

Case No. 94229-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES DISTRICT  
COURT FOR THE WESTERN DISTRICT OF WASHINGTON

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MARIANO CARRANZA and ELISEO MARTINEZ, individually and on  
behalf of all others similarly situated,  
*Petitioners/Plaintiffs,*

v.

DOVEX FRUIT COMPANY,  
*Respondent/Defendant.*

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***AMICUS CURIAE BRIEF OF UNITED FARM WORKERS OF  
AMERICA AND MIGRANT CLINICIANS NETWORK IN  
SUPPORT OF PETITIONERS/PLAINTIFFS CARRANZA AND  
MARTINEZ***

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## I. Identity and Interest Amici Curiae

*Amicus curiae* United Farm Workers of America (“UFW”) represents thousands of migrant and seasonal farm workers in various agricultural occupations throughout the country, including Washington state. UFW seeks to improve the lives, wages, and working conditions of farm workers and their families through collective bargaining, cooperation with employers, worker education, state and federal legislation, impact litigation, and public campaigns. UFW participated as amicus before this Court in *Ana Lopez Demetrio v. Sakuma Bros. Farms*, 183 Wn.2d. 649, 355 P.3d 258 (2015), addressing certified questions concerning paid rest breaks for piece rate workers.

*Amicus* Migrant Clinicians Network (MCN) is a national organization with staff in Washington State. MCN pursues health justice for the mobile poor, with work that occurs at the intersection of poverty, mobility and health. Founded over 30 years ago, MCN has at its foundation the health and well-being of America’s farm workers and their families. Recognized as experts in farm worker morbidity, mortality and social determinants of health, MCN serves the nation’s 1400 federally funded health centers as well as numerous outreach and community-based organizations and clinics. MCN experts have direct experience in primary care with underserved populations and provide technical assistance in

areas of infectious disease, occupational and environmental health, maternal and child health, chronic illness care, violence prevention, behavioral health, oral health and bioethics. MCN also participated as *amicus* before this Court in *Ana Lopez Demetrio v. Sakuma Bros. Farms*.

## **II. Introduction**

The Washington Minimum Wage Act (MWA) has the express purpose of protecting the health, safety and welfare of the people of Washington. Through initiative, the Washington voters included agricultural workers in this protection, overcoming decades of legislative exclusion.

Farm workers have a greater need for MWA protection than most workers because agriculture is one of the most dangerous occupations nationally and in Washington State, and because most farm workers live and work in punishing poverty. Common hazards in agriculture include falls, exposure to hazardous substances, and heat-related illness. Farm workers compensated by a piece rate, such as an amount per bin or pound, face even higher risks because they must work as fast as possible to earn even poverty wages. The pressure to work rapidly results in unsafe conditions and practices throughout the agricultural industry.

When farm employers fail to pay their piece-rate employees for work not paid by the piece, such as training, meetings, and transportation between fields, the workers earn less for time working for their employer and face even more pressure to work as rapidly as possible. Washington's policy of protecting the health, safety and welfare of workers, and the remedial purpose of the MWA, require full compensation for piece-rate workers, including compensation for work that is necessary for the performance of jobs, yet not paid.

### **III. Statement of the Case**

*Amici Curiae* incorporate Plaintiffs' Statement of the Case by reference.

*Amici* will address the following questions that the federal district court certified to this Court:

1. Does Washington law require agricultural employers to pay their pieceworkers for time spent performing activities outside of piece-rate picking work (e.g., "Piece Rate Down Time" and similar work)?
2. If the answer to the above question is "yes," how must agricultural employers calculate the rate of pay for time spent performing activities outside of piece-rate picking work ( e.g., "Piece Rate Down Time" and similar work)?

#### IV. Argument

1. **The purpose of the Minimum Wage Act is to protect the health, safety and welfare of Washington residents, including farm workers.**

The Washington Legislature unambiguously stated that the purpose of the Minimum Wage Act (MWA) is to protect the health, safety and welfare of Washington residents:

Whereas the establishment of a minimum wage for employees is a subject of vital and imminent concern to the people of this state and requires appropriate action by the legislature to establish minimum standards of employment within the state of Washington, therefore the legislature declares that in its considered judgment *the health, safety and the general welfare of the citizens of this state require the enactment of this measure*, and exercising its police power, the legislature endeavors by this chapter to establish a minimum wage for employees of this state to encourage employment opportunities within the state. The provisions of this chapter are enacted in the exercise of the police power of the state *for the purpose of protecting the immediate and future health, safety and welfare of the people of this state.*

RCW 49.46.005(1) (emphasis added).

