

NO. 94229-3

SUPREME COURT
OF THE STATE OF WASHINGTON

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

IN

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on
behalf of others similarly situated,

Petitioners/Plaintiffs

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant

DEFENDANT DOVEX FRUIT COMPANY'S
ANSWER TO AMICI BRIEFS

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I. INTRODUCTION

This case is about agricultural workers' and employers' right to contract for piece rate compensation. Employers and employees know best the benefits and the burdens of piece rate work and may freely enter into contracts that include non-picking time in the overall piece rate compensation. Respondent Dovex Fruit Co. ("Dovex") submits this brief in response to amici in support of Plaintiffs Mariano Carranza and Eliseo Martinez ("Carranza") in this case: United Farm Workers of America ("UFW"), the Attorney General of Washington ("AG"), Familias Unidas Por La Justicia, and the Washington Wage Claim Project ("WWCP") (collectively "Carranza's Amici"). Dovex also responds to amici who support its position: the Washington Tree Fruit Association ("WTFA") and Agricultural Employers, Workers, and Washington Trucking Association (collectively "Amici Workers and Employers").

The Washington State Minimum Wage Act, RCW Chapter 49.46 ("the MWA") allows for piece rate compensation and provides the flexibility for employers and employees to include non-picking, non-measured tasks within piece rate compensation. Under existing Washington law, work-week averaging as a lawful method of ensuring MWA compliance. The Washington State Department of Labor and Industries ("DLI") has affirmed that work-week averaging complies with the MWA in its regulations and guidance to agricultural employers and employees. The AG, filing on behalf of DLI, admitted DLI provided this guidance in its amicus briefing in *Demetrio v. Sakuma Bros. Farms, Inc.*,

183 Wn.2d 649, 355 P.3d 258 (2015). Therefore, if the Court rules against the longstanding industry-wide practice of work-week averaging and inclusion of non-picking time within piece rate compensation, it is a change in current law appropriately applied prospectively only.

II. ARGUMENT

Piece rate compensation is a non-hourly pay structure permitted under Washington law. The nature of piece rate pay requires inclusion of unmeasured tasks within the compensation arising from the measured tasks upon which the rate is based. To do this, the pay system requires averaging to ensure total pay does not fall below the minimum standard. DLI has expressly approved averaging. The MWA was fashioned after the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*, which also permits averaging to include unmeasured tasks within piece rate pay for minimum wage compliance. *See Adair v. City of Kirkland*, 185 F.3d 1055, 1059, FN 6 (9th Cir. 1999) (averaging allowed for minimum wage compliance under the FLSA for non-hourly pay).

Carranza’s Amici ask this Court to create new law and prohibit employment agreements to include non-picking activities within the piece rate. They also ask this Court to adopt new law to prohibit the only method available to ensure that non-hourly pay complies with the MWA: averaging. They limit this change, without any objective basis, to agricultural workers only. This new law would eliminate the piece rate compensation that thousands of skilled workers rely upon for their

livelihood. The new law contradicts Washington and federal law, and DLI's existing regulations and guidance.

A. Piece rate compensation is permitted in Washington State.

The MWA permits employers to pay on a piece rate basis:

Under Washington law, when an employee is paid on a piecework basis,...it is permissible for an employer to determine whether the employee's compensation complies with the MWA on the basis of a work-week period. *See* Wash. Admin. Code § 296-126-021; Dept. of Labor and Indus. Admin. Policy ES.A.3. ...as long as the total wages paid for a given week, divided by the total hours worked that week, averages to at least the applicable minimum wage, an employee's compensation complies with Washington law. On the other hand, if an employee is an hourly employee, he “retain[s] a per-hour right to minimum wage under Washington law,” and weekly averaging is not permitted. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 912 (9th Cir. 2003); *see also* Wash. Rev. Code § 49.46.020.

Hill v. Xerox Bus. Servs., LLC, 2017 WL 3598659 (9th Cir. Aug. 7, 2017).

DLI regulations and guidance to both agricultural and non-agricultural workers and employers confirm that the MWA permits piece rate compensation and work-week averaging.¹ Excepting exclusions that do not apply here, the MWA and DLI's regulations and guidance do not distinguish between agricultural and non-agricultural workers.

