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**SUPREME COURT OF
THE STATE OF WASHINGTON**

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

VALERIE SAMPSON AND DAVID RAYMOND,
on their own behalf and on behalf of all others similarly situated

Petitioners/Plaintiffs,

v.

KNIGHT TRANSPORTATION, INC., an Arizona corporation
KNIGHT REFRIGERATED, LLC, an Arizona limited liability company,
and KNIGHT PORT SERVICES, LLC, an Arizona limited liability company

Respondents/Defendants.

**BRIEF OF AMERICAN TRUCKING ASSOCIATIONS, INC.
AND WASHINGTON TRUCKING ASSOCIATIONS
AS *AMICI CURIAE***

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IDENTITY AND INTEREST OF *AMICI CURIAE*

American Trucking Associations, Inc., (“ATA”) is the national association of the trucking industry, comprising motor carriers, state trucking associations, and national trucking conferences, and created to promote and protect the interests of the national trucking industry. Its direct membership includes approximately 1,800 trucking companies and industry suppliers of equipment and services; and in conjunction with its affiliated organizations, ATA represents over 30,000 companies of every size, type, and class of motor carrier operation. The motor carriers represented by ATA, haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation.

The Washington Trucking Association (“WTA”) is a nonprofit corporation established in 1922 by a group of motor carriers to protect and promote the interests of all segments of Washington’s trucking industry. WTA cooperates, and maintains regular contact, with departments of city, county, state, and federal governments, including the Washington State Department of Labor & Industries, and regularly appears as a party or *amicus curiae* on trucking industry issues before this Court.

ATA, WTA, and their members, have a strong interest in the question presented in this case. The piece-rate pay systems at issue here—under which commercial drivers are typically paid a lump sum to move freight from one place to another and perform a variety of tasks associated with that movement—are widespread in the trucking industry, because they provide a strong productivity incentive to employees who, by the nature of their work, are not closely supervised. Piece-rate pay in the trucking industry is a win-win: it promotes higher productivity (which benefits not just carriers but anyone who relies on trucking to deliver goods—which is to say, *everyone*) and leads to higher driver earnings. Because the approach to piece-rate pay that the drivers here urge the Court to adopt would throw those pay practices into disarray, *amici*'s members have a direct interest in the outcome of this case. And *amici*'s familiarity with how piece-rate pay plays a role in the trucking industry will help inform the Court of the practical implications of the question at hand.

STATEMENT OF THE CASE

In the interest of “avoid[ing] repetition and matters in other briefs,” RAP 10.3(e), *amici* adopted by reference to respondents’ Statement of the Case. Resp. Br. 3-8.

ARGUMENT

The defendant carriers explain in detail how regulations promulgated by the Washington Department of Labor & Industry (“DLI”), WAC 296-126-021, expressly authorize averaging a non-agricultural worker’s total workweek earnings over the hours worked to determine compliance with the Washington Minimum Wage Act (“MWA”). Resp. Br. 17-22. They further explain the validity of that regulation. *Id.* at 22-27, and its consistency with the text and purposes of the MWA itself. *Id.* at 27-35. *Amici* agree with those arguments, and will not repeat them here.

Instead, *amici* submit this short brief to further explain the important role activity-based pay (and, by extension, workweek averaging) plays in the trucking industry. Motor carriers and commercial drivers in Washington rely on the long-term, stable set of expectations created by DLI’s express authorization of workweek averaging. They also explain that, were this Court to upset those stable expectations and accept the plaintiffs’ invitation to invent an a-textual “no-averaging” rule, it would not promote any public policies underlying the MWA, such as the “legislature’s intent of protecting employees.” *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 625, 416 P.3d 1205 (2018). On the contrary, a no-averaging rule would deprive the trucking industry in Washington of a powerful productivity incentive (and, accordingly, harm Washington resi-

dents and businesses who rely overwhelmingly on trucking to move their goods), while at the same time exerting *downward* pressure (or, at the very least, no *upward* pressure) on driver earnings. The no-averaging rule the plaintiffs urge here is, to put it simply, a lose-lose proposition, and this Court should reject it.

