

NO. 94229-3

**SUPREME COURT OF THE STATE OF WASHINGTON
CERTIFICATION FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF WASHINGTON**

MARIANO CARRANZA and ELISEO MARTINEZ, individually and on
behalf of all others similarly situated

Petitioners/Plaintiffs,

v.

DOVEX FRUIT COMPANY,

Respondent/Defendant,

***AMICI CURIAE* BRIEF OF THE WASHINGTON WAGE CLAIM
PROJECT and WASHINGTON EMPLOYMENT LAWYERS
ASSOCIATION**

David N. Mark, WSBA No. 13908
WASHINGTON WAGE CLAIM
PROJECT
810 Third Avenue, Suite 500
Seattle, WA 98104
Telephone: (206) 340-1840
*Attorneys for Washington Wage
Claim Project*

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L.
NEEDLE
119 First Avenue South, Suite 200
Seattle, WA 98104
Telephone: (206) 447-1560
*Attorney for Washington
Employment Lawyers Association*

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. IDENTITY OF INTEREST OF AMICI CURIAE.....2

III. ISSUE ADDRESSED BY AMICI3

IV. STATEMENT OF THE CASE3

V. ARGUMENT3

 A. Washington’s Long and Proud History in Wage and Hour Law Began With A Holding that Non-Production Activity Was Work, Notwithstanding a Contrary Industry Custom.....3

 B. IBP Slaughterhouse Workers Were Awarded Hour-by-Hour Minimum Wage Pay for Non-Production Work, Without an Offset for Productivity Pay.....5

 C. IBP Reacted as Most Employers Would React – It Applied Efficiencies to Reduce the Non-Production Work.....7

 D. This Issue Affects Significant Segments of Non-Agricultural Workers.10

VI. CONCLUSION11

TABLE OF AUTHORITIES

State Cases

<i>Anderson v. DSHS</i> , 115 Wn.App. 452, 63 P.3d 134 (2003)	10
<i>Anfinson v. Fedex Ground Package System, Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	8
<i>Davies v. Seattle</i> , 67 Wash. 532, 121 P. 987 (1912)	4 - 5
<i>Larsen v. Rice</i> , 100 Wash. 642, 171