NO. 91945-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ABELARDO SAUCEDO, *et al.*,

Plaintiffs-Respondents,

v.

JOHN HANCOCK LIFE & HEALTH INSURANCE, CO., *et al.*,

Defendants-Petitioners.

AMICUS CURIAE BRIEF
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Jeffrey L. Needle, WSBA #6346
Law Offices of Jeffrey Needle
119 1st Ave. South - Suite #200
Seattle, WA 98104
Telephone: (206) 447-1560
Email: jneedlel@wolfenet.com

Christie Fix, WSBA #40801
Frank Freed Subit & Thomas
705 2nd Ave Ste 1200
Seattle, WA 98104-1798
Telephone: (206) 682-6711
Email: cfix@frankfreed.com

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I. INTRODUCTION AND INTEREST OF AMICUS

The Washington Employment Lawyers Association ("WELA") is comprised of more than 150 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life. WELA is an affiliate of the National Employment Lawyers Association.

Plaintiffs filed a class action lawsuit in federal court on behalf of approximately 700 farm workers to prevent a gun wielding foreman from cheating them out of their wages for work performed for John Hancock's orchards. The farm workers named Hancock, Farmland and NW Management as defendants.[1] Plaintiffs claimed that all defendants violated the Farm Labor Contractor Act ("FLCA"), RCW 19.30 *et seq.*

The United States District Court granted summary judgment in favor of the Plaintiffs and the Defendants appealed. The Ninth Circuit Court of Appeals certified to this Court two questions:

> (1) Does the FLCA, in particular Washington Revised Code § 19.30.010(2), include in the definition of a "farm labor contractor" an entity who is paid a per-acre fee to manage all aspects of farming—including hiring and employing agricultural workers as well as making all planting and harvesting decisions, subject to approval—

[1] "John Hancock" and "Hancock" refer to John Hancock Life & Health Insurance Co., John Hancock Life Insurance Company, and Texas Municipal Plans Consortium, LLC; "Farmland" refers to Farmland Management Services; "NW Management" refers to NW Management & Realty Services, Inc.; "Growers" refers to all Defendants-Petitioners; "Workers" refers to Plaintiffs-Respondents.

for a particular plot of land owned by a third party?

(2) Does the FLCA, in particular Washington Revised Code § 19.30.200, make jointly and severally liable any person who uses the services of an unlicensed farm labor contractor without either inspecting the license issued by the director of the Department of Labor & Industries to the farm labor contractor or obtaining a representation from the director of the Department of Labor & Industries that the contractor is properly licensed, even if that person lacked knowledge that the farm labor contractor was unlicensed?

This Court should answer both questions in the affirmative.

II. SUMMARY OF ARGUMENT

Farm workers are one of the most vulnerable classes of employees. They invariably are low income and transient, and they often speak little or no English. In recognition of their vulnerability, the Washington Legislature enacted the Farm Labor Contractor Act to protect them from unscrupulous growers and employers. The legislation must be liberally construed to advance its broad and remedial purpose.

The Court should answer both certified questions in the affirmative. The plain meaning of the FLCA includes as a "farm labor contractor" "any person" who for a fee engages in "recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees." RCW 19.30.010(2)-(3). The plain language of the statute establishes that the Defendant, NW Management, qualifies as "farm labor contractor." It is unlawful to act as a "farm labor contractor" without a valid license

issued by Washington's Department of Labor & Industries ("L&I"). RCW 19.30.020.

RCW 19.30.200 provides for joint and several liability for those entities that "knowingly" engage the services of an unlicensed "farm labor contractor." To avoid joint and several liability, the statute requires those entities either to inspect the "farm labor contractor's" license or to confirm in writing with L&I that the "farm labor contractor" is licensed by the State of Washington. An assurance from the contractor that all necessary licenses and permits have been acquired is not, as a matter of law, sufficient compliance. Negligent or willful ignorance that a contractor is unlicensed cannot be allowed to defeat the purpose of the statute.

The statutory interpretation of an administrative agency responsible for the enforcement of the statute is due substantial deference. To the extent that Section 200 of the FLCA is ambiguous, the Department of L&I has interpreted the statute to require either inspection of the actual license held by a farm labor contractor or written confirmation by L&I that the farm labor contractor is licensed. WAC 296-310-260. The Court should defer to the statutory interpretation by the Department of L&I.