The MWA's protection did not extend to farm workers until 1988, nearly 30 years after initial passage of the Act. For most workers, the right to a minimum wage began in 1938, when Congress enacted the Fair Labor Standards Act (FLSA), a major component of the New Deal.<sup>1</sup> But

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<sup>1</sup> Marc Linder, *MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* 130 (1992).

Congress categorically excluded agricultural workers from FLSA coverage while including workers in nearly every other industry.<sup>2</sup> Southern Democrats dominated congressional leadership and southern agriculture depended on low-paid black laborers.<sup>3</sup> Southern members of Congress freely expressed their view that “[y]ou cannot put the Negro and the white man on the same basis and get away with it.”<sup>4</sup>

In 1959, Washington adopted its own minimum wage law, the MWA, which like the FLSA excluded farm workers. *See* Laws of 1959, ch. 294. The MWA excluded agricultural workers from the definition of “employee,” and thus from the protections of both minimum wage and overtime protections. Laws of 1959, ch. 294, § 1(5)(a).

Washington voters ended the MWA’s farm worker exclusion in 1989, after decades of unequal treatment. The voters passed Initiative 518, which specifically raised the minimum wage and added coverage of agricultural workers. *See* Laws of 1989, ch. 1, §1. The specific intent to cover farm workers is demonstrated by the ballot language: “Shall the state minimum increase from \$2.30 to \$3.85 (January 1, 1989) and then to

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<sup>2</sup> Linder *supra*, at 153-54; Pub. L. No. 75-718 § 13(a)(6), 52 Stat. 1060 (codified as 29 U.S.C. §213(a)(6) (1938)).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 155.

\$4.25 (January 1, 1990) *and include agricultural workers?*”<sup>5</sup> Thus, the voters extended the MWA’s protection of health, safety and welfare to agricultural workers.

Full and effective implementation of the MWA’s protection of farm workers is necessary to fulfill the Act’s remedial purpose:

[M]inimum wage laws have a remedial purpose of protecting against “the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health,” *United States v. Rosenwasser*, 323 U.S. 360, 361, 65 S. Ct. 295, 89 C (1945) (quoting S. Rep. No. 884, at 4 (1937)), and “to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage,” *Walling*, 330 U.S. at 152.

*Anfinson*, 174 Wash. 2d at 870.

Compensating piece rate farm workers for all work time, including non-piece-rate work, is required by the remedial purpose of the MWA and its liberal construction pursuant to that purpose. Depriving farm workers of compensation for such work as meetings, training, and transportation between fields, contributes to “the evils and dangers resulting from wages

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[https://ballotpedia.org/Washington\\_Minimum\\_Wage\\_Increase\\_Initiative\\_518\\_\(1988\)](https://ballotpedia.org/Washington_Minimum_Wage_Increase_Initiative_518_(1988)) (last visited July 13, 2017) (emphasis added).

too low to buy the bare necessities of life.” *See Anfison*, 174 Wash. 2d at 870.

**2. Farm workers, especially piece-rate workers, face highly dangerous working conditions that the MWA is intended to address.**

Agricultural employment puts workers at a high risk for on-the-job accidents, including musculoskeletal injuries, and heat-related illness. According to a 2011 report of the U.S. Bureau of Labor Statistics, the agricultural industry has among the highest rates of occupational injury and illness.<sup>6</sup>

An Occupation Safety and Health Administration safety review for agricultural operations estimated that every day about 243 agricultural workers suffer lost work time injuries, and about 5 percent of these result in permanent impairment.<sup>7</sup> In 2011, the national injury rate for agricultural workers was over 40 percent higher than the rate for all workers.<sup>8</sup> The fatality rate for the agriculture, forestry and fishing industry in Washington State during the period from 1998 through 2002

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<sup>6</sup> Bureau of Labor Statistics, United States Department of Labor. NEWS RELEASE: October 25, 2012.

