NO. 1029225

SUPREME COURT OF THE STATE OF WASHINGTON

Department of Labor and Industries,

Petitioner-Plaintiff,

v.

Cannabis Green, LLC, et al.

Defendants-Respondents.

BRIEF OF AMICI CURIAE FAIR WORK CENTER, WORKING WASHINGTON, AND NATIONAL EMPLOYMENT LAW PROJECT.

Jeremiah Miller
WSBA #40949
Fair Work Center &
Working Washington
2100 24th Ave. S., Ste. 270
Seattle, WA 98144
(206) 620-0777
jmiller@fairworkcenter.org

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITIES AND INTERESTS OF AMICI

The identities and interests of Amici are set out in the accompanying motion for leave. We are non-profit legal advocacy organizations that work to raise and enforce workplace standards in Washington State and nationally.

II. STATEMENT OF THE CASE

Amici adopt Petitioner's Statement of the Case.

III. ARGUMENT

A. This Court should grant review under RAP 13.4(b)(4) because there is a substantial public interest in interpreting RCW 49.48.040(1) consistent with its broad remedial purpose and to prevent wage theft.

1. Wage theft is rampant, especially in low-wage industries like retail.

Companies too often commit wage and hour violations across low-wage industries. A landmark study surveying more than 4,000 workers across 3 major U.S. cities found that 26 percent of workers were not paid the applicable minimum wage,

76 percent were not paid overtime, and 70 percent suffered from "off-the-clock" violations by not being compensated for all hours worked, among other violations.[1] Another study updating and extrapolating this data nationwide found that workers lost more than $50 billion in wage theft nationwide in 2016.[2] Retail is one of the leading industries where employers commit wage violations.[3]

---

[1] Annette Bernhardt, Ruth Milkman, Nik Theodore, *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities* 2-3 (National Employment Law Project, University of California at Los Angeles, University of Illinois at Chicago: September 2, 2009), *available at* https://www.nelp.org/app/uploads/2015/03/BrokenLawsReport2009.pdf

[2] Celine McNicholas, Zane Mokhiber & Adam Chaikof, *Two billion dollars in stolen wages were recovered for workers in 2015 and 2016 – and that's just a drop in the bucket* 3 (December 13, 2017), *available at* https://files.epi.org/pdf/138995.pdf

[3] Amy Traub, *The Steal: The Urgent Need to Combat Wage Theft in Retail* 2 (DEMOS: 2017), *available at* https://www.demos.org/sites/default/files/publications/The%20Steal%20-%20Retail%20Wage%20Theft.pdf

2. Ensuring the Department of Labor and Industries ("L&I") has its full authority to initiate actions benefiting workers without first pre-determining the precise damages owed, consistent with the broad remedial purpose of the statute, is vital given the many hurdles for workers seeking to recover unpaid wages.

Washington State has a "long and proud history of being a pioneer in the protection of employee rights." *Hill v. Xerox Bus. Servs., LLC,* 191 Wn.2d 751, 760, 426 P.3d 703 (2018). In the early part of the 20th Century, Washington's minimum wage law (predating the Minimum Wage Act, ("MWA")) was upheld as a valid attempt by the state to protect the health, safety, and general welfare of its people. *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 587, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379, 57 S. Ct. 578 (1937) (overturning, *inter alia*, *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539 (1905)). In enacting the MWA, the Washington Legislature recognized that a minimum wage was "a subject of vital and imminent concern to the people of this state," RCW 49.46.005(1), and as this Court has repeatedly recognized, "[c]onsistent with Washington's priority of protecting employee

rights, courts must liberally construe the MWA in favor of the employee." *Nwauzor v. GEO Grp., Inc.*, 2 Wash 3d. 505, 513, 540 P.3d 93 (2023) (internal citations and quotation marks omitted).

L&I enforces wage and hour laws on behalf of employees under the Collection of Wages in Private Employment Act (CWPEA). RCW 49.48.040-070. L&I's role is essential to effectuating the purpose of the Minimum Wage Act – to protect employee rights – because of the daunting barriers workers face in trying to assert their rights to be properly paid for their work.

First, low-wage workers face well-documented and well-founded fears of retaliation by their employers that discourage them from coming forward. One national study of low-wage workers found that 43 percent of workers who complained about workplace violations were retaliated against – including being fired, suspended, or threatened with cuts in their hours or pay by

their employers.[4] Among those workers who did not make a complaint, despite perceived violations, half said they feared they would be fired if they complained.[5] A recent study surveying over 1,000 California workers found that 38 percent of workers surveyed had experienced a workplace violation, and that a majority of those that came forward to report it experienced employer retaliation as a result.[6]

Retaliation – and the fear of retaliation – have a chilling effect because the cost can quickly escalate, especially for those who live paycheck to paycheck: "missed bill payments, lower credit scores, eviction, repossession of a car or other property, suspension of a license, inability to pay child support or taxes,

---

[4] Bernhardt *et al.*, *supra* note 1 at 3.
[5] *Id.*
[6] Tsedeye Gebreselassie, Nayantara Mehta & Irene Tung, *How California Can Lead on Retaliation Reforms to Dismantle Workplace Inequality* 4-5 (National Employment Law Project: November 2022), *available at* https://www.nelp.org/app/uploads/2022/11/NELP-Report-CA-Retaliation-Funds-2022.pdf

attorney's fees and costs, stress, trauma and more."[7] For undocumented workers, who already experience disproportionately higher rates of wage theft,[8] the threat of their employers' immigration-based retaliation is especially chilling.[9] The ability of L&I to "stand in the shoes," *see Dep't of Lab. & Indus. v. Overnight Transp. Co.*, 67 Wn. App. 24, 36, 834 P.2d 1295 (1987) of these aggrieved employees that are too frightened to come forward must be given its full effect for their rights to be vindicated.

Second, L&I's role in upholding employee rights is essential because of the barriers workers face in obtaining private

---

[7] Laura Huizar, *Exposing Wage Theft Without Fear: States Must Protect Workers from Retaliation* 7 (National Employment Law Project: June 2019), *available at* https://www.nelp.org/app/uploads/2019/06/Retal-Report-6-26-19.pdf

[8] Bernhardt *et al.*, *supra* note 1 at 43.

[9] *See* Rebecca Smith & Eunice Cho, *Workers Rights on ICE: How Immigration Reform Can Stop Retaliation and Advance Labor Rights* (National Employment Law Project: February 2013), *available at* https://www.nelp.org/app/uploads/2015/03/Workers-Rights-on-ICE-Retaliation-Report.pdf

representation. Income eligibility requirements for pro-bono legal services can be extremely low – in 2015, "an individual had to make less than $14,713 per year – a family of four less than $30,313 per year – to be eligible for Legal Services Corporation aid," which constitutes the "biggest source of funding for civil legal aid for low-income Americans."[10] Underfunding of legal aid assistance makes it difficult for these programs to meet demand.[11] Additionally, finding a private attorney willing to take the average wage and hour case is nearly impossible, given the relatively low-dollar amounts of many workers' claims in low-paying jobs. A 2023 CBS News investigation analyzing 650,000 complaints filed with state labor departments around the country

[10] Rebecca Buckwalter-Poza, *Making Justice Equal* 4 (Center for American Progress: December 8, 2016), *available at* https://www.americanprogress.org/wp-content/uploads/sites/2/2016/12/MakingJusticeEqual-brief.pdf

[11] *Id.*

found that the average amount owed to workers was just under $1,000.[12]

Finally, the rise of employer-imposed forced arbitration agreements and class and collective action waivers present yet another barrier for workers seeking to recover unpaid wages. More than 60 million workers in the U.S. are subject to mandatory arbitration agreements, foreclosing their right to file a lawsuit on their own behalf.[13] Nearly 25 million workers are forced to sign class action waivers, losing their right to address widespread workplace violations through collective action that protects individuals and can result in broader impacts and compliance by companies.[14] A 2019 study estimated that by

---

[12] CBS News, "Wage theft often goes unpunished despite state systems meant to combat it" (June 30, 2023), *available at* https://www.cbsnews.com/news/owed-employers-face-little-accountability-for-wage-theft/

[13] Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration: Access to the courts is now barred for more than 60 million American workers* 2, (Economic Policy Institute: April 6, 2018), *available at* https://files.epi.org/pdf/144131.pdf

[14] *Id.*

2024, 80 percent of all private-sector, non-union employees would be subject to forced arbitration requirements and class/collective action waivers.[15]

Faced with the prospect of trying to resolve their claims alone, in a process that heavily favors employers, 98 percent of workers whose claims are subject to forced arbitration abandon them. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C.L. Rev. 679, 696 (2018). For this vast and growing majority of U.S. workers barred from accessing the courts, public enforcement like L&I is the most effective and sometimes the only way for them to recover what they are actually owed.

---

[15] Kate Hamaji, Rachel Deutsch, Elizabeth Nicolas, Celine McNicholas, Heidi Shierholz & Margaret Poydock, *Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back* 1 (The Center for Popular Democracy & The Economic Policy Institute: May 2019), *available at* https://www.populardemocracy.org/sites/default/files/Unchecked-Corporate-Power-web.pdf

B. There is a substantial public interest in interpreting the statute to not reward employers for noncompliance with recordkeeping requirements.

1. Employers frequently do not keep employee records, especially in low-wage industries where wage violations are the most common.

The respondents in this case had a clear duty to keep and produce records of their employees' wages and hours worked, RCW 49.46.040(3), a duty which they flagrantly violated. Employer record-keeping requirements are fundamental to the enforcement of wage laws, since employers are in the best position "to know and produce the most probative facts concerning the nature of the amount of work performed" by their employees. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S.Ct. 1187 (1946), *see also Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 584, 397 P.3d 120 (2017) (providing evidence "should not be an onerous burden on the employer, who is already keeping track of the employee's time for payroll purposes" and citing the "comparable burden shifting and record

retention responsibility on the employer regarding the employee's claim under [FLSA])."[16]

This recordkeeping duty is especially vital for effective enforcement in workplaces with large concentrations of low-wage workers who may be paid off-the-books in cash or by personal check and who receive very little, if any, documents from their employer. *See, e.g.* Bernhardt *et al.,* at 3 (finding that 57 percent of low-wage workers did not receive pay stubs in violations of state laws requiring employers to provide workers with written documentation regarding wages, rates of pay and hours worked). However, too many employers in these low-wage industries persist in failing to make, maintain, or produce records and face no consequences. This frustrates the ability of workers and/or L&I to vindicate their workplace rights.

---

[16] Washington courts often look to precedent under the Fair Labor Standards Act ("FLSA") to interpret corresponding provisions of the MWA. *See*, *e.g.*, *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 869-870, 281 P.3d 289 (2012) (adopting the FLSA's economic realities test for which workers are employees as defined by the MWA).

2. The lower court's ruling creates an incentive for employers to not keep records, resulting in rewarding law-breaking employers, facilitating wage theft, and putting law-abiding businesses at a disadvantage.

If upheld, the impact of the lower court's ruling will be far reaching across low-wage industries that are already most affected by wage theft. Aggrieved workers should not be penalized by an employer's failure – or outright refusal – to comply with their recordkeeping duties under the statute. *See Anderson*, 328 U.S. at 687 (in FLSA context, stating that "such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the [FLSA]." And employers should not be rewarded for thumbing their nose at their duty under the statute by refusing to provide payroll records. *See, e.g. Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.*, 6 Wn. App. 2d 803, 824, 431 P.3d 1018 (2018) (court was "not at all sympathetic" to employer's complaint that

it incurred additional pre-judgment interest because of the time it took to deliver final calculation of employee wages because "the difficulty in accounting for the unpaid wages was entirely attributable to . . . [the employer's] failing to keep a record of the amount of time originally reported by the employee"). Such a result would just give a green light for even more employers to violate workplace laws, secure in the knowledge that they can avoid liability by engaging in the same egregious conduct that Respondents did here. It would have the perverse effect of putting law-abiding businesses that *do* comply with their obligations under Washington's wage and hour laws at a disadvantage. And it would shift the costs of noncompliance onto the community as a whole. *See, e.g. Parrish*, 300 U.S. at 399-400 (in upholding Washington State minimum wage statute, stating that "[t]he exploitation of a class of workers . . . is not only detrimental to their health and well-being, but casts a direct burden for their support upon the community . . . the community

is not bound to provide what is in effect a subsidy for unconscionable employers").

IV. CONCLUSION

The Court should grant the petition for review.

This document contains 2,093 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 31st day of May 2024,

Jeremiah Miller
WSBA #40949
Fair Work Center &
Working Washington
2100 24th Ave. S., Ste. 270
Seattle, WA 98144
(206) 620-0777
jmiller@fairworkcenter.org

Attorney for Amici Curiae

FAIR WORK CENTER / WORKING WASHINGTON

May 31, 2024 - 3:06 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,922-5
Appellate Court Case Title:	Department of Labor and Industries v. Cannabis Green, LLC, et al.
Superior Court Case Number:	22-2-01496-7

The following documents have been uploaded:

- 1029225_Motion_20240531150233SC566540_4481.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Amicus Brief.pdf
- 1029225_Other_20240531150233SC566540_2690.pdf
  This File Contains:
  Other - Motion for Leave to File Amicus Brief
  The Original File Name was Motion for Leave to File.pdf

A copy of the uploaded files will be sent to:

- anastasia.sandstrom@atg.wa.gov
- cruckelshaus@nelp.org
- jmiller@fairworkcenter.org
- lniseaeservice@atg.wa.gov
- rplatin@ecl-law.com
- sthilo@ecl-law.com
- tgebreselassie@nelp.org

Comments:

Sender Name: Alexis Rufi - Email: arufi@fairworkcenter.org
Filing on Behalf of: Jeremiah Miller - Email: jmiller@fairworkcenter.org (Alternate Email:)

Address:
116 WARREN AVE N
SUITE A
SEATTLE, WA, 98109
Phone: (206) 289-0693

Note: The Filing Id is 20240531150233SC566540