A. Activity-Based Pay Is Ubiquitous in the Trucking Industry, Because It Aligns the Productivity Incentives of Carriers and Drivers

Activity-based payment systems that compensate the drivers based on the work they do (rather than simply the time they spend at work), like the one at issue in this case, are standard practice in the trucking industry. The particular nature of the industry explains their widespread use: compared to the vast majority of other industries, motor carriers have limited ability to supervise and monitor the productivity of the people who drive for them. “Plaintiffs are frequently away from the motor carrier's office or terminals for weeks with little oversight. The drivers take upon themselves the time and specific tasks to complete a freight movement.” James C. Hardman, *Motor Carrier Service and Federal and State Overtime Wage Coverage*, 35 *Transp. L. J.* 1, 22 (2008). Thus, “because of the length of hauls and the relative freedom of the driver while on the road,” most drivers are paid according to activity-based, piece-rate formulas. *Id.* A piece-rate system helps align the driver’s incentives with those of the carrier,

and promotes productivity and efficiency in safely moving freight around the country. Moreover, the opportunity to earn pay keyed to these incentives will tend to attract drivers who are confident in their ability to work productively—precisely the kinds of drivers carriers want driving for them. *See, e.g.,* Brenda Lantz, *Piecework: Theory and Applications to the Motor Carrier Industry*, Upper Great Plains Transportation Institute (1992) at 3, *available at* <https://www.ugpti.org/pubs/pdf/SP107.pdf>.

No surprise, then, that in most sectors of the industry, few drivers are paid solely by the hour. In a survey undertaken by the Government Accountability Office for a 2011 report focusing on over-the-road drivers, some 64.7% of those interviewed were paid according to mileage, and another 25.7% on a percentage-of-revenue basis; only 2.7% were paid by the hour. GAO, Report to the Ranking Member, Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, House of Representatives, GAO-11-198 (Jan. 2011), at 30. *See also*, National Private Truck Council 2011 Annual Benchmarking Survey at 26 (some 46% of private carriers’¹ over-the-road drivers are paid by a piece-rate based on mileage; another 26% on some other activity-based system; and 27% on an hourly basis); Hardman, *supra* at 22 (“In the truckload segment of the

¹ Private carriers are fleets owned by non-transportation companies for the purpose of transporting their own freight. For example, many large retailers maintain their own private carrier fleets to move goods from warehouses to retail stores.

industry, hourly wages are virtually null or limited to Plaintiffs used on local hauls.”).²

B. Adopting a “No-Averaging” Rule Will Not Benefit Drivers

Typically, when an employer pays an employee on a piece-rate system rather than by the hour, minimum wage compliance is determined by calculating the employee’s average hourly wage—i.e., the total compensation divided by the total number of hours—and comparing that figure to the applicable hourly minimum. *See, e.g.*, WAC 296-126-021; *see also, e.g., Hensley v. MacMillan Bloedel Containers*, 786 F.2d 353, 357 (8th Cir. 1986); *Dove v. Coupe*, 759 F.2d 167, 171 (D.C. Cir. 1985); *U.S. v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 490 (2d Cir. 1960). Indeed, this has been the established standard under the federal Fair Labor Standards Act since the early days of a federal minimum wage. *See Dove*, 759 F.2d at 171 (citing DOL’s 1940 determination that “wages may be averaged to determine whether the employer has paid the equivalent” of the hourly minimum wage).

The drivers, however, ask this Court to reject averaging as a means

² By contrast, short-haul drivers who operate close to their home bases can be more readily supervised by the carriers they drive for. Thus, such drivers are more commonly paid by the hour. *See* NPTC Benchmarking Survey at 26 (44% of regional drivers and 55% of local drivers paid by the hour, compared to 27% of over-the-road drivers).

of determining compliance with the MWA, and instead require that certain categories of work be paid on an hourly basis. The carriers have explained why the drivers' no-averaging rule has no basis in the text of the MWA, and is inconsistent with regulations promulgated by DLI to implement it.

But that no-averaging rule would not only be unrooted in the text of the MWA—it would fail to serve the employee-protection policies of the MWA, for at least two reasons.

First, as the carriers explain in detail, Resp. Br. 4-6, 9-16, the drivers' position, and the certified question in this case, rest on the false premise that when a driver is paid on a piece-rate basis with reference to mileage, that means they are being paid only “for the activity of driving,” Pet. Br. 6, and that other work is therefore uncompensated. While carriers and drivers commonly speak of “mileage pay” or “pay by the mile,” those terms do not describe a taxi meter-like system under which the driver's compensation moves up with each click of the odometer. On the contrary, “mileage pay” is industry parlance for a lump-sum payment for making a delivery *and completing all associated tasks*, where the lump sum is calculated, at least in part, with reference to the estimated length of the trip.