<sup>7</sup> OSHA Safety and Health Topic: Agricultural Operations *available at* <https://www.osha.gov/dsg/topics/agriculturaloperations/> (last visited July 21, 2017).

<sup>8</sup> *Id.*

was 25.7 fatalities per 100,000 workers, by far the highest of any major industry division.<sup>9</sup>

Workers' compensation data compiled by the Washington Department of Labor and Industries (DLI) illustrates the number and types of accidents and injuries incurred by Washington farm workers. For fiscal year 2016, there were 4,151 reported claims for injuries, at an average cost of \$4,541, and total cost to the Industrial Insurance fund of \$18.8 million.<sup>10</sup> Common accident types for farm workers included falls, overexertion, exposure to hazardous substances, and being struck by or against objects.<sup>11</sup>

Farm workers also face increased risk for heat injury and illness due to the fact that most field work is performed in eastern Washington

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<sup>9</sup> *Work-related Agricultural Fatalities in Washington State, 1998-2005*, SHARP Report #72-3-2006, July 27, 2006 available at [http://www.lni.wa.gov/Safety/Research/FACE/files/ag\\_rep.pdf](http://www.lni.wa.gov/Safety/Research/FACE/files/ag_rep.pdf) (last visited at July 25, 2017).

<sup>10</sup> Excel Spread Sheet titled "Occupation" data for farmworkers and laborers on DLI website: <http://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp> (last visited on July 14, 2017).

<sup>11</sup> Excel Spread Sheet titled "Occupation and Accident Type" data for farm workers and laborers available at [www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp](http://www.lni.wa.gov/ClaimsIns/Insurance/DataStatistics/WorkersCompData/default.asp) (last visited on July 14, 2017).

where summer temperatures regularly exceed 90-100 degrees.

Unregulated heat stress can lead to heat-related illnesses such as dehydration, neurological impairment, multi-organ failure, and death.<sup>12</sup>

During the period from 1992 through 2006, 423 workers in U.S. agricultural and nonagricultural industries were reported to have died from exposure to environmental heat.<sup>13</sup> In those years, the average annual heat-related death rate for crop workers was about 20 times the rate for all civilian workers.<sup>14</sup>

Farm workers suffer a high incidence of musculoskeletal injury because farm labor consists of constant bending, twisting, carrying heavy items, and repetitive motions during long hours.<sup>15</sup> Agricultural work poses

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<sup>12</sup> R.C. Luginbuhl, *et al.*, *Heat-Related Deaths among Crop Workers – United States, 1992-2006*. MMWR, 57 (24), p. 649-653 (2008) abstract available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (last visited July 21, 2017).

<sup>13</sup> Centers for Disease Control, *Heat-Related Deaths Among Crop Workers, United States 1992 – 2006*, MMWR WEEKLY (2008), available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> (last visited July 20, 2017).

<sup>14</sup> *Id.*

<sup>15</sup> Maureen J. Anthony, *et al.*, *Self-Care and Health Seeking Behavior of Migrant Farmworkers*. 12 J. IMMIGRANT AND MINORITY HEALTH 5, 634-39 (2010), abstract available at <https://link.springer.com/article/10.1007/s10903-009-9252-9>

(last visited July 24, 2017).

risks for eye injuries because of the persistent exposure to pesticides, fertilizers, tools and machinery.<sup>16</sup> Farm workers also face a high risk of work-related illnesses, including respiratory illnesses<sup>17</sup> and skin disorders.<sup>18</sup> Agricultural workers have the highest incidence of skin disorders of all industrial sectors with an annual incidence four to six times higher than the annual incidence for all private industry.<sup>19</sup>

Contributing factors for high injury rates are long hours and long workweeks. Farmworkers often work over 40 hours per week, which, according to one study, resulted in a 61% higher injury hazard rate compared to jobs without overtime work.<sup>20</sup> Working at least 12 hours per

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<sup>16</sup> Sara A. Quandt, S.A., *et al.*, *Occupational Eye Injuries Experienced by Migrant Farmworkers*, 17(1) *J. AGROMEDICINE* 63-69 (2012), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3286547/> (last visited July 24, 2017).

