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SUPREME COURT  
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NO. 96264-2

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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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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, and Arizona limited liability company, and  
KNIGHT PORT SERVICES, LLC, an Arizona limited liability company,

Respondents/Defendants.

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**AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT  
LAWYERS ASSOCIATION**

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**TABLE OF CONTENTS**

	Pg.
I. INTRODUCTION AND INTEREST OF AMICI CURIAE .....	1
II. SUMMARY OF ARGUMENT .....	1
III. ARGUMENT .....	3
A. The plain language of the Washington Minimum Wage Act provides employees a “per hour” right to minimum wage for all non-piecework time even if a worker performs some piecework during the workweek .....	3
B. Employers must pay no less than minimum wage for all non-piecework time during which no piece-rate pay accrues.....	4
C. The Court must liberally construe the MWA to protect vulnerable workers and reject any interpretation by the Department of Labor and Industries that is inconsistent with a liberal construction of the statute .....	6
D. Low-wage workers in piece-rate industries have historically faced wage theft under pure “workweek averaging” schemes .....	9
IV. CONCLUSION.....	11

**TABLE OF AUTHORITIES**

Pg.

**STATE CASES**

*Bostain v. Food Express, Inc.*,  
159 Wn.2d 700, 153 P.3d 846 (2007)..... 2, 7, 8

*Carranza v. Dovex Fruit Co.*,  
190 Wn.2d 612, 416 P.3d 1205 (2018).....*passim*

*Drinkwitz v. Alliant Techsystems, Inc.*,  
140 Wn.2d 291, 996 P.2d 582 (2000)..... 2, 8

*Lopez Demetrio v. Sakuma Brothers Farms, Inc.*,  
183 Wn.2d 649, 355 P.3d 258 (2015)..... 3, 5

*Stevens v. Brink’s Home Sec.*,  
162 Wn.2d 42, 169 P.3d 473 (2007)..... 3

**FEDERAL CASES**

*Ballaris v. Wacker Siltronic Corp.*,  
370 F.3d 901 (9th Cir. 2004) ..... 8

*Lehigh Valley Coal Co. v. Yensavage.*,  
370 F.3d 901 (9th Cir. 2004) ..... 4

*Sec’y of Labor v. Lauritzen*,  
835 F.2d 1529 (7th Cir. 1987) ..... 4

**STATE STATUTES AND REGULATIONS**

RCW 49.12 ..... 6

RCW 49.46.020 .....*passim*

WAC 296–126–002 ..... 3

WAC 296-126-021..... 6, 7, 8

## **I. INTRODUCTION AND INTEREST OF AMICI CURIAE**

This amicus curiae brief is prompted by deep concern about the difficulties piece-rate workers encounter when they seek to enforce their right to be paid no less than minimum wage for time worked outside of their primary piece-rate work. Through their experiences as advocates for workers, attorney members of the Washington Employment Lawyers Association (“WELA”) have gained extensive, on-the-ground knowledge of the payment schemes which preclude piece-rate workers from receiving compensation for all hours worked.

WELA is an organization of approximately 200 lawyers licensed to practice law in Washington. WELA advocates in favor of employee rights in recognition that employment with dignity and fairness is fundamental to the quality of life. WELA is a chapter of the National Employment Lawyers Association. WELA has appeared in numerous cases before this Court involving employee rights.

## **II. SUMMARY OF ARGUMENT**

The certified question presented in this case asks: “Does the Washington Minimum Wage Act require non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work?” WELA respectfully submits that the answer is “yes.” The plain language of the Washington Minimum Wage Act (“MWA”) requires that employers pay no less than minimum wage for each hour worked. RCW 49.46.020. When workers are working purely on a piece-rate basis and their employers do not require any non-piecework

activities, a workweek averaging approach is a feasible way of measuring minimum wage compliance. But for work periods when an employer requires an employee to perform non-piecework activities—work periods during which no pay otherwise accrues—the employer violates the MWA if it fails to separately pay the employee for the time worked. *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 615, 416 P.3d 1205 (2018).

Washington has a “long and proud history of being a pioneer in the protection of employee rights.” *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). This Court has mandated that the MWA be “liberally construed in favor of the employee.” *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 712, 153 P.3d 846 (2007). Thus, this Court should liberally construe the MWA in favor of the workers and not retreat from the important protection for Washington workers inherent in the per-hour approach to minimum wage compliance, which this Court confirmed in *Carranza*. This Court should answer the certified question with a “yes.” The Court should hold that employers must separately pay piece-rate employees for work time during which the employees are unable to earn a piece rate because employers have required them to perform non-piecework activities. This holding will ensure that workers who perform some work on a piece-rate basis—including truck drivers, roofers, drywall installers, and fruit packers—receive compensation for other work their employers require them to perform during the work day.

### III. ARGUMENT

**A. The plain language of the Washington Minimum Wage Act provides employees a “per hour” right to minimum wage for all non-piecework time even if a worker performs some piecework during the workweek.**

The MWA provides that “every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than [the minimum wage] *per hour*.” RCW 49.46.020(1) (emphasis added). This obligation applies “for each hour of employment.” Wash. Dep’t of Labor & Indus. (“DLI”) Admin. Policy ES.A.5 at 1 (2002).

As this Court stated in *Carranza*, “the MWA’s plain language requires us to conclude that employees have a per hour right to minimum wage.” *Carranza*, 190 Wn.2d at 620. The Court has also stated a piece rate “is earned only when the employee is actively producing.” *Lopez Demetrio v. Sakuma Brothers Farms, Inc.*, 183 Wn.2d 649, 652, 355 P.3d 258 (2015). Thus, employers must pay piece-rate workers no less than minimum wage during work periods outside of active production, during which workers otherwise earn no pay.

Indeed, under Washington law, an employer may not require an employee to perform work for which no compensation is paid. *See Stevens v. Brink’s Home Sec., Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007) (“Under the MWA, employees are entitled to compensation for regular hours worked,” and “‘hours worked’ . . . mean[s] all hours during which the employee is authorized or required . . . to be on duty on the employer’s premises or at a prescribed work place” (quoting WAC 296–126–002(8))).

Thus, for each “hour worked” on something other than “piecework,” an employee is entitled to be paid at no less than the minimum wage rate.

This standard must apply regardless of any contract, custom, or agreement to the contrary. Indeed, employment statutes like the MWA were “designed to defeat rather than implement contractual arrangements,” especially for workers who are “selling nothing but their labor.” *Sec’y of Labor v. Lauritzen*, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring); *see also Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2d Cir. 1915) (Hand, J.) (noting that employment statutes were meant to “upset the freedom of contract”).

In *Carranza*, this Court held that the plain language of RCW 49.46.020 gives employees a “per hour right” to minimum wage. *Carranza*, 190 Wn.2d at 620. The Court thus rejected the use of workweek averaging to compensate for non-piecework hours. *Id.* at 622 (“Workweek averaging ignores the per hour right to compensation that the MWA imposes by making it possible to conceal the fact that an employer is not compensating its employees for all hours worked because payment for *some* hours of piece-rate picking work is spread across *all* hours worked.”). Because the MWA applies to all workers not specifically exempt, this Court’s conclusion applies to both agricultural and non-agricultural workers and both pieceworkers and non-pieceworkers. This Court should not retreat from this important protection for all Washington workers.

**B. Employers must pay no less than minimum wage for all non-piecework time during which no piece-rate pay accrues.**

For workers who perform both piecework and non-piecework tasks, this Court should adopt a standard that provides employers must separately pay at least minimum wage for all non-piecework activity. That is, if a worker cannot increase his or her pay through more efficiency or productivity during the work period (as is the case during the stopovers, fueling periods, meetings, and periods of waiting for loading or unloading that Knight's drivers experience), then the worker is not performing piecework and must be separately compensated at no less than the minimum wage.

Under this standard, a roofing company must separately pay roofing workers for a required thirty-minute safety meeting before starting on the roof. A drywall company must pay workers who are required to wait at a worksite for one hour before the materials arrive. And a fruit packing company must pay a piece-rate pear packer for the twenty minutes of downtime during which she cannot pack any fruit but must stay at the packing plant because there was a packing line malfunction.

Under this standard, however, an employer does not have to pay separately for any active production time during which a worker can increase his or her piece-rate pay through productivity or efficiency. *Lopez Demetrio*, 183 Wn.2d at 652 (recognizing a piece rate "is earned only when the employee is actively producing"). This includes time truck drivers

spend on the road, time roofers spend working on the roof, and time fruit packers are able to spend actively packing fruit on the packing line.

The dividing line between productive piecework tasks and non-piecework tasks is logical. Workers who perform some piecework are entitled to separate pay at no less than minimum wage for work time during which they are unable to earn a piece rate. Thus, if an employer requires a piece-rate employee to perform work for which no piece rate can be earned because no “pieces” can be produced, the employer must separately pay for that work. Requiring compensation for time periods in which workers otherwise earn nothing is consistent with the plain language and remedial purpose of the MWA, is fair, and is easy to enforce.

**C. The Court must liberally construe the MWA to protect vulnerable workers and reject any interpretation by the Department of Labor and Industries that is inconsistent with a liberal construction of the statute.**

The standard WELA proposes is consistent with a liberal construction of the MWA. The standard Knight proposes is not.

Knight’s entire argument relies on its interpretation of WAC 296-126-021, a Department of Labor and Industries interpretation of the Industrial Welfare Act (RCW 49.12), not the MWA (RCW 49.46). WAC 296-126-021 provides that where workers are paid on a “piecework basis, wholly or partially, (1) [t]he amount earned on such basis in each work-week period may be credited as *a part* of the total wage for that period; and (2) [t]he total wages paid for such period shall be computed on the hours

worked in that period resulting in no less than the applicable minimum wage rate.” (Emphasis added).

For employees who perform *solely* “production” work and are paid exclusively on a piece-rate basis for that work, compliance could be measured on a workweek basis. *See* WAC 296-126-021. But for employees who perform both non-production *and* production work in the same week, compliance must be measured *both* on a per-hour basis and on a workweek basis. *See* Plaintiffs’ Opening Brief on Certified Question at 27-28. The per-hour approach is used for the non-production work because the employee is not working on a piecework basis during those periods and thus defaults to the basic entitlement to receive no less than the minimum wage rate for each hour (or partial hour) of work. RCW 49.46.020; *Carranza*, 190 Wn.2d at 615.

While Washington courts sometimes defer to DLI interpretations of the MWA, this Court has cautioned that courts should defer to DLI only if its interpretation is “consistent with the plain language” of the MWA, “the stated purposes of the MWA,” and “the [liberal construction] principles that apply to interpretation of remedial legislation governing payment of wages.” *Bostain*, 159 Wn.2d at 712-15. “Deference to an agency’s interpretation is never appropriate when the agency’s interpretation conflicts with a statutory mandate.” *Id.* at 716-17. Here, this Court has held the plain language of the MWA provides a “per hour right” to minimum wage. *Carranza*, 190 Wn.2d at 620. An interpretation of WAC 296-126-021 that would permit an employer to refuse to pay for certain work time so

long as the employer pays a workweek average of minimum wage would conflict with the statutory mandate this Court recognized in *Carranza*. In addition, a liberal interpretation of WAC 296-126-021 for the benefit of workers requires the per-hour approach for non-production time during which no pay otherwise accrues. Under *Bostain*, this Court should not defer to Knight's interpretation of WAC 296-126-021 because it is not "consistent with the plain language" of the MWA as stated in *Carranza*, "the stated purposes of the MWA," and "the [liberal construction] principles that apply to interpretation of remedial legislation governing payment of wages." *Bostain*, 159 Wn.2d at 712-15.

Furthermore, "[e]xemptions from remedial legislation, such as the MWA [] are narrowly construed and applied only to situations which are plainly and unmistakably consistent with the terms and spirit of the legislation." *Drinkwitz*, 140 Wn.2d at 301. The exemption Knight seeks for pieceworkers would be inconsistent with both the terms of the MWA, which requires payment of no less than minimum wage "per hour," *Carranza*, 190 Wn.2d at 620, and the spirit of the MWA, which must be liberally construed for the benefit of employees. See RCW 49.46.020; *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012). Such an exemption would allow an employer to offset unpaid hours worked with compensation paid for other hours worked, which is impermissible. See *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 914 (9th Cir. 2004) ("Crediting money already due an employee for

some other reason against the wage he is owed is not paying that employee the compensation to which he is entitled by statute.”).

This Court should liberally construe the MWA for the benefit of workers and hold that if an employer requires a piece-rate employee to perform work during which no piece rate can be earned, the employer must separately pay for that work.

**D. Low-wage workers in piece-rate industries have historically faced wage theft under pure “workweek averaging” schemes.**

This Court held in *Carranza* that the MWA provides Washington employees a “per hour right to minimum wage.” *Carranza*, 190 Wn.2d at 620. There is no policy reason for treating non-agricultural workers differently than agricultural workers with regard to the right to be paid at least minimum wage for all non-piecework time.

Many non-agricultural workers perform some work on a piece-rate basis. For example, residential construction workers, including drywall hangers and tapers, roofers, and insulation applicators, are often paid piece rates for their productive work (e.g., by the square foot of drywall hung, roof completed, or insulation installed). This workforce, which is largely comprised of immigrants, can earn above minimum wage for their piecework, but when employers do not pay them for non-piecework activities, the employers are effectively using the workers’ piece-rate pay to finance the non-piecework activities. In other words, they’re robbing Peter

to pay Peter. These workers often must perform non-piecework activities during which no pay accrues and during which they have no control over their time, such as attending safety meetings, filling out paperwork, waiting at the worksite for supplies, donning and doffing, and traveling between sites. Employers often deprive these workers of several hours of pay each week for these “non-productive” tasks during which the workers still must be on the job in the interest of their employer.

The MWA was not designed to permit these types of arrangements. Instead, the MWA requires payment for each hour worked at no less than the minimum wage “per hour.” RCW 49.46.020; *Carranza*, 190 Wn.2d at 614-15.

Adopting Knight’s position in this case would deprive piece-rate workers of rights that hourly workers clearly possess. For example, non-agricultural workers who pack apples in Washington fruit-packing plants are generally paid on an hourly basis. Workers who pack pears in those plants, on the other hand, are often paid on a per-box piece-rate basis. In fruit-packing plants, the machine operating the packing line sometimes malfunctions, resulting in downtime that can range from five to thirty minutes (or more), during which the workers often cannot leave their positions on the line. Under Knight’s approach to minimum wage compliance, the hourly apple packer would be entitled to be paid for a thirty-

minute machine downtime period, but the piece-rate pear packer who must also stand by at the line, ready to begin packing again, could be deprived of pay for that half hour. In effect, if this Court adopted Knight's position, the employer could require the piece-rate packer to stay on the packing line, without pay, until the machine was fixed, while paying the hourly packer for that same work time. This would be an anomalous and unfair result for workers who perform some work on a piece-rate basis. It is not what the legislature intended when it enacted the MWA. To ensure employers cannot require Washington workers to perform work for no pay, this Court should answer the certified question, "yes."

#### IV. CONCLUSION

This Court should protect Washington workers' right to be paid for all hours worked by holding that the MWA requires non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work.

Respectfully submitted this 1st day of April 2019.

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I hereby declare under penalty of perjury under the laws of the State of Washington that the above and foregoing AMICUS CURIAE BRIEF was filed with the Washington Supreme Court and copies were served to the following counsel of record via email and the Court's electronic filing system:

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**April 01, 2019 - 1:01 PM**

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