The details of how “mileage pay” is typically implemented reflect that reality. For one thing, drivers “paid by the mile” are not typically paid with reference to the *actual miles* they drive—as one would expect if driv-

ers were in fact literally being paid only *for driving*. Rather, trips in a mileage-pay system are generally assigned a lump sum based on some consistent, independent measure of distance, such as the one in this case, which prices trips based on starting and ending zip codes. Resp. Br. 4. For another, shorter trips are, all else equal, typically compensated at a higher per-mile rate than longer trips. Resp. Br. 5. That higher short-trip rate recognizes the fixed, routine non-driving tasks that are integral to every delivery (e.g., pre- and post-trip inspections, paperwork, terminal visits) but do not scale with the length of the trip, and which are part of the bundle of services the lump sum compensates the driver for. If drivers were, as a factual matter, *only* being paid for the time they spend driving, there would be no reason for the amount per mile used to price the delivery to increase for shorter trips. Finally, mileage pay systems regularly *do* separately compensate drivers for non-driving tasks that are unusual or unanticipated—such as extra stops, or more than the customary time stuck at a loading dock. Resp. Br. 5. This, too, reflects the fact that carriers and drivers agree that mileage-based lump-sum payments compensate drivers not simply for driving, but for *all* the usual tasks associated with delivering a given load.

To put it simply, the notion that drivers working on a piece-rate system perform non-driving tasks without compensation is a gross mis-

characterization of the underlying reality. Were this Court to prohibit averaging because it thought doing so was necessary to protect drivers from performing work without compensation, it would be upending decades of settled industry practice—expressly authorized by DLI—in order to knock down a man of straw.

Second, and perhaps more importantly, adopting the no-averaging rule that plaintiffs urge here, and requiring separate hourly compensation for certain categories of time, would not benefit drivers whatsoever, because it would not require carriers to pay drivers any more than they currently do—it would just require them to pay drivers *differently*. Indeed, under the drivers’ proposed rule, carriers could generally pay drivers *less* than they do now without violating their rights under the MWA. Of course, if the Court adopts a no-averaging rule here, the plaintiffs *in this case* will enjoy an enormous windfall; but on a going-forward basis, the new rule will upset decades of settled practice, without improving Plaintiffs’ bottom lines by so much as a dime.

To illustrate, consider a driver who agrees to move a load from point A to point B, and do all the tasks associated with that movement, for a lump sum of \$200. If the job, from start to finish, took 10 hours—nine hours driving, and one hour performing associated tasks—the driver would have earned an average of \$20 per hour, far in excess of either the

federal or Washington hourly minimum wage. If this Court interpreted the MWA to prohibit averaging and require separate compensation for non-driving tasks, however, the carrier would have violated the driver's minimum wage rights under Washington law. That would be equally true if the driver had been paid \$2,000, or even \$20,000, for the exact same 10-hour job. But had this hypothetical carrier instead paid the driver \$12 per hour on an hourly basis, there would be no question of a minimum wage violation, and the driver would have been \$80 poorer.

While a no-averaging rule would not put any additional money in the drivers' pockets, it *would* require carriers in Washington who compensate their drivers on a piece-rate system to re-engineer those systems—in all likelihood, to achieve the same pay outcomes, but with added complexity and less transparency.

The trucking industry recently watched precisely this scenario unfold in California, which, to *amici*'s knowledge, is the only jurisdiction to have adopted a no-averaging rule like the one contemplated here. That rule arose, initially, from judicial interpretations of California's minimum wage law. *See Armenta v. Osmose, Inc.*, 135 Cal. App. 4th 314 (2005); *see also, e.g., Bluford v. Safeway, Inc.*, 216 Cal. App. 4th 864 (2013); *Gonzalez v. Downtown LA Motors*, 215 Cal. App. 4th 36 (2013); *Cardenas v. McLane Foodservices, Inc.*, 796 F. Supp. 2d 1246 (C.D. Cal. 2011). Even-

tually, the California legislature codified the rule—presumably recognizing that the cases embracing it were not rooted in the text of California’s wage laws. *See* Cal. Assembly Bill No. 1513 (Oct. 10, 2015), codified at Cal. Lab. Code 226.2. Thus, in California, employers who pay on a piece-rate system cannot use averaging to determine compliance, and must pay so-called “non-productive time” (which, in the trucking context, appears to mean “non-driving time”) on a separate hourly basis.

Unsurprisingly, motor carriers in California did not react to this development by maintaining their existing mileage rates and paying for non-driving tasks on top of that with a separate hourly wage—that is, they did not simply start paying more for the same work. Instead, most carriers developed pay systems that ensure drivers are compensated on an hourly basis for non-driving time, while at the same time resulting in the same total compensation outcomes the driver would have experienced under a simple piece-rate regime that permitted averaging. Most commonly, carriers in California have adopted some form of “hybrid” system that includes an hourly component paid at or around the state’s hourly minimum wage rate for all hours worked, combined with a “productivity bonus” calculated to top drivers up to what they would have earned based on the mileage-rate system.

That has caused a considerable amount of disruption in the indus-

try in California, with carriers forced to come up with convoluted mechanisms to achieve what would otherwise be simple results, and drivers puzzled by the replacement of a well-established, industry-standard, transparent mileage-pay system with an opaque contrivance used nowhere else in the industry—and that disruption has no offsetting benefits in the form of increased driver earnings. If this Court accepts the plaintiffs’ invitation to reject the DLI’s interpretation of the MWA in favor of a prohibition on averaging, we can expect the same story to play out in Washington.

C. Adopting a “No-Averaging” Rule Will Adversely Affect Motor Carrier Productivity and Driver Pay in Washington

That a no-averaging rule will not force carriers to pay drivers more is, as explained above, an indisputable matter of logic. Whether or not averaging is permissible, Washington law prohibits an employer from paying an employee *less than* \$12 multiplied by the number of hours worked; but by the same token, averaging or no, Washington law will not require an employer to pay an employee *more than* that same sum.

In all likelihood, though, the effect of a no-averaging rule would not be merely *neutral* with respect to driver pay: it would be detrimental. After all, as explained above, the whole point of piece-rate pay in the

trucking industry is to provide a strong productivity incentive for employees whose productivity cannot be closely overseen. The rule urged by the drivers here would attenuate that incentive, by requiring some tasks to be paid on an hourly basis rather than a piece-rate—and that attenuated incentive can be expected to result in a decrease in productivity. That productivity decrease, in turn, translates to a downward pressure on wages: provided that drivers are not already at the floor of the applicable minimum wage rate, carriers would have no reason to pay them the same amount for less work. (And according to the Bureau of Labor Statistics, the 2017 median hourly pay for tractor-trailer drivers was \$20.42, meaning that the vast majority of drivers are indeed earning well above Washington’s hourly minimum floor. *See* BLS Occupational Outlook Handbook: Heavy and Tractor-trailer Truck Plaintiffs, *available at* <https://www.bls.gov/ooh/transportation-and-material-moving/heavy-and-tractor-trailer-truck-Plaintiffs.htm>.)

This is no mere theoretical prediction: it is a well-grounded empirical finding as well. In 2013, against the backdrop of litigation in which driver plaintiffs claimed that a motor carrier’s piece-rate compensation system violated California law, a highly qualified labor economist had the opportunity to study the effects on both productivity and driver pay when the carrier converted a particular operating division from an hourly pay

system to an activity-based piece-rate system. *See Ortega v. J.B. Hunt Transp., Inc.*, No. 07-cv-8336, 2014 U.S. Dist. LEXIS 79720, at *15 (C.D. Cal. June 4, 2014), *rev'd on other grounds*, 694 Fed. App'x 589 (9th Cir. 2017). That conversion offered a sort of “natural experiment” in which other factors (such as customers, routes, and employees) largely remained constant, allowing an apples-to-apples comparison of results produced by hourly pay compared to piece-rate pay.

And those empirical results bore out what the theory predicted. The conversion from hourly to piece-rate pay increased efficiency by 6.4% and productivity by 7%. *Ortega*, 2014 U.S. Dist LEXIS 79720 at *15-16. Even more impressively, “Plaintiffs on average received 10% higher wages after the [activity-based pay] system was implemented. *Id.* at *17. As the court observed, “it is reasonable to infer the increase [in driver wages] was due to increased deliveries completed,” which in turn was a product of the incentives activity-based pay provides as compared to hourly pay.

To be sure, if this Court adopted the drivers’ proposed no-averaging interpretation of the MWA, it would not prohibit carriers from including an incentive-based component in their pay plans altogether. Thus, the impact on productivity and driver pay would not necessarily be of the same magnitude as the differences experienced on conversion from

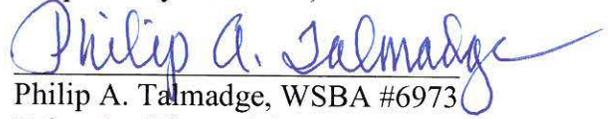
a purely hourly system to a piece-rate system. The underlying point remains, however, that attenuating the incentives of piece-rate pay is detrimental to both productivity and driver pay. Adopting the drivers' no-averaging rule would be bad for efficiency in the trucking industry—and for the economy that relies on trucking for the efficient movement of goods—and, more to the point, bad for the drivers whose interests the MWA is supposed to promote.

CONCLUSION

The Court should hold that, consistent with WAC 296-126-021, non-agricultural employers who compensate employees on a piece-rate basis satisfy the MWA's minimum wage requirements when they pay their employees total compensation for a workweek that, when divided by the number of hours worked, results in an average hourly rate that meets or exceeds the legal hourly minimum.

DATED this 1st day of April, 2019

Respectfully submitted,



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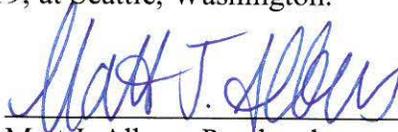
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