<sup>17</sup> Department of Health and Human Services, *Respiratory Disease in Agricultural Workers: Mortality and Morbidity Statistics*, DHHS (NIOSH) Publication Number 2007-106 (2007), available at <https://www.cdc.gov/niosh/docs/2007-106/pdfs/2007-106.pdf> (last visited July 24, 2017).

<sup>18</sup> Steven R. Feldman, *et. al.*, *Health Care Utilization among Migrant and Seasonal Farmworkers: the Case of Skin Disease*. *J. RURAL PUBLICATION* (2009), available at [\(https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2737349/](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2737349/) (last visited July 24, 2017).

<sup>19</sup> *Id.*

<sup>20</sup> A. E. Dembe, *et. al.*, *The impact of overtime and long work hours on occupational injuries and illnesses: new evidence from the United States*. 62 *OCCUP. ENVIRON. MED.*, 588, 592 (2005), available at

day was associated with a 37% increased hazard rate, and working at least 60 hours per week was associated with a 23% increased hazard rate.<sup>21</sup>

Farm workers who are compensated by a piece rate face even greater workplace hazards.<sup>22</sup> This is due in part to the fact that farm workers are not compensated for non-piece rate work *at all*, and therefore face pressure to make up earnings during their piece work, often by skipping rest breaks. For example, if a piece rate worker spends 15 minutes of work time at a training, 30 minutes to travel to another field, and 15 minutes to put tools and equipment away at the end of the day, she has spent one hour performing work for her employer which has not been compensated. This creates pressure on the worker to “make up” for this uncompensated time by working feverishly (and dangerously) during piece rate work, and in some cases, skipping mandated rest periods.

Indeed, a scientific review of 31 articles on piece rate work found very strong support for the proposition that piece rate work has negative effects on worker safety and health.<sup>23</sup> The piece-rate system creates

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<http://oem.bmj.com/content/oemed/62/9/588.full.pdf> (last visited July 21, 2017).

<sup>21</sup> *Id.*

<sup>22</sup> Dovex acknowledges that thousands of Washington pickers earn a piece rate rather than a straight hourly wage. Answering Br. at 45.

<sup>23</sup> Bo Johansson, *et al.*, *Piece rates and their effects on health and safety – A literature review*, 41 APPLIED ERGONOMICS, Issue 4, 607-14 (2010),

pressure to work as fast as possible and puts greater mental and physical stress on workers.<sup>24</sup> This creates an environment in which considerations such as health and accident risk are often secondary to rapid piece work and higher earnings.<sup>25</sup>

Moreover, piece rates are very low. According to the latest available data, from a 2006 survey, the average Washington farm worker household earned approximately \$17,000 a year.<sup>26</sup> This was 88% of the 2006 poverty level (\$20,000).<sup>27</sup> Workers must be extremely fast to earn anything near a living wage.

Failure to pay farm workers for work other than piece-rate activities exacerbates poverty and increases the pressure to work at an

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*abstract available at*

<http://www.sciencedirect.com/science/article/pii/S0003687010000086?via%3Dihub> (last visited July 21, 2017).

<sup>24</sup> Bonnie Lynn Bade, *Is there a doctor in the field? Underlying conditions affecting access to health care for California farmworkers and their families*, CPRC REPORT, California Policy Research Center at 9-10 (1999), available at <http://cpac-dev.berkeley.edu/documents/badedoctorrpt.pdf> (last visited July 21, 2017).

<sup>25</sup> *Id.*

<sup>26</sup> Washington State Farmworker Housing Trust, *A Sustainable Bounty: Investing In Our Agricultural Future, Washington State Farmworker Survey* (2008) at 4, available at

<http://lib.ncfh.org/pdfs/7482.pdf> (last visited July 23, 2017).

<sup>27</sup> *Id.*

unhealthy pace, and to skip rest periods. When non-piece-rate work is not separately paid, workers' earnings become depressed below the minimum wage, *see infra*. As this Court recognized in *Lopez v. Sakuma*, failure to separately pay for non-piece-rate work creates a system that incentivizes workers to labor through conditions that create increased injury risk, such as heat and fatigue. 183 Wn.2d at 658-59. This happens frequently. One survey of farmworker behavior found that it was uncommon for workers to change their work hours or activities in response to extreme heat.<sup>28</sup>

Given the dangers and meager compensation prevalent in agriculture, full and effective MWA protection of health, safety and welfare is critically important for piece-rate farm workers. The remedial purpose of the MWA strongly supports requiring compensation for all of farm laborers' work time, including time that is not paid by the piece rate.