¹ *See* WAC 192-310-040 (treating hours recorded for commission and piecework employees as the same); WAC 296-126-021 (allowing work-week averaging for piece rate/commission workers); WAC 296-131-117 (allowing computation of pay on a piecework basis for minor agricultural workers); WAC 296-131-010 (describing piece rate as a “regular wage” for agricultural workers); and DLI Administrative Policies ES.A.1 (“Minimum Wage Applicability”), ES.A.3 (“Minimum Hourly Wage”: directing all employers of piece rate workers to use work-week averaging for MWA compliance) and ES.C.3 (“Commission, Piece Work and Minimum Wage Requirements”).

B. Non-picking tasks are properly included within the piece rate pay.

The MWA allows agricultural employers and employees to agree to include all activities, including non-picking tasks, within the piece rate. The AG concedes this point by admitting that the MWA does not specify a measure of compliance for piece work and it is a “reasonable reading that RCW 49.46.020 permits workweek averaging in some circumstances...” AG Brief at 6. There is no language within the MWA that departs from the FLSA in this context. Piece rate compensation can include time spent on unmeasured tasks, not merely the tasks upon which the piece rate is based. *Helde v. Knight Transportation, Inc.*, No. C12-0904RSL, 2016 WL 1687961, at *2 (W.D. Wash. Apr. 26, 2016); *Hensley v. MacMillan Bloedel Containers, Inc.*, 786 F.2d 353, 357 (8th Cir. 1986). The Washington Employment Security Department has recognized services ancillary to the piece itself are included in the piece rate:

[T]hese petitioners [may have been] merely working on a “piece-rate” basis (a common form of compensated personal service). ...we are aware of this common practice...in... In re Peterson, Docket No. A-39551, Review No. 5263,...we pointed out, “While it is true that the ‘poles’ were the ultimate product contracted for by the Company, it remains apparent that the rendition of ‘services’ was a necessary incident to producing the poles. . . . The claimant...was compensated “for his ‘services’ on a piece-rate basis. It cannot be argued that the Company was paying for the timber; they already owned same. Necessarily, the remuneration received by the claimant was for the services performed...” ...

Commr’s Ruling in *In Re Albert A. Bajocich*, 1961 WL 66451 at 6 (1961).

The compensation Dovex pays is based on the number of bins filled. The piece rate compensates the employee for all time and services “necessary incident to producing” the bin. Every bit as much as moving hands from apple to apple; moving equipment, receiving instructions, and walking from block to block is necessary to produce the bins.

Since the current piece rate pay system conforms with the MWA and other applicable laws, it is entirely within the parties’ rights to agree to this system of payment. *See Helde*, 2016 WL 1687961, at *2. The AG’s description of workers’ agreement to the piece rate pay system as a “waiver” of rights incorrectly characterizes the agreement between Dovex and its employees and is contrary to existing law. As WTFa points out, agricultural workers are free to enter into such a contract so long as they are paid minimum wage on average for all hours worked during the work-week. WTFa Brief at 16-17. Non-picking time is time worked and included in the calculation of “time worked” for MWA compliance. Continued employment under these terms constitutes the employees’ acceptance of those terms. *Owens v. Local No. 169, Ass’n of W. Pulp & Paper Workers*, 971 F.2d 347, 354–55 (9th Cir. 1992), *as amended* (Aug. 18, 1992). Such an agreement is not a waiver of rights but a valid contract.

C. The MWA is patterned on the FLSA which allows averaging.

This Court can and should refer to federal law to interpret the MWA. The MWA is patterned on the FLSA and, therefore, “our courts may look to the federal courts’ interpretation of the FLSA for guidance in interpreting the state MWA.” *Becerra v. Expert Janitorial, LLC*, 176

Wn.App. 694, 309 P.3d 711 (2013). *See also Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn.App. 35, 244 P.3d 32 (2010). Federal law expressly allows parties to include what Carranza characterize as non-picking work in the piece rate so long as the hours worked for the week average out to the minimum hourly rate (work-week averaging):

[T]he Congressional purpose [of the FLSA] is accomplished so long as the total weekly wage paid by an employer meets the minimum weekly requirements of the statute, such minimum weekly requirement being equal to the number of hours actually worked that week multiplied by the minimum hourly statutory requirement. Hence so long as this weekly requirement is met, 206(a) is not violated if the parties by agreement treat all of that wage as being paid for part of the work and regard certain other work as done for nothing.

