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No. 1029225

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,
Petitioner,

v.

CANNABIS GREEN, LLC, dba LOVELY BUDS, a
Washington limited liability company, SIMPLY BUDS, LLC
dba LOVELY BUDS NORTH, a Washington limited liability
company, TLE OF SPOKANE, LLC dba LOVELY BUDS
DIVISION, a Washington limited liability company, and
TODD BYCZEK and ELIZABETH BYCZEK, in their
individual capacities and as a marital community,

Respondents.

**RESPONDENTS' ANSWER TO BRIEF OF AMICI CURIAE FAIR
WORK CENTER, WORKING WASHINGTON, AND NATIONAL
EMPLOYMENT LAW PROJECT**

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I. INTRODUCTION

The amicus brief filed by the Fair Work Center, Working Washington, and the National Employment Law Project's (collectively "FWC/WW and NELP" or "the Amici Curiae") does not raise an actual issue of substantial public interest which could make this dispute ripe for review, but rather seeks an inappropriate advisory opinion in an area of well-settled law. The Amici Curiae sidestep the narrow issue before the Court in favor of a broad focus on policy matters related to supporting the mantra of worker's rights without an understanding of what they are asking the Court to do and ignoring laws and mechanisms already in place that better protect workers.

The Amici Curiae offer no new insights, analysis, or authority to assist the Court in determining whether or not the Court will accept review of the appellate court's decision. Rather, the Amici Curiae make a broad policy argument that the Court should expand the law under RCW 49.48.040(1)(b) to give DLI broader powers to hold employers accountable a)

without identifying why the current law is ambiguous or was improperly interpreted by the trial court and Court of Appeals and b) why the current laws enacted by Washington's Legislature are deficient.¹ The generalized support offered by the Amici Curiae for the Department of Labor & Industries' ("DLI") position rings hollow as it ignores the underlying facts and issues before the trial court and provides no additional assistance to the Court in reviewing this matter. By embracing the Amici Curiae's argument, both employers *and their employees* would be deprived of due process and the ability to pursue prompt, efficient, and appropriate resolutions under Washington's Wage Payment Act (WPA) and Collection of Wages in Private Employment Act (CWPEA). The Respondents (collectively "Cannabis Green") respectfully request that the Court declines review of the appellate court's opinion.

¹ Assuming the latter issue is correct, it is not this Court's responsibility to legislate and either re-write or expand the law to support the Amici Curiae's policy goals.

II. ARGUMENT

Washington Rule of Appellate Procedure 13.4 provides four exclusive reasons why this Court may accept a petition for review:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Amici Curiae make no argument that review is appropriate under any of the first three prongs. The Amici Curiae argue solely there is substantial public interest. The Amici Curiae present two issues that they claim satisfy the “substantial public interest” standard, and which they argue

would be addressed by this Court's review. First, they allege that RCW 49.48.040(1) should be interpreted in a manner such that it is “consistent with its broad remedial purpose and to prevent wage theft”. *Brief of Amici Curiae*, pp. 1-9. Second, they allege that the current interpretation of the statute will “reward employers for noncompliance with recordkeeping requirements.” *Brief of Amici Curiae*, pp. 10-14. Both of these arguments fail.

1. The Amici Curiae Fail to Demonstrate Review Is Appropriate Under RAP 13.4(b)(4).

The Amici Curiae argue that the Court needs to revise and change the law to broaden the scope of DLI’s authority. Effectively, the Amici Curiae ask that the Court permit DLI to file civil actions on behalf of all employees of an employer without first determining amounts owed by the employer or ordering payment of the amounts determined owed. In so doing, the Amici Curiae ask that the Court change the statute to permit DLI to bring such an action without the knowledge, consent, or

assignment of the employees, and to permit DLI to settle, dismiss, or otherwise resolve the claims of individual workers in superior court. Based upon the facts and circumstances of this specific case, DLI could ignore individual wage complaints filed by workers (despite there being a sixty (60) day requirement to address such complaints) and advance litigation for years without the employee being able to opt-out or pursue their own relief through a WPA claim or separate lawsuit.

The Amici Curiae do not identify a specific issue on which the amicus curiae brief is directed, but rather advocate for the “effective enforcement of labor standards by L&I”. The Amici Curiae merely restate DLI’s irrelevant (and factually inaccurate) contentions about enforcement of labor laws and the protection of low-wage workers. *See* RAP 10.3(e) (Amicus must “avoid repetition of matters in other briefs.”). “An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does

not serve this purpose burdens the Court, and its filing is not favored.” U.S. Supreme Court Rule 37(1). The Amici Curiae disagree with the trial and appellate court decisions but offer no reason why and certainly not what distinguishes their amicus brief from what DLI has already argued.

2. Amici Curiae Seek an Improperly Broad Scope of Review of RCW 49.48.040(1)(b).

As is the case with Petitioner/Appellant DLI’s contentions, this matter is inappropriate for review under “the issue of substantial public interest” provision of RAP 13.4(b)(4) because Amici Curiae fail to provide any reason why the Court of Appeals was incorrect when it rejected all of DLI’s arguments with regard to the expansion of RCW 49.48.040(1)(b), an unambiguous statute. The Amici Curiae devote a significant portion of their brief to discussing general concepts regarding challenges workers face in recovering unpaid or withheld wages. These challenges include the fear of retaliation by an

employer and the inability to hire legal counsel because of the high costs of litigation.

Regarding the fear of retaliation, by removing the prerequisite that DLI determine wages owed and order the payment of wages before filing a suit under RCW 49.48.040(b)(1), the concerns about employer retaliation are not addressed. Instead, DLI would skip the step of fulfilling its statutory obligations and proceed straight to potentially protracted litigation representing employees without their knowledge (but presumptively compelling them to participate in litigation as party witnesses). An employee is no more reassured by this approach because rather than having a prompt resolution to their unpaid wages through an administrative investigation followed by DLI issuing an order to the employer to pay wages, a lawsuit would be initiated with no immediate end in sight. An employee would not know whether their wages are part of the lawsuit, or how quickly their potential undefined claims would be resolved. However, by DLI's definition, these employees would be party

witnesses to the lawsuit and expected to comply with discovery requests issued by the employer.

With regard to access to justice concerns and the costs of retaining private legal counsel, both DLI and the Amici Curiae conveniently ignore RCW 49.48.040(1)(c) which expressly authorizes DLI to “[t]ake assignments of wage claims and prosecute actions for the collection of wages of persons who are financially unable to employ counsel when in the judgment of the director of the department the claims are valid and enforceable in the courts.” Moreover, under the WPA, employees can file a wage complaint that DLI is responsible for investigating and issuing a citation if it finds that there are unpaid wages within sixty (60) days of submission. Employees have no greater access to justice or more immediate right to recover unpaid wages under the Amici Curiae’s paradigm.

Even in the absence of an employee wage complaint, DLI has the statutory authority to determine what is owed and order an employee to pay such wages without ever filing suit.

Removing that component of the statute does not eliminate a hurdle, it weakens DLI's authority and forces civil suits to be filed.

3. The Amici Curiae's Argument that RCW 49.48.040(1)(b) Should Be Interpreted Differently to Force Compliance with Record-Keeping Requirements Is a Red Herring and Inapplicable to These Proceedings.

The issue on appeal is not whether Cannabis Green “failed to maintain and produce accurate records”, but rather whether DLI could initiate a lawsuit under RCW 49.48.040(1)(b) without first ordering the payment of all wages owed the workers and determining an amount owed. To now reframe the issue, in spite of the plain language of RCW 49.48.040(1)(b), to being about whether or not Cannabis Green had or had not complied with obligations to comply with administrative investigations would distort the entirety of these proceedings.

If it is the Amici Curiae's position that DLI needs an expansion of authority to act in court on behalf of Washington's

workers without first ordering the payment of wages determined to be owed, then the Amici Curiae's argument is well-suited for legislative process and decision-making. This Court, however, is not responsible for changing the law to suit the Amici Curiae's apparent policy wish-list.

Importantly, the record-keeping policy arguments the Amici Curiae offer ignore the very statutes that embrace the Amici Curiae's concerns. For example, Washington workers have been empowered to bring wage claims to L&I for swift resolution and without the need to retain legal counsel under RCW 49.48.083. In instances where a worker is compelled to bring a lawsuit against an employer but is financially unable to employ counsel, RCW 49.48.040(c) authorizes the director of DLI to take an assignment and prosecute the claim. And L&I can act independently of an employee's potential wage claim by file own wage complaint by ordering "the payment of all wages owed the workers and institute actions necessary for the

collection of the sums determined owed.” RCW 49.48.040(1)(b).

What both DLI and the Amici Curiae ignore is that if DLI is unable to order the payment of wages owed workers because of a lack of compliance with an investigation, DLI has a number of enforcement mechanisms to compel an employer’s compliance with an investigation or statutory request for records. *See, e.g.,* RCW 49.46.040, -.070, -.100; RCW 49.48.040(4). With its subpoena power, if there is no response or insufficient compliance, DLI can bring enforcement and contempt proceedings. *See* RCW 34.05.588. DLI chose not to do so in this instance because DLI admittedly never issued a valid subpoena that Cannabis Green was obligated to respond to. However, whether or not Cannabis Green responded to a lawful request for records or an administrative subpoena was not the nature of the lawsuit filed against Cannabis Green and the Amici Curiae are silent on this issue.

4. Public Policy Strongly Disfavors the Amici Curiae's Request to Broaden RCW 49.48.040(1)(b).

Because the Amici Curiae ignore and mischaracterize the circumstances of DLI initiating the lawsuit against Cannabis Green, they undermine the public policy arguments they hope to advance. In 2019, DLI reached out to Cannabis Green under the pretext of educating Cannabis Green on best business practices and ensuring compliance with Washington's wage and labor laws. (CP 231-232) Cannabis Green was amenable to the overture and a willing participant. After delays and interruptions which were no fault of Cannabis Green, DLI eventually revealed that it was performing an investigation of Cannabis Green because of "concerns". (CP 225) DLI has never identified a single instance of wage theft by Cannabis Green including the identity of any employee, the type of wage or benefit that was unpaid to that specified individual, or the amount of wages owed. DLI has never informed Cannabis Green of an audit or initiated one.

DLI went for extended periods without any communication with Cannabis Green. (CP 220-228; 82-114) After Cannabis Green asked for further clarification as to DLI's investigation, DLI served invalid subpoenas that were never reissued to require a response from Cannabis Green and Cannabis Green was forced to bring a civil action to quash the subpoenas. (CP 175) DLI never resumed its investigation, re-issued subpoenas, conducted interviews or depositions, or made a basic request for information. Instead, DLI proposed a "Compliance Agreement" to Cannabis Green. (CP 87-90)

What the Amici Curiae ignore is that the actions taken by DLI did not serve to help Washington's workers in the manner they argue in their amicus curiae brief. The proposed Compliance Agreement did not confirm any violations or specify an instance of wage theft for a single employee. *Id.* In fact, the key component of the Compliance Agreement was that DLI agreed to *terminate* its incomplete investigation into past unpaid wages for the arbitrary sum of \$25,000 of unspecified attorney's fees and

costs. (CP 99) (“Through the agreement, L&I will commit not to investigate wage and hour violations through the date of the signed compliance agreement.”) Under the proposed Compliance Agreement, no employee would have received any amount for unpaid wages and Cannabis Green would not have been released from any wage claims.²

III. CONCLUSION

No new issue, insight, analysis, or consideration is offered in the amicus brief. The Amicus Curiae contend that the lower court’s ruling “will incentivize employer noncompliance and make it even more difficult for workers to recover their unpaid

² Moreover, DLI stated that if the Compliance Agreement was rejected, DLI would resume its investigation and demand payment of any wages determined to be due.” (CP 99). Rather than resuming its investigation, determining amounts owed, and ordering payment of those amounts, DLI issued a press release and filed a civil suit against Cannabis Green. This generated at least five (5) WPA complaints which DLI summarily ignored despite purporting to represent the claimants in DLI’s lawsuit against Cannabis Green. Cannabis Green never refused an investigatory request or failed to comply with a subpoena after negotiations over the proposed Compliance Agreement broke. Instead, DLI simply filed suit.

wages” without articulating what new information or analysis they can offer to support that position. Surely, DLI has made these exact same arguments at the trial and appellate court levels. The amicus brief does not offer any substantive reason for additional argument and is merely a restatement (or at times a direct copy) of DLI’s position on policy.

The arguments of the Amici Curiae are unpersuasive. Cannabis Green respectfully requests that the Court reject these arguments and decline review of the Petition.

This document contains 2377 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 25th day of June, 2024.

EVANS, CRAVEN & LACKIE, P.S.

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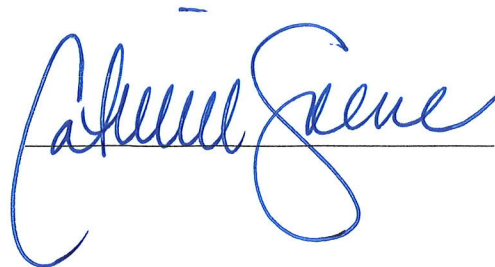
CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the 25th day of June, 2024, the foregoing was delivered to the following persons in the manner indicated:

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A handwritten signature in blue ink, appearing to read "Catharine Greene", written over a horizontal line.

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