**3. Washington law requires that employers pay employees for all time worked.**

Under Washington law, employers are required to pay employees at least the minimum wage for all "hours worked." The MWA provides that "employees are entitled to compensation for regular hours worked"

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<sup>28</sup> Maria C. Mirabelli, *et al.*, *Symptoms of Heat Illness Among Latino Farm Workers in North Carolina*, 39(5) AM. J. PREV. MED. (2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2963149/> (last visited July 25, 2017).

and “hours worked” means “all hours during which the employee is authorized or required . . . to be on duty on the employer’s premises or at a prescribed workplace.” *Stevens v. Brinks Home Security, Inc.*, 162 Wn.2d 42, 47; 169 P.3d 473 (2007) (quoting WAC 292-126-002(8)). The MWA further provides that “every employer shall pay to each of his or her employees . . . a rate of not less than [the minimum wage] per hour.” RCW 49.46.020; *see also, SPEEA v. Boeing Co.*, 139 Wn.2d 824, 828-29, 835 n.6, 839-40, 991 P.2d 1126 (2000) (rejecting a workweek averaging approach to minimum wage requirements and holding that employees are entitled to compensation “measured by the statutory hourly wage”); *Miller v. Farmer Bros. Co.*, 136 Wn. App. 650, 656, 156 P.3d 598 (2007) (“Under the Act, employees must be paid per hour, and must receive at least the minimum wage”); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912-13 (9<sup>th</sup> Cir. 2003) (holding that under Washington law, employees have a right to minimum wage for every hour worked).

Because piece rate employees are “authorized or required” to perform non piece rate tasks during piece rate shifts, Washington law requires they be separately compensated for such tasks at the minimum wage, or contractually agreed upon rate. Such necessary non-piece-rate tasks include gathering tools and materials before actual harvesting in order to be able to pick and pack; attending instructional or safety

meetings; travelling to and from fields; and putting away tools and materials at the end of each day. Such work is not only necessary and essential for the performance of the piece rate work, but it is clearly “authorized or required” within the meaning of the MWA. As such, employers are required to separately pay employees for that non-piece rate work at the Washington minimum wage.<sup>29</sup>

## V. CONCLUSION

The MWA is based on Washington’s public policy to protect the health, safety and welfare of workers. Farm workers compensated on a piece-rate basis have a heightened need for the protection because of the prevalence of dangerous conditions in agricultural work, poor wages, and the hazards of the piece rate system. Moreover, Washington law requires employees be paid for all hours worked.

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<sup>29</sup> California courts have interpreted similar language in their statutes to find that non-piece rate work must be separately compensated at least at the minimum wage. *See, e.g. See Armenta v. Osmose, Inc.*, 135 Cal.App.4th 314, 323; 37Cal.Reptr.3d 460 (2005) (“[A]ll hours worked must be paid at the statutory *or agreed upon rate* and no part of this rate may be used as a credit against a minimum wage obligation.”) (emphasis added); *Shook v. Indian River Transp. Co.*, 72 F. Supp. 3d 1119, 1125 n.3 (E.D. Cal. 2014) (“[H]ours worked pursuant to a piece-rate system may not be used as a credit toward rest breaks, which, like other hours worked, must be separately compensated.”).

*Amici* respectfully request that the Court answer the first certified question in the affirmative, and rule that Washington law requires agricultural employers to pay their pieceworkers separately for time spent performing activities outside of piece-rate work. *Amici* also request that the Court answer the second certified question by ruling that employers must calculate the pay for non-piece-rate time based either on the Washington minimum wage or the agreed hourly rate for non-piece-rate time, whichever is greater.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of July, 2017.

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**CASE NO.:** 94229-3  
**COURT:** Supreme Court of the State of Washington

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MIGRANT CLINICIANS NETWORK IN SUPPORT OF PETITIONERS/PLAINTIFFS  
CARRANZA AND MARTINEZ***

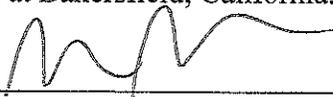
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**July 30, 2017 - 10:21 PM**

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