U.S. v. Klinghoffer Bros. Realty Corp., 285 F.2d 487, 490 (2d Cir. 1960).

Likewise, in *Hensley*, 786 F.2d 353, a truck driver paid by the mile sought additional pay for time spent completing paperwork and inspections on his vehicle, claiming that these non-driving activities fell outside of his per-mile compensation. The Eight Circuit held that these non-driving activities were properly included in the piece rate because, under the work-week averaging method, he earned on average a higher hourly rate than the statutory minimum. *Hensley*, 786 F.2d 353 at 357.

In conformity with the regulatory and judicial interpretations of the FLSA's minimum wage requirements, DLI has correctly interpreted the MWA to allow work-week averaging for piece rate workers. WAC 296-126-021 and DLI Administrative Policy ES.A.3. There is no reason why

the MWA would exclude agricultural workers from this method of compliance. In *Dove v. Coupe*, 759 F.2d 167, 172 (D.C. Cir. 1985), the Court of Appeals for the District of Columbia engaged in a thoughtful analysis of FLSA work-week averaging, holding that it was an appropriate measure *even in the absence of such an agency regulation as Washington has here*: “The workweek measuring rod has never been promulgated as an agency regulation; however, the Wage and Hour Division continues to adhere to it, and the courts have agreed that the workweek standard generally represents an entirely reasonable reading of the statute.” (Footnotes and citations omitted.) Like the FLSA, the plain language of the MWA, “establishing the forty-hour workweek and the right to overtime pay” (RCW 49.46.005) evidences the use of work-week averaging is appropriate to establish minimum wage compliance. *See also* RCW 49.46.070 (requiring employers record employee hours for each work-week during a pay period); *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 533, 7 P.3d 807 (2000) (“calculation of overtime [pay] under a fluctuating workweek does not violate” the MWA). This language complies with the work-week measure set forth in the FLSA. 29 U.S.C. § 206(a).

Carranza and their Amici have one thing in common: they deny *any* averaging is permissible under the MWA for agricultural piece rate workers and argue that even if a worker earns \$40 for one hour of piece rate work, if that worker spent three moments of that hour waiting for equipment, she is entitled to additional compensation for those three

moments. This theory precludes *any* averaging and effectively precludes piece rate pay, conflicting with the MWA and other existing law.

1. DLI’s guidance clearly allows work-week averaging.

WAC 296-126-021 (allowing work-week averaging to comply with the MWA when paying piece rate) is binding law because the Legislature has delegated authority to DLI to adopt regulations and guidance interpreting the MWA (*see e.g.*, RCW 49.46.810), “Legislative rules bind the court if they are within the agency’s delegated authority, are reasonable, and were adopted using the proper procedure.” *Ass’n of Wash. Bus. v. State of Wash., Dep’t of Revenue*, 155 Wn. 2d 430, 446–47, 120 P.3d 46 (2005)(citations omitted). Even if the Court is persuaded that WAC 296-126-021 is somehow inapplicable to agricultural workers, the Court should defer to DLI’s other regulations and guidance (see footnote 1 herein) allowing work-week averaging for these workers: “Where a statute is within the agency’s special expertise, the agency’s interpretation is accorded great weight, provided that the statute is ambiguous.” *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). The AG agrees that the Court should defer to DLI guidance regarding piece rate workers’ pay under the MWA. AG’s Brief at 6.²

² The AG has engaged in a politically-inspired effort that contradicts the position his office took in *Demetrio* and is contrary to the position of his own client, DLI. That the position is political is only further re-enforced by the AG’s bizarre contention that this interpretation applies only to the agricultural industry, and not to any other industry. Likewise, the other amici’s discussions of the history of treatment of agricultural workers has nothing to do with piece rate compensation. Piece rate compensation is a system that is beneficial both for employers and workers alike.