The rule of lenity applies only to a criminal statute and only "*after* employing tools of statutory construction." *State v. Ervin,* 169 Wn.2d 815, 823, 239 P.3d 354 (2010). That is, the rule applies only if "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply

guess as to what [the legislature] intended." *United States v. Castleman*, ___U.S. ___, 134 S. Ct. 1405, 1460 (2014). Although RCW 19.30.200 is not free from ambiguity, ordinary rules of statutory interpretation suffice to provide clear meaning to the statute. The rule of lenity need not be considered.

Moreover, this Court has never applied the rule of lenity to a hybrid statute (with both civil and criminal components) where the statute is primarily civil in nature or where there exists no deprivation of liberty. It should not now apply the rule to the FLCA. Although the FLCA provides for a criminal penalty, there exists no record of any criminal prosecution under the statute, and, after inquiry, L&I has confirmed that it is aware of none. The absence of any criminal prosecution under the FLCA establishes that it is primarily civil in nature, and militates against application of the rule of lenity.

The criminal penalty in the FLCA was included by the legislature to strengthen the protections for farm workers, but application of the rule of lenity would weaken those protections and defeat the legislature's purpose. The statute provides for compensation to workers and liquidated damages to deter violations. The statute is remedial in nature and must be given a liberal interpretation to advance its remedial purposes.

III. ARGUMENT

A. NW Management is a "Farm Labor Contractor."

The FLCA defines "farm labor contractor" as "any person, or his or her agent or subcontractor, who, for a fee, performs any farm labor contracting activity." RCW 19.30.010(2). *See also* WAC 296-310-010(8) ("'Farm labor contractor' means any person, or his or her agent or subcontractor, who, for a fee, performs any farm labor contracting activity"). "'Farm labor contracting activity' means recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees." RCW 19.30.010(3).

"Where statutory language is plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute." *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005). *See also Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 527, 286 P.3d 46 (2012) ("When a statute is clear and unambiguous, the meaning is derived from its language").

Here, the facts are undisputed that NW Management was responsible for recruiting, soliciting, employing, supplying, transporting, or hiring agricultural employees, and that it was paid a fee for its services. RCW 19.30.010(2)-(3). Because the meaning of the statute is clear and unambiguous, no statutory interpretation is required to conclude that NW

Management was a "farm labor contractor" within the meaning of the FLCA.

The Defendants argue that NW Management was not a "farm labor contractor" within the meaning of the statute because, under their interpretation, a "contractor" does not use farm labor in its own operations but rather is essentially a broker of farm labor to third parties. They argue that because NW Management was not a broker of farm labor to third parties, it was not a contractor. Def. Brief at 20-21. While creative, the Defendants' interpretation is not supported by the plain language of the statute. Instead, the Defendants ignore the plain language of the statute and rely upon a passing reference from *Perez-Farias* which describes a farm labor contractor as "an intermediary between farm workers and farmer." *Perez-Farias*, 175 Wn.2d at 521. But the definition of "farm labor contractor" (which includes an intermediary) was not at issue in *Perez-Farias*, and the Court had no need to apply the statutory definition in that case. The Defendant reads far too much from the Court's dicta in *Perez-Farias*. The Court should reject Defendants' interpretation and answer "Yes" to the Ninth Circuit's first certified question.

B. All Defendants are Jointly and Severally Liable.

RCW 19.30.200 provides for joint and several liability for a violation of the statute:

> Any person who *knowingly* uses the services of an unlicensed farm labor contractor shall be personally, jointly, and severally liable with the person acting as a farm labor contractor to the same extent and in the same manner

> as provided in this chapter. In making determinations under this section, any user *may rely* upon *either* the license issued by the director to the farm labor contractor under RCW 19.30.030 *or* the director's representation that such contractor is licensed as required by this chapter.

(Emphasis added). The Department of L&I, the agency delegated with responsibility to enforce the FLCA, has determined that a user of farm labor must either inspect the farm labor contractor's license or obtain written confirmation from the Department of L&I that a farm labor contractor is licensed:

> Pursuant to RCW 19.30.200, a person may prove lack of knowledge by proving that she or he relied on a license issued by the department, or upon the department's representation that the contractor was licensed. The department shall not make oral representations that a contractor is or is not licensed. All representations by the department that a contractor is licensed shall be made in writing and shall be signed by the director or the employment standards supervisor or the assistant director. *The department shall not accept reliance on a supposed oral representation as proof in any administrative enforcement proceeding.*

WAC 296-310-260(2) (emphasis added).

The Defendants argue that the L&I regulation supports their interpretation of the statute that written confirmation of a license is only an option which creates a "safe harbor" for an entity contracting with a farm labor contractor. But the Defendants rely only upon the first sentence of the regulation and ignore the rest. Def. Brief at 39-40. The remainder of the regulation makes clear that oral representations even from L&I are insufficient to prove a lack of knowledge. If oral representations from

L&I are not sufficient to prove lack of knowledge, *a fortiori* mere oral representations or assurances from the contractor are insufficient.

In discerning the plain meaning of a provision, this Court considers the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *City of Spokane v. County of Spokane*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). The Court interprets statutes so that all language is given effect with no portion rendered meaningless or superfluous. *Perez-Farias*, 175 Wn.2d at 526. The Court's "paramount duty" in statutory interpretation is to give effect to the Legislature's intent. *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000); *Whatcom County v. City of Bellingham,* 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). In particular, "[r]emedial statutes protecting workers generally must be liberally construed to further their intended purposes, which in this case includes promoting the enforcement of the FLCA and deterrence." *Perez-Farias*, 175 Wn.2d at 530.

The broad purpose of the FLCA is to assure that farm labor contractors make full disclosure to all workers concerning the wages to be paid, RCW 19.30.110, and that they are financially solvent to pay wages due farm workers. RCW 19.30.040-045. Toward that end, the FLCA requires that farm labor contractors be licensed and imposes joint and several liability for those who knowingly use an unlicensed farm labor contractor. In the absence of inspection of an actual license or written

confirmation from the Department of L&I that the contractor is licensed, the enforcement of the statute is easily frustrated by negligence or willful ignorance. The purpose of the statute is defeated if those who hire farm labor contractors are allowed to make no effort at compliance or to simply rely upon the oral assurances from the contractor that all necessary licenses and permits have been acquired.

The Department of L&I is responsible for administering the FLCA. The agency has interpreted this statute to require written proof that a farm labor contractor is licensed. WAC 296-310.260(2). Oral representations by L&I are not sufficient. *Id.* To the extent the court finds that RCW 19.30.200 is ambiguous, the Court should defer to the agency's interpretation of the statute. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77 (2000) ("Where a statute is within the agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous).

Here, Hancock simply relied upon assurances by Farmland that it had complied with all license requirements. Def. Brief at 8-9. The record is devoid of any effort made by Hancock or Farmland to confirm with NW Management or with the State that NW Management was licensed as a farm labor contractor. The Defendants' apparent ignorance that a license was required is no excuse, and they are jointly and severally liable for all damages. The Court should answer "Yes" to the Ninth Circuit's second certified question.

C. The Rule of Lenity Does Not Apply to the FLCA Because the Court Need Not Guess at its Meaning.

"If a statute is ambiguous, the rule of lenity requires [the Court] to interpret the statute in favor of the [criminal] defendant absent legislative intent to the contrary." *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281, 284 (2005). Relying upon *State v. Jacobs*, the Defendants argue that "[t]o the extent Section 200 is reasonably susceptible to alternative interpretations, the rule of lenity requires resolution of any ambiguity in Defendants' favor." Def. Brief at 46. The Defendants are wrong.

The rule of lenity only applies to resolve an ambiguous term after all other rules of statutory construction fail. *State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010); *United States v. Castleman*, ___U.S. ___, 134 S. Ct. 1405, 1460 (2014) ("The rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended"); *Muscarello v. United States*, 524 U.S. 125, 138 (1998) ("'[G]rievous ambiguity or uncertainty' necessary to invoke lenity requires more than '[t]he simple existence of some statutory ambiguity' because 'most statutes are ambiguous to some degree'") (internal quotation omitted); *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute'") (quoting *Bifulco v. United States*, 447 U.S. 381, 387

(1980)). Here, application of familiar rules of statutory construction mandate a conclusion that any person or entity who hires a farm labor contractor must inspect the license or confirm in writing that she or he is licensed with the Department of Labor and Industries. *See* Section IIIB. The Court need not guess at the statute's meaning, and the rule of lenity does not apply.

This Court has already determined that the FLCA is a remedial statute to be liberally construed in order effectuate its purpose. *Perez-Farias*, 175 Wn.2d at 530 ("Remedial statutes protecting workers generally must be liberally construed to further their intended purposes, which in this case includes promoting the enforcement of the FLCA and deterrence"). The rule of lenity is inconsistent with the liberal interpretation mandated by *Perez-Farias,* and the FLCA would be significantly weakened if the rule of lenity is applied to allow an employer's ignorance to excuse compliance.

D. The Rule of Lenity Does Not Apply to This Hybrid Statute.

Statutes with both a civil and criminal component are commonly known as "hybrid statutes." Courts have been inconsistent in applying the rule of lenity to the interpretation of hybrid statutes. *See* Jonathan Marx, *How to Construe a Hybrid Statute*, 93 Va. L. Rev. 235, 235 (2007); Stephen Wills Murphy, *The Rule of Lenity and Hybrid Statutes: WEC Carolina energy Solutions LLC v. Miller*, 64 South Carolina L. Rev. 1129, 1129 (2013). One scholar has noted that application of the rule of lenity in

hybrid statutes "creates the paradox that, although Congress would probably imagine itself to be *strengthening* a statute by adding criminal penalties to it, . . . the addition of such penalties has the effect of *weakening* the statute, because courts may then feel obliged to apply the rule of lenity . . . in civil cases." Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex. L. Rev. 339, 392 (2005) (emphasis added). It is clear that the imposition of a criminal provision to the FLCA statute was intended to *strengthen* the statute and not weaken it. The same is true for many hybrid statutes which, like the FLCA, this Court has interpreted to apply liberally to protect employees.[2] Application of the rule of lenity to the FLCA would have the effect of weakening the statute by allowing employers to easily avoid any responsibility for cheating farm workers out of their hard earned wages. That could not have been the legislature's intention.

Defendants cite *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004), for the proposition that the rule of lenity must be applied to a hybrid statute

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[2] *Perez-Farias*, 175 Wn.2d at 530; *see Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 157-59, 961 P.2d 371 (1998) (civil statute prohibiting willful withholding of wages and making violations a misdemeanor, RCW 49.48.020, must be liberally construed to protect workers' wages); *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (interpreting the Minimum Wage Act, RCW 49.46 *et seq.* broadly to protect workers despite criminal provision against retaliation, RCW 49.46.100(2)); RCW 49.52.070 (creating a claim for rebated wages with liquidated damages despite a criminal provision, RCW 49.52.050); RCW 49.38.*et seq.* (creating a claim for wages against a theatrical enterprise despite criminal provision, RCW 49.38.060); RCW 49.44.135 (creating a civil cause of action for requiring lie detector tests with liquidated damages, despite a criminal provision, RCW 49.38.120(3)).

regardless of whether the case arose in a criminal or civil context. Def. Brief at 27-28. Washington courts, however, are not bound by this dicta.

In *Leocal*, a Haitian citizen who was a permanent resident of the United States was convicted of driving under the influence of alcohol and causing serious bodily injury in violation of Florida law. *Leocal*, 543 U.S. at 3. Because this conviction was interpreted to be a "crime of violence" under the Immigration and Nationality Act ("INA"), the Board of Immigration Appeals ordered the petitioner to be deported. The Supreme Court reversed the deportation and concluded that the DUI conviction was not a "crime of violence."

To determine whether petitioner had committed a "crime of violence," the Court considered "the elements and nature of the offense of conviction, rather than [] the particular facts relating to petitioner's crime." *Id.* at 7. In that regard, the Court considered whether the conviction for DUI required the "use" of force, and determined that it did not. *Id.*

Although the case arose in a civil deportation hearing, the underlying Florida statute being analyzed was indisputably and exclusively criminal in nature, and under those circumstances application of the rule of lenity made sense. In this case, however, the FLCA is primarily civil in nature, and its criminal application is rarely, if ever, prosecuted. The application of the rule of lenity to a hybrid statute which is primarily civil in nature effectively transforms it into a criminal statute despite the lack of criminal prosecutions. This makes no sense.

The Defendants cite two state cases for the proposition that the rule of lenity should apply where the statute provides for both civil remedies and criminal penalties. Def. Brief at 28 n.35. These cases are readily distinguishable. In *State v. Harris*, 39 Wn. App. 460, 693 P.2d 750 (1985), the Plaintiff filed a personal restraint petition seeking release from confinement in a mental institution after he was acquitted of a crime by reason of insanity. *Id.* at 462. The rule of lenity applied to the commitment statute, RCW 10.77.020(3), despite the civil posture of the personal restraint petition because the statute "involve[d] a deprivation of liberty." *Id.* at 465. *Internet Cmty. & Ent't Corp. v. State*, 39 Wn. App. 460, 201 P.3d 1045 (2009), was a declaratory judgment action filed by an internet company that had been accused of engaging in "professional gambling" in violation of a criminal gambling statute. In affirming summary judgment to the internet company, the Court of Appeals reluctantly applied the rule of lenity because the statute was criminal in nature and "the nature of the statute at issue determines whether the rule of lenity is to be applied, not the civil posture of the case in which the statute is being considered." *Id.* at 465. Notably, however, the Supreme Court *reversed* the Court of Appeals' application of the rule of lenity, holding that the statute was unambiguous and that the internet company had unambiguously engaged in unlawful conduct. *See Internet Cmty. & Entm't Corp. v. Wash. State Gambling Comm'n*, 169 Wn. 2d 687, 694, 238 P.3d 1163 (2010).

In this case, in contrast to *Harris* and *Internet Community*, there exists no deprivation of liberty and the nature of the statute is primarily civil, rather than criminal.

There are no published or unpublished cases addressing the FLCA's criminal provisions, and, after inquiry, the Department of L&I reports no knowledge of criminal prosecutions under this statute. To the contrary, the FLCA is primarily remedial—its purpose is to protect vulnerable workers, and unlike the commitment and criminal gambling statutes at issue in Defendants' cited cases, it provides a civil remedy for aggrieved workers. An interpretation of the entire statute as criminal would be inconsistent with the virtual absence of criminal prosecutions and the liberal interpretation required for civil remedial statutes.

IV. CONCLUSION

The Court should give the FLCA a liberal interpretation to promote its remedial purpose. The Court should answer both certified questions affirmatively.

Dated this 30th day of November, 2015.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, _____
Jeffrey Needle, WSBA #6346
Christie J. Fix, WSBA #40801

DECLARATION OF SERVICE

I, Lonnie Lopez, hereby declare that on the 30th day of November, 2015, I caused to be sent and filed via email to the Clerk of the Supreme Court of the State of Washington and to be delivered via email a true and accurate copy of the attached document to the following:

Attorneys for Defendants-Appellants Texas Municipal Plans Consortium, LLC, John Hancock Life Insurance Company & John Hancock Life and Health Insurance, Co.

Susan Felice Dicicco
Ari M. Selman
David Bruce Salmons
Morgan Lewis
1.01 Park Avenue
New York, NY 10178
Email:
susan.dicicco@morganlewis.com,
ari.selman@morganlewis.com,
david.salmons@morganlewis.com

David Bruce Salmons
Morgan Lewis
2020 K St. NW
Washington, DC 2006-1806
Email:
david.salmons@morganlewis.com

John Ray Nelson
Foster Pepper PLLC
422 W. Riverside Avenue, Suite 1310
Spokane, WA 99201-0302
Email: nelsj@foster.com

Christopher Glenn Emch
Foster Pepper PLLC
1111 3rd Avenue, Suite 3400
Seattle, WA 98101-3264
Email: emchc@foster.com

Attorneys for Defendants-Appellant Farmland Management Services

Leslie Richard Weatherhead
Geana Mae Van Dessel
Lee & Hayes, PLLC
6.01 W. Riverside Avenue, Suite 1400
Spokane, WA 99201-0627
Email: LeslieW@leehayes.com,
GeanaV@leehayes.com

Attorneys for Defendants-Appellant Northwest Management and Realty Services, Inc.

Brendan V. Monahan
Sarah Lynn Clarke Wixson
Stokes Lawrence Velikanje Moore
& Shore
12.0 N. Naches Avenue
Yakima, WA 98901-2757
Email: bvm@stokeslaw.com,
slw@stokeslaw.com

Attorneys for Plaintiffs-Respondents
Lori Jordan Isley
Joachim Morrison
Andrea Schmitt
Columbia Legal Services
6 Sound Second Street, Suite 600
Yakima, WA 98901
Email:
lori.isley@columbialegal.org,
joe.morrison@columbialegal.org,
andrea.schmitt@columbialegal.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 30th day of November, 2015.

Lonnie Lopez

Lonnie Lopez