

Evidence that the Growers and Global jointly planned to replace local workers with a more exploitable workforce from Thailand includes two virtually identical letters written in early January, 2004, weeks before work began in the orchards. ER 290 & 291. In these letters, Global's CEO, Mordechai Orian, alerts the Growers to a problem and exhorts them to "stay the course." *Id.* The "problem" identified by Mr. Orian was that Global had received "a large response" from local workers with "extensive experience" that they would be "forced" to hire. *Id.* Mr. Orian assured the Growers that his company would "eliminate" the workers and then apply to the Department of Labor "to bring [in] foreign labor (Thailand workers) thus creating the labor outcome we discussed." *Id.*

This unlawful "elimination process" was best described by Ebony Williams, the former operations manager for Global. Ms. Williams admitted that "[t]he elimination process was getting rid of the local workers basically so we could get H-2A approval." ER 338 & 338-A.

¹ See also Dkt. Entry 40-1 at 8-14 (Workers' statement of facts on appeal) & Dkt. Entry 55-1 at 1-2 (Workers' supplemental statement of facts identifying the Growers' factual contentions which were contrary to or unsupported by the record).

Although the January letters alone demonstrate the Growers' knowledge of the joint plan, Ms. Williams confirmed it in her testimony:

They [the Growers] knew we wouldn't be able to get the H-2A approved if we kept all the local workers and they didn't want that to happen, which is maybe why they were also saying that we didn't meet the production or they were moving too slow.

ER 344.

According to the Growers' revisionist history, eliminating local workers was not a joint plan hatched by them and Global prior to local workers starting work. Instead, the Growers suggest, it was an unfortunate business decision taken after the work began in response to Global's hiring of unskilled local workers who proved to be unproductive. Growers' Opp. at 4. Citing the January letters, the Growers state that "[a]fter the Growers expressed concern about the quality of work, Global promised to eliminate workers who were unable to adequately perform the orchard work." Growers' Opp. at 5 (emphasis added).

As conclusive proof that these letters were written *before* the workers started work, the Workers direct the Court to Global's billing records which show that work began in the Growers' orchards at the end of January. ER 280 & 283.

Based on these and other facts, the district court and the jury declined to find that the Workers were inadequate, and instead found that

the planned elimination scheme succeeded — Global failed to hire, laid off and fired the Workers to permit captive H-2A workers from Thailand to take their place. Dkt. Entry 76 at 5-10; ER 56, 77 & 251-52.

Just as the Growers knew Global was unlicensed and continued using Global's services for months during harvest (ER 169)², the Growers were in on the unlawful "elimination process" from day one. The Growers' efforts to distance themselves from or justify Global's unlawful acts are ill-conceived and unavailing.

B. A Court Choosing to Award Statutory Damages Under FLCA Must Award Statutory Damages of \$500 Per Violation.

1. The Plain Language of FLCA Requires a Court Choosing to Award Statutory Damages to Award \$500 Per Violation.

Both parties urge this Court to determine the meaning of FLCA's remedies provision based on its plain language. The Growers' characterization of the Workers' analysis as an argument based on the "strained reliance on a comma," Growers' Opp. at 26, however, ignores

² During this same time period, the Growers permitted Global to use H-2A workers in their orchards without the required approval by the federal government. Dkt. Entry 76 at 5-10; ER 158-59; *see also* ER 168 (the Growers had control and oversight over the day-to-day working conditions of Global's workers).

the full scope of the Workers' plain language argument, which relies on *all* of the language of the provision. *See* Opening Brief at 7-17.

As used in FLCA's remedies provision, the term "may" gives the courts discretion to choose to award among the civil remedies provided:

[T]he court . . . may award damages *up to* and including an amount equal to the amount of actual damages, **or** statutory damages of [~~up to~~] five hundred dollars per plaintiff per violation, *whichever is greater*³

RCW 19.30.170(2) (emphasis added). The question is not whether the term "may" grants discretion, but whether it grants discretion to award statutory damages of less than \$500 when a court chooses to award statutory damages. FLCA requires an award of \$500 per violation when statutory damages are chosen, as demonstrated by (1) the phrase "up to," which only modifies the term "actual damages," and is set apart by a comma *and* the disjunctive word "or" from the term "statutory damages"; (2) the omission of a second "up to" after "statutory damages" and before

³ The Growers suggest that a court might award "equitable relief" of less than \$500 per violation under the final clause of RCW 19.30.170(2), which provides for "other equitable relief." *See* Growers' Opp. at 17 n. 6. The Ninth Circuit's certified question presupposes, however, that a court has "cho[sen] to award statutory damages" and does not ask this Court to address when or under what circumstances a court might make an alternative award as "other equitable relief." *See* Dkt. Entry 76 at 4. Moreover, the Growers have provided no Washington precedent holding that equitable relief may include monetary damages, and the Workers are aware of none. *See also* Dkt. Entry 65-1 at 4-5 (Ninth Circuit's original decision discussing Washington law as consistent with the general rule that equitable relief is distinct from money damages).

“five hundred dollars” to modify the term “five hundred dollars”; and (3) the inclusion of the phrase “whichever is greater.” Applying the rules of grammar, giving effect to all of the words used in the statute, and not supplying words that the Legislature did not include, the necessary interpretation is that a court choosing to award statutory damages does not have discretion to award less than \$500.

Without any supporting authority, the Growers argue that the language “whichever is greater,” which compares “actual damages” to “statutory damages, means that a court has discretion to award a range of statutory damages, summarily dismissing three contrary holdings interpreting analogous civil remedies provisions. *See* Growers’ Opp. at 22 (discussing *Kehoe v. Fidelity Federal Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005), *Robinson v. Fulliton*, 140 S.W.3d 312 (Tenn. App. 2003), and *First Nat. Collection Bureau, Inc. v. Walker*, 348 S.W.3d 329 (Tex. App. 2011)). The Growers’ efforts to distinguish these cases are unpersuasive.

Each of these cases involves the interpretation of a provision commencing with the term “may” which provides options for awarding actual damages or fixed amounts of statutory damages. *See* Opening Brief at 10-12. In each, the court held that the inclusion of discretion-limiting language in the statute’s comparison of actual damages to statutory damages — *i.e.*, “not less than,” “the greater of,” or “*whichever is*

greater” — required an award of the fixed amount of statutory damages specified, and not a range of statutory damages *up to* the fixed statutory amount. *See Kehoe*, 421 F.3d at 1216-17; *Robinson*, 140 S.W.3d at 324; *Walker*, 348 S.W.3d at 346. Based on this plain language, as the Ninth Circuit concluded in its original decision, Dkt. Entry 65-1 at 3-4, the Legislature’s instruction that a court “may” award *either* “damages up to and including an amount equal to the amount of actual damages” *or* “statutory damages of \$500 per plaintiff per violation” — “whichever is greater” — allows courts to make that binary choice, but it does not allow them to award statutory damages of less than the fixed amount of \$500 per violation as provided in the statute.⁴

2. The Legislature Amended FLCA in 1985 Because the Existing Federal Remedies Did Not Adequately Protect Farm Workers.

The Growers contend that the “most persuasive authority” on the interpretation of FLCA’s statutory language is the language of the now-superseded Farm Labor Contractor Registration Act (“FLCRA”) and the

⁴ As a remedial statute intended to protect farm workers, FLCA should be liberally construed in favor of the workers it was intended to protect. *See* Opening Brief at 8; *see also Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007) (remedial statutes protecting workers should be liberally construed to further their intended purpose). As the Growers note, this rule of construction is distinct from the rule of strict construction that applies to provisions which impose fines or penalties, rather than statutory damages. *See* Growers’ Opp. at 22 n. 8.

federal case law interpreting that statute, and in particular, *Alvarez v. Longboy*, 697 F.2d 1333 (9th Cir. 1983) (“*Longboy*”). Growers’ Opp. at 23-24. The Growers’ reliance on *Longboy* demonstrates the weakness of their argument and is misplaced in three fundamental respects.

First, Congress repealed FLCRA and replaced it with AWPFA in 1983. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1303 n.1 (9th Cir. 1990). Unlike FLCRA, AWPFA added a second “up to” phrase specifically providing that a court may award a range of statutory damages:

. . . it 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 (emphasis added).

Second, before AWPFA added the second “up-to” phrase, the Ninth Circuit found that FLCRA’s statutory damages clause was ambiguous and therefore considered its legislative history. *Longboy*, 697 F.2d at 1339. The court found that FLCRA’s legislative history “cut in both directions.” *Id.* In contrast, FLCA’s legislative history points in one direction. The initial draft of FLCA, like AWPFA, included a second “up to” phrase modifying statutory damages; the Legislature removed that phrase from *all* subsequent drafts and the final law. *See* Opening Brief at 15-16.

“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). The Legislature is also presumed to have knowledge of the federal law in the area in which it is legislating. *Dailey v. North Coast Life Ins. Co.*, 129 W.2d 572, 577, 919 P.2d 589 (1996). Finally, omissions from statutes are deemed to be exclusions. *Adams v. King Co.*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008). The Growers ignore these established canons of statutory construction,⁵ and thus ignore the significance of the Legislature’s striking of the second “up to” phrase modifying statutory damages.

Third, the Washington Legislature chose to follow Oregon’s lead and amended FLCA in 1985 to create a state law remedy with fixed statutory damages because the federal law was not adequately protecting farm worker rights. Part of the legislative history includes affidavits from farm workers whose rights were violated by labor contractors and who,

⁵ In response to the Workers’ discussion of FLCA’s legislative history, the Growers rely almost exclusively on *King County v. Taxpayers of King County*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985). Growers’ Opp. at 26-28. *King County* is inapposite, because it deals with statements made by proponents of a ballot measure, not the legislative process. The recognized means of determining legislative intent, through consideration of sequential drafting history, presumptions about the Legislature’s awareness of existing law, and the documents and testimony offered and relied upon in support of the legislation that may be appropriately considered, are similarly not refuted or even addressed by the Growers. See Opening Brief at 15-21.

after filing suit under federal law, were left with paper judgments because the contractor either disappeared or was insolvent. Dkt. Entry 40-4 at 29-30, 33 & 45-56. The workers asked the legislature to create a meaningful state law remedy. *Id.*

Modeling the 1985 FLCA amendments after the Oregon law, the Legislature included (1) a private right of action, including the amended civil remedies provision at issue here; (2) a provision imposing liability for knowingly using unlicensed farm labor contractors, as the Growers did in this case; and (3) mandatory bonding and disclosure provisions, all intended to protect the rights of farm workers and afford them remedies not available under federal law. *See* Opening Brief at 17-20. Of particular note, in the remedies provision, unlike *any* federal law protecting farm workers, the Legislature chose to include the phrase “whichever is greater,” consistent with the Oregon statute which similarly provides actual damages or statutory damages of \$1,000, “whichever amount is greater.” ORS § 658.453(4).⁶

⁶ While not every member of the Washington House Committee was familiar with the Oregon law, as demonstrated by a legislator’s request for a copy of the Oregon statute in the hearing process, the bill sponsor compared the FLCA amendments to “almost identical” Oregon law, staff counsel prepared a memo comparing the FLCA amendments to Oregon law, and the legislative history includes a marked up copy of the Oregon act. *See* Opening Brief at 19; *see also* Philip A. Talmadge, *A New Approach to Statutory Interpretation in Washington*, 25 Seattle U. L. Rev.

By striking the second “up to” which had been included in the initial draft of the 1985 FLCA Amendments, and which had been included in the federal statute, AWPAs, and by also including the phrase “whichever is greater” from Oregon’s statute containing fixed statutory damages, the Legislature provided that courts choosing to award statutory damages were required to award farm workers fixed damages of \$500 for violations of FLCA.

C. The Growers Rely Exclusively on Inapposite Punitive Damage Case Law and Fail to Address the Workers’ Statutory Damage Authority That Demonstrates the Legislature’s Choice of Fixed Statutory Damages of \$500 Is Consistent with Washington’s Public Policy and Its Constitutional Guarantees of Due Process.

The proper due process test for determining the constitutionality of the Legislature’s decision to provide \$500 in statutory damages for FLCA violations is set forth in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). The U.S. Supreme Court, through *Williams*, instructs reviewing courts to first give the legislative body “wide latitude” to choose the statutory damage amount, and then to focus on three issues: (1) the interests of the public; (2) the numberless opportunities for committing the offense; and (3) the need to secure uniform adherence to the law. *Id.* at 66-67. Courts are proscribed from comparing the economic loss or the

179, 186-87 (2001) (“That some legislators lack personal knowledge related to the contents of bills in no way diminishes the potency of the statute’s legislative intent.”).

harm suffered by the plaintiff to the dollar amount chosen by the legislature. *Id.* (the statute’s “validity *is not* to be tested in that way” as “the Legislature may adjust its amount to the public wrong rather than the private injury”) (emphasis added). Instead, after reviewing the three factors, courts are to decide if the amount chosen is “so severe and oppressive” as to be “wholly disproportionate to the offense or obviously unreasonable.” *Id.*

The Legislature chose statutory damages of \$500 per violation to protect the FLCA rights of farm workers. RCW 19.30.070(2). Those rights include, among others: prompt payment of wages; accurate record-keeping; written job disclosures; prohibiting false or misleading representations; and, compliance with legal agreements. RCW 19.30.110-.120. The Growers attempt to diminish all the FLCA rights, by pointing in isolation to the pay stub violation in which Global failed to include its name, address, and telephone number on wage documentation provided to Workers. Growers’ Opp. at 1. This violation must be placed in context. Global was stealing wages from low-income farm workers a few dollars at a time (much as the railroad company was charging excess fares in *Williams*) by removing non-existent Washington taxes out of their paychecks. ER 162. Global was also firing and laying off the large pool of local workers in order to fabricate a labor shortage so that it could

import H-2A workers from Thailand. Dkt. Entry 76 at 5-10; ER 56, 77 & 251-52. The last thing Global needed was workers calling and complaining about these practices, and the best way to ensure that would not happen was to keep workers in the dark by failing to include its contact information on the pay stubs. Global followed the same pattern, when it failed to provide written employment disclosures advising workers of their right to assert a claim against Global's bond. ER 49-50 & 154, WSER 185-86; RCW 19.30.110(7)(I). Considered in that context, the pay stub violation was just another part of the scheme designed to keep Global's unlawful activities from being exposed. The Legislature's choice of \$500 per FLCA violation, to protect the public from Global's numberless schemes and to promote compliance with the law was not "wholly disproportionate or obviously unreasonable" to these multiple FLCA offenses.

The Growers effectively concede that FLCA's statutory damages provision passes constitutional muster under the *Williams* standard outlined above, as they fail to address it and the established line of statutory damages cases that have applied and followed *Williams*. See Opening Brief at 22, 26-29 & 32-35. Instead, the Growers construct their entire argument on the faulty premise that statutory damages and punitive

damages are identical, and thus, that U.S. Supreme Court case law addressing limitations on punitive damages is controlling.

The Growers' brief immediately falters by claiming *Williams* has "evolved" and due process standards are now set forth in two punitive damage case law decisions — *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) ("*Gore* and *Campbell*"). See Growers' Opp. at 31. This contention is essentially an argument that *Gore* and *Campbell* somehow overruled *Williams*. No case law supports that argument, and recent case law demonstrates that *Williams* is still the proper test.

In *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011), after extensive briefing on whether *Williams* or *Gore* applied to statutory damage awards, including a Justice Department *amicus* brief arguing that *Williams* was the proper test, the First Circuit wrote:

We note that in *Gore*, the Supreme Court did not overrule *Williams*. Nor has the Supreme Court to date suggested that the *Gore* guideposts should extend to constitutional review of statutory damage awards.

Id. at 513 (citations omitted); see also *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007), *cert. denied*, 553 U.S. 1032 (2008) ("We know of no case invalidating such an award of

statutory damages under *Gore* or *Campbell*."); *In re Marriage of Miller*, 879 N.E.2d 292, 301 (Ill. 2007) ("The principles underlying the *Williams* decision still have vitality today.").

The Growers' reliance on *Vasudeva v. United States*, 3 F. Supp. 2d 1138 (W.D. Wash. 1998), *aff'd*, 214 F.3d 1155 (9th Cir. 2000), is also misplaced.⁷ In *Vasudeva*, the court upheld civil fines against store owners whose employees were trafficking food stamps. The owners argued *Gore*'s punitive damage test applied because the fines were "disproportionate to the harm caused" and the owners had no knowledge of their employees' criminal behavior. *Id.* at 1139 & 1146. The court refused, writing, "The cases cited by the [owners] construing the Due Process Clause are unpersuasive." *Id.* at 1146. Thus, in *Vasudeva*, the court expressly rejected the use of the *Gore* factors in its evaluation of the statutory penalties imposed in that case.

⁷ The Growers also cite *State v. WWJ Corp.*, 138 Wn.2d 595 (1999), and *Planned Parenthood Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005). Growers' Opp. at 33. This Court's ruling in *WWJ*, supports the Workers' due process arguments, as previously discussed. *See* Opening Brief at 29-32. *Planned Parenthood Columbia/Willamette* provides no support for the Growers, as it involves a straightforward review of a jury's punitive damage award. *Id.* at 953-62. It does not discuss *Williams* or in any way compare or equate the jury-awarded punitive damages at issue in that case with the legislatively-determined statutory damages at issue here. *Id.*

Finally, application of the *Gore* punitive damages test to FLCA statutory damage awards would subvert the Legislature's mandate to hold users of unlicensed contractors accountable. As the Legislature provided:

Any person who *knowingly* uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor *to the same extent and in the same manner* as provided in this chapter.

RCW 19.30.200(emphasis added).

The Growers argue that the Workers cannot meet the first prong of *Gore's* punitive damage test because the Growers' behavior was not "reprehensible." *See* Growers' Opp. at 34-36. The principal bad actor in every FLCA case is the fly-by-night farm labor contractor, while the agricultural employer who hired the contractor invariably feigns ignorance of the contractor's violations. If the Growers' scapegoating argument were successful, it would provide users of unlicensed labor contractors a virtually unassailable defense that would eviscerate the Legislative protections embodied in RCW 19.30.200.

Furthermore, to impose user liability under FLCA, the *only* proof required is that the user "knowingly" hired an unlicensed farm labor contractor. RCW 19.30.200. The Workers proved that the Growers knowingly hired Global in 2004, and the Growers never contested or appealed that legal determination. They should not be allowed to avoid

the consequences of their violations by seeking refuge in inapplicable punitive damages case law.

Applying the second prong of the punitive damage test to a fixed statutory damage award statute like FLCA would also produce absurd results. The second prong mandates a court to review “the ratio between the plaintiff’s compensatory damages and the amount of the punitive damages.” *Gore*, 517 U.S. at 560. Yet the Growers concede that “plaintiffs need not prove actual damages to collect statutory damages under FLCA.” Growers’ Opp. at 37. Therefore, there is no compensatory damages amount that would enable the calculation of a ratio, and no basis for Washington courts to make such a determination in a case such as this one.⁸

The third prong of the punitive damages test also makes no sense when reviewing statutory damages provisions. Implicit in the third prong is “whether the offender had fair notice that the offensive conduct could potentially incur such a high amount of penalties or damages.” *State v.*

⁸ Even if the actual damages were quantified and the second prong could be applied, Judge Whaley, the trial judge, found that, “Based on the award to the class representatives at trial, the possible award to the rest of the class for lost wages could have exceeded \$2,000,000 for the denied work sub-class alone.” ER 8. The claims at trial were based on an overlapping federal discrimination claim and a FLCA claim. ER 251-55. Therefore, for just one FLCA violation for one of the sub-classes, the potential actual damages exceeded the entire amount of the statutory damages sought by the Workers.

WWJ Corp., 138 Wn.2d 595, 606, 980 P.2d 1257 (1999). Because statutes inform the public in advance what the financial consequences will be if the law is violated, prior notice is never an issue. In *WWJ*, this Court concluded the defendant had “full and fair statutory notice” since the statute spelled out that each violation of the Mortgage Act could result in a \$2,000 civil fine. *Id.* at 607; *see also Sony BMG Music*, 660 F.3d at 513 (“The concerns regarding fair notice to the parties of the range of possible punitive damage awards present in *Gore* are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award.”). The Growers have been on notice since 1985 that FLCA violations could result in statutory violations of \$500 per plaintiff, per violation, if they knowingly used an unlicensed farm labor contractor.

For all these reasons, the Court should conclude that an award of fixed statutory damages of \$500 per plaintiff per violation as provided in FLCA is consistent with Washington’s public policy, and comports with due process standards governing statutory damages as articulated by the U.S. Supreme Court in *Williams*.

D. FLCA's Provision Allowing Suit by "Any Person Aggrieved by a Violation" Is a Standing Requirement That Requires a Showing that Persons Seeking Relief Fall Within the Zone of Interests Protected by the Statute and that a Defendant Violated Their Statutory Rights.

The parties agree that a person must be "aggrieved by a violation" of FLCA in order to obtain relief under the statute. *Compare* Opening Brief at 35 *with* Growers' Opp. at 42. The Workers have demonstrated, both through Washington case law and by reference to other Washington statutes containing virtually identical standing provisions, that FLCA's provision allowing suit by "any person aggrieved by a violation," RCW 19.30.170(1), is a conventional standing requirement which requires a showing that persons seeking relief under the statute fall within the zone of interests protected by the statute and that the defendant violated their statutory rights. *See* Opening Brief at 35-40. The Growers do not rebut, or even address, these cases and analogous statutory provisions.

Instead, the Growers wrongly suggest that the Workers have not shown that absent class members were "aggrieved." Citing nothing, the Growers argue that the Workers seek statutory damages for "hundreds of absent class members about whom plaintiffs provided no evidence whatsoever," and that they "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).” Growers’ Opp. at 43.

Again, the Growers’ assertions are baseless. The Workers compiled and submitted evidence which the district court admitted to prove that Global engaged in systematic violations of FLCA which in some cases violated the rights of all class members, and in other cases only violated the rights of specific members of the Green Acre and Valley Fruit subclasses. *See* Dkt. Entry 76 at 5-10 (Ninth Circuit’s statement of facts in certification order); *see also* ER 154-173 & 200.⁹

For example, when Global violated the FLCA by failing to pay \$19 per bin to local workers in the pear harvest, the Workers only sought statutory damages for the 24 class members who were picking pears at Valley Fruit Orchards at that time. ER 200 (FLCA Damage Chart submitted by Workers at the statutory damages bench trial in 2010).¹⁰ Similarly, the Workers submitted wage records linking the FLCA

⁹ The specific evidence introduced by the Workers is not part of the record on appeal, because the Growers did not appeal these issues. However, the enormity of evidence submitted by the Workers in support of summary judgment is referenced in the record. *See* ER 576-77 (referencing Dkt. 467-69 & Exhibits A-XX, totaling nearly 700 pages of supporting evidence).

¹⁰ *See* FLCA Damage Chart, FLCA Violation No. 10; *see also* fn. 7 thereto, which references the exhibit submitted by the Workers that established the statutory violation as to each of the 24 workers.

violation that Global deducted non-existent Washington State income taxes (wage theft) to the specific class members whose rights were violated. Dkt. Entry 76 at 8-9; ER 160; ER 200 (FLCA Violation No.8 and fn. 5, limiting that statutory violation to those 121 class members).

At the 2007 jury trial involving the sole FLCA claim not resolved at summary judgment, the Workers submitted more than one hundred exhibits and put on testimony from all sub-classes to prove Global systematically refused to hire, fired, or laid off all class members. *See* WSER 104-18 & 125-27 (list of Workers' trial witnesses); ER 396-404 (Workers' list of proposed trial exhibits).

Finally, when the district court later determined statutory damages, the Workers again provided specific evidence about each class member and the particular statutory violations related to them, and the district court relied on this evidence to award statutory damages. ER 36-38¹¹, ER 53-55. Thus, contrary to the Growers' claims, the Workers provided ample evidence attributing the specific FLCA violation to the class members whose rights were violated.

¹¹ The district court identified class members and determined class membership almost exclusively based on Global's records, including wage and other employment records, which were amassed by the Workers and not contested by the Growers.

The Growers also cite *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), and say that “[a]bsent class members seeking to recover statutory damages must show that the particular violation affected them, *i.e.*, that they were ‘aggrieved.’” Growers’ Opp. at 44. The core of the Growers’ argument is their suggestion that this Court should require proof that a statutory violation caused actual damages or injury before a person may recover statutory damages. *Id.* Yet there is no such requirement under FLCA. Rather, FLCA’s remedies provision provides for statutory damages as an *alternative* to actual damages. See RCW 19.30.170(2) (providing 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*”) (emphasis added).

Once again, the plain language of FLCA demonstrates the fallacy of the Growers’ argument. If the Legislature had intended to require evidence of actual damages or injury as a prerequisite for recovering statutory damages, it would have so provided, and it would not have provided for statutory damages an alternative to actual damages.¹²

¹² See also, e.g., *Beaudry v. Telecheck Services, Inc.*, 579 F.3d 702, 705 (6th Cir. 2009) (interpreting remedies provision similarly providing that “‘Any consumer’ . . . may sue to recover ‘any actual damages . . . or damages of not less than \$100 and not more than \$1,000,’” and holding

Finally, federal courts interpreting the remedial provisions of AWPA which similarly provide for actual *or* statutory damages have uniformly ruled that statutory damages may be awarded without proof of actual injury. *See, e.g. Martinez v. Shinn*, 992 F.2d 997, 999 (9th Cir. 1993); *Herrera v. Singh*, 103 F. Supp. 2d 1244, 1248 (E.D. Wash. 2000); *Rodriguez v. Carlson*, 166 F.R.D 465, 479 (E.D. Wash. 1996).

Accordingly, this Court should answer the third certified question by holding that while FLCA does not provide for awarding statutory damages to persons who have not been “aggrieved by a violation,” RCW 19.30.170(1), “aggrieved” in this context is a conventional standing requirement. A person seeking relief is “aggrieved” and has standing to obtain statutory damages under FLCA if he or she falls within the group of persons or zone of interests that the statute was created to protect and shows that his or her statutory rights under FLCA were violated, as the Workers have amply showed in this case.

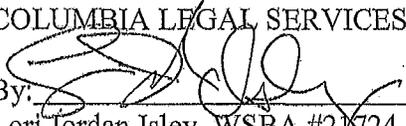
that “[b]ecause ‘actual damages’ represent an alternative form of relief . . . a claimant need not suffer (or allege) consequential damages”) (emphasis in original); *Kehoe*, 421 F.3d at 1213-16 (interpreting remedies provision which provided that persons who obtain, disclose or use personal information from motor vehicle records are liable for “actual damages, but not less than liquidated damages in the amount of \$2,500,” and holding that the “disjunctive” separation of “actual damages” from “liquidated damages” indicated legislature’s intent that liquidated damages require no showing of actual damages or injury).

III. CONCLUSION

The Washington Legislature amended FLCA to provide fixed statutory damages for violations of the statute, and made the policy decision to hold users of unlicensed farm labor contractors liable to the same extent as contractors. The Workers respectfully ask this Court to uphold these policy choices to protect farm workers as the law intends.

DATED this 13th day of February, 2012.

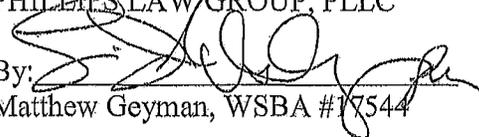
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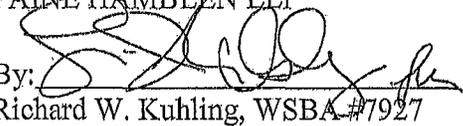
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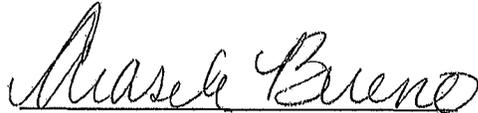
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