In *Demetrio*, 183 Wn.2d 649, DLI's amicus curiae brief, which the AG submitted on DLI's behalf, admitted that DLI provided guidance and a worksheet specifically allowing work-week averaging for determining agricultural employers' compliance with the MWA for piece rate workers:

While the Department's publications, F700-171-000 and F700-125-000, do address the [piece rate] workers here, they do not address the questions raised by the certified questions [in *Demetrio*]. The Department created the Agricultural Employer Worksheet F700-125-000, as a worksheet for agricultural employers to assist them in determining if they are following the state agricultural employment standards and the Minimum Wage Act for their employees. The Department created the document entitled "When paid by piece rate, are you earning minimum wage?," F700-171-000, to show piece rate workers working in the field how to calculate their wages to check if they are being paid at least minimum wage. Neither was intended to provide additional interpretative guidance regarding rest period pay requirements. The documents focus on telling employers and employees how to comply with the minimum wage requirements....

Demetrio v. Sakuma Bros., Amicus Brief of DLI, 2015 WL 917625, at 4. The Court should take judicial notice of and defer to DLI's admission to this Court that it provided guidance directing both agricultural employers and employees to utilize work-week averaging for MWA compliance when paying on a piece rate basis.

In addition to its admission quoted above, DLI treats agricultural and non-agricultural piece rate workers the same for the purposes of MWA compliance in other various regulations. For example, WAC 296-131-010(8)(a) recognizes that agricultural employees may be paid on a

piece rate basis and piece rate is a form of “regular pay.” WAC 296-131-015 also recognizes piece work pay as acceptable for agricultural workers. Nothing in WAC 296-131 *et seq.* indicates that work-week averaging would be in violation of the MWA. In fact, WAC 296-131-015 specifically sets forth the information necessary for agricultural piece rate workers’ pay statements in a form mirroring WAC 296-126-021 and DLI guidance allowing work-week averaging:

A pay statement shall be provided to each employee at the time wages are paid. The pay statement shall identify the employee, show the number of hours worked or the number of days worked based on an eight-hour day, the rate or rates of pay, the number of piece work units earned if paid on a piece work basis, the gross pay, the pay period, all deductions and the purpose of each deduction for the respective pay period....

Likewise, DLI Administrative Policy ES.A.3 explains the application of the MWA to both agricultural and non-agricultural workers. Page 2 of ES.A.3 contains a section titled “Minimum Hourly Wage—Agricultural Labor.” Directly below this is a section titled “Determining whether an employee has been paid the minimum wage” which sets forth the work-week averaging method:

For employees paid on commission or piecework basis, wholly or in part, ... the commission or piecework earnings earned in each work-week are credited toward the total wage for the pay period. The total wage for that period is determined by dividing the total earnings by the total hours worked; the result must be at least the applicable minimum wage for each hour worked. See WAC 296-126-021.

DLI Administrative Policy ES.A.3 at 2.

DLI’s guidance is set out to guide agricultural piece rate workers and employers to use work-week averaging as the method to comply with the MWA. Up until at least September of 2015, DLI provided guidance specifically to agricultural *workers* regarding work-week averaging:

Agricultural workers:

When paid by piece rate, are you earning minimum wage? (\$9.32 in 2014)

Follow these steps to find out:

1. Record the *hours* you work each day....

...

2. Record the *units* you complete each day.

...

6. Calculate your hourly wage.

Divide your gross pay by the total number of hours your own record shows you worked in the work-week.

- Check: Were you paid at least \$9.32 per hour?

Dovex’s Statement of Additional Authorities, Ex. A.

DLI goes on to provide this example:

Example *José’s workweek*

José picks strawberries. His employer promised to pay 50 cents for every pound (unit) of strawberries. Every day, José records how many *hours* he worked and how many *pounds* of strawberries he picks.

	Sun. July 14	Mon. July 15	Tues. July 16	Wed. July 17	Thurs. July 18	Fri. July 19	Sat. July 20	Totals
Units (bins/trees/pounds/etc.)	92	125	175	149	183	105	98	927 Total units
Hours (subtract your meal period)	5	8	10	9	10	7	6	55 Total hours

For the workweek above, José was paid \$463.50 (gross wages) for picking 927 pounds (units) of strawberries at 50 cents per pound. His own records show that he worked 55 hours for the week.

Piece rate correct? Yes.

- 927 pounds (units) multiplied by 50 cents per pound = \$463.50. The employer did pay José for all the pounds (units) of strawberries he picked. José was paid the promised rate of 50 cents per pound.

Minimum wage paid? No.

- \$463.50 gross wages divided by 55 hours worked = \$8.43 per hour. José was not paid at least the minimum wage of \$9.32 per hour. His employer should have paid him \$512.60 gross wages: 55 hours of work multiplied by \$9.32 = \$512.60. José’s employer owes him an additional \$49.10.

Although this guidance has been removed from DLI’s website, DLI never retracted this guidance. DLI has not issued any contrary guidance or

submitted any briefings on this matter to suggest that its interpretation of the MWA treats agricultural workers differently than other workers. The Court should disregard the AG's argument that contradicts DLI's position regarding work-week averaging for agricultural piece rate workers. There is no reasonable explanation why work-week averaging would fairly compensate all workers under the MWA *except* agricultural workers.

2. Carranza's Amici cites law that supports the use of work-week averaging for piece rate workers.

Carranza's Amici argue cases that do not support their position here. Carranza' and their Amici's reliance on cases featuring hourly workers not getting paid for hourly work is misleading and incorrect. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 900 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005) recognizes this. Hourly workers must be paid by the hour. However, non-hourly workers, such as commission or piece rate workers, need only average minimum wage for all hours worked on a weekly basis. The case law cited by Carranza's Amici supports Dovex's position.

a. *Demetrio* does not discuss the issue of non-picking work and its relationship to the piece rate.

The AG cites to *Demetrio* for the proposition that non-picking "time is distinct from the work that generates the employee's piece rate wage." AG Brief page 7. This is an incorrect reading of that case. Non-picking time was not at issue before this Court in *Demetrio*. The two certified questions before the Supreme Court in *Demetrio* specifically involved rest breaks. As stated above, DLI admitted that the rest break

issue in *Demetrio* was completely separate from the issue of utilizing work-week averaging for piece rate workers' pay.

b. *Alvarez* supports Dovex's position.

WWCP's brief cites to *Alvarez*, 339 F.3d 894, in support of Carranza' argument that work-week averaging is impermissible under the MWA. *Alvarez* is a case where *hourly* employees were not paid for certain tasks performed "off the clock." *Alvarez* simply affirms that hourly employees are to be paid by the hour on the hour. *Alvarez* distinguishes hourly and non-hourly employees, acknowledging that employers may utilize work-week averaging for non-hourly employees, such as commission or piece rate, under Washington law. *Alvarez*, 339 F.3d 894 at 912–13. WWCP also misconstrues the concept of "sunshine pay" in the lower court's decision in *Alvarez* which was intended to be an incentive-based bonus for employees working more efficiently while on the clock, and was communicated to employees as such. It was not intended to cover unmeasured time. *Alvarez v. IBP, Inc.*, CT-98-5005-RHW, 2001 WL 34897841, at *2 (E.D. Wash. Sept. 14, 2001), *aff'd in part, rev'd in part*, 339 F.3d 894 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005), and *amended*, CT-98-5005-RHW, 2005 WL 3941313 (E.D. Wash. Dec. 20, 2005). The *Alvarez* employer attempted to offset its minimum wage obligations by arguing that it paid additional wages through "sunshine pay" and thus its off-the-clock time was covered. *Id.*, at 24. Circumstances in *Alvarez* are inapposite to the circumstances at Dovex where the pay is calculated to include non-picking activities and all time, and this inclusion

is communicated and known to the workers *before* work commences. Dovex is not seeking to offset its liability as in *Alvarez* but is simply pointing out that its pay system as understood by its employees has always included non-picking work and time within the piece rate compensation.

c. Federal law supports Dovex's position on work-week averaging for agricultural piece rate workers.

Contrary to Carranza's Amici's arguments, federal case law also supports Dovex's position. As stated above, federal law can guide the Court in its interpretation of the MWA. Carranza's Amici conflate federal case law regarding hourly paid workers with the law regarding piece rate workers. This is a misleading and incorrect representation of federal law. Dovex's reliance on federal law to support its practice of work-week averaging is proper. As Dovex has pointed out previously, the FLSA clearly allows for work-week averaging. Dovex's Answering Brief at 43-44. Of particular significance is 29 C.F.R. § 778.318 which allows non-picking time to be included within the piece rate if the parties so agree. Federal statutes, regulations, and case law all support including non-picking time within the piece rate and utilizing work-week averaging as an appropriate method for agricultural piece rate minimum wage compliance.

d. Washington law does not favor agricultural piece rate workers over all other Washington workers.

Carranza's Amici argue agricultural piece rate workers should be subject to a higher minimum wage standard than that of all other Washington workers. Carranza's Amici are not advocating for workers

whose piece rate earnings fall below minimum wage (those workers' wages are already "grossed up" to the minimum wage) but rather are advocating for employees who make *more* than minimum wage, asserting they are entitled to additional compensation. Carranza's Amici take issue with the minimum wage itself, arguing that it is insufficient for workers to support their families. This is an issue for the State Legislature to decide.

Carranza's Amici also claim the Court should offset agricultural workers' exclusion from other employment laws and allegedly harsher working conditions by compensating them at a *higher* minimum wage than that of other workers. Existing law does not support such a preference.³ Again, this is a legislative issue.

The AG requests the Court adopt California's approach by compensating piece rate workers hourly for so-called non-piecework tasks. Because California's wage laws are not patterned on the FLSA, a Washington court cannot rely on California precedent when interpreting the MWA. *See* Dovex's Answering Brief at 42-43 and *Anfinson*, 159 Wn. App. 35. The California legislature departed from federal law in establishing special rules for piece rate compensation. If such a change is contemplated in Washington, the Legislature is the proper venue.

³ Carranza's Amici demonstrate a lack of knowledge of orchard harvest and the agricultural industry as a whole. For example, WWCP argues that, "By allowing productive incentive pay to subsume unpaid non-production time, the employer has little or no incentive to reduce inefficiencies in non-production work." WWCP Brief at 8. Amici Workers and Employers and WTFA demonstrate the inaccuracy of this argument. There is a huge incentive because of the labor shortage and short harvest season, weather conditions, fruit spoilage, etc. to maximize picking efficiencies so that workers are not spending much time on non-picking activities. WTFA Brief at 3.

D. A decision in favor of Carranza should be prospective only.

In its amicus brief the AG opens the door to a prospective-only application of this Court’s forthcoming ruling on the certified issues because the AG 1) directly contradicted the position it recently took on behalf of DLI in *Demetrio*; and 2) expressly acknowledged that both parties interpretation of existing Washington Law were reasonable. As such, as the AG’s amicus brief clearly demonstrates, if the Court accepts Carranza and their Amici’s invitation to adopt new law, the resulting change warrants only prospective application. This Court has discretion to apply such a new law “purely prospectively – to all litigants whose claims arise after [its] decision.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009).

If rights have vested under a faulty rule, or a constitution misinterpreted, **or a statute misconstrued**, or . . . subsequent events demonstrate a ruling to be in error, **prospective overruling becomes a logical and integral part of stare decisis by enabling courts to right a wrong without doing more injustice than is sought to be corrected.**

Id. at 278-79, 1100 (citing *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 666, 384 P.2d 833 (1963)(emphasis added).

Unlike in *Demetrio*, the parties here have not settled on retroactive compensation. To the extent the Court agrees to create new law, it must determine whether it is equitable to require additional payments by employers who reasonably relied on DLI’s express guidance for years in planning and budgeting their labor costs. “By its very nature, the decision

to apply a new rule prospectively must be made in the decision announcing the new rule of law. . . . It is then that we will employ any balancing of the equities deemed necessary.” *Id.* at 279, 1100. Moreover, “once the new rule has been applied in the case announcing the new rule, it must apply to all others regardless of the equities.” *Id.* at 276, 1098. Thus this issue, which is raised by both the AG’s and the Coalition of Washington Trucker’s Association amici briefs, is properly before the Court and ripe for review.

Although “a new decision of law generally applies retroactively. . . . [the Court] may choose to give a decision prospective-only application...[if] these three factors are met: “(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rules, and (3) retroactive application would produce a substantially inequitable result.” *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 75 (2013) (footnote omitted)(citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), *overruled in part by Harper v. Department of Taxation*, 509 U.S. 86 (1993). *See also Lunsford*, 166 Wn.2d at 281.

All three factors are met here. A decision prohibiting work-week averaging would establish a new rule of law, depart from clear DLI precedent, and would “decide an issue of first impression whose resolution was not clearly foreshadowed.” *Chevron Oil Co. v. Huson*, 404 U.S. 97, at 106-107 (1971). DLI provided express, consistent guidance to employers

for years to utilize work-week averaging, and despite DLI wage audits over this same period, employers with this pay policy were never instructed to change. Whether work-week averaging is consistent with the MWA is clearly an issue of first impression for this Court, and DLI's consistent longstanding policies in this regard did not in any way foreshadow a potential change. Work-week averaging was not at issue in *Demetrio*. Furthermore, as the AG concedes, neither the MWA nor any administrative rule expressly specifies what steps an employer must take in order to comply with the MWA while paying piece rate workers. In fact, it was reasonable to interpret the MWA as “allow[-ing] ‘workweek averaging,’ so long as every hour is accounted for.” AG Brief at 1.⁴

The second factor of the *Chevron Oil* test is met because retroactive disallowance of work-week averaging would impede the policy objective of clarifying and stabilizing employee pay practices, by disrupting the labor market with protracted litigation to determine past pay for formerly non-defined and non-tracked picking-related activities. Instead of promoting any new rule policy in favor of clear and stable pay calculations for both the employee and employer, this protracted litigation would not benefit either the employees or employers, but rather only attorneys seeking to capitalize on the inherent lack of stability and clarity

⁴ The AG argues, “The MWA Specifies No Measure of Compliance for Piecework.” AG’s Brief at 4, Section A. Yet the AG admits that work-week averaging is permissible under the MWA for non-agricultural piece rate workers. AG’s Brief at 6, ¶ 2. The overarching and logical inference is that, during the relevant period, Dovex relied on what it believed was a valid and legal interpretation of the MWA to pay piece rate workers and that any future change in the MWA could not be foreshadowed.

any retroactive application would create. The end of work-week averaging would also effectively put an end to piece rate compensation, as the burden and administrative expense to monitor each minute of work will outweigh any benefit of retaining the pay system. The result will be to deprive efficient and productive employees of the opportunity to earn more for their work.

The third factor of the test is also met here as a retroactive disallowance of work-week averaging would not only produce a substantially inequitable result, it would significantly harm many Washington farmers and potentially devastate the smallest farmers. Agricultural employers included non-picking time in setting the piece rate. It would be inequitable to retroactively change the agreement between employers and employees, when as even the AG concedes, employers reasonably relied on the DLI's express guidance in planning and budgeting their labor costs. A retroactive decision would also punish employers' reasonable reliance on DLI's guidance. Equity requires prospective application of any ruling in favor of Carranza.

III. CONCLUSION

Carranza's Amici seek to undermine the piece rate system at the expense of the skilled and experienced farm workers. Their proposal would allow piece rate pay only in a system where every moment of every day for every worker is monitored to determine whether activities are within the measured tasks, eliminating the control over their lives and earnings that piece rate workers desire. WTFA and Amici Workers and

Employers express the concern from the industry that a new rule requiring separate tracking and payment of non-picking time will so severely fragment the workday that it will not only be impossible to implement at the orchard level but will also result in the end of the piece rate pay system. WTFA Brief at 5; Amici Workers and Employers' Brief at 13.

DLI has recognized the piece rate compensation system as a permissible form of payment for agricultural piece rate workers and directed the agricultural industry to utilize work-week averaging to comply with the MWA. Carranza and their Amici attempt to undermine a payment system that has been preferred by agricultural workers and employers alike for decades. Carranza and their Amici should bring their concerns to the Legislature. Despite all of this, if the Court is inclined to rule in Carranza' favor, any such ruling must have prospective application only. Any other application would be inequitable.

RESPECTFULLY SUBMITTED AND DATED this 5th day of September, 2017.

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I, Clay M. Gatens certify that on September 5, 2017, I caused a true and correct and copy of the foregoing to be filed with the Washington Supreme Court and copies were served to the following counsel of record via email (per agreement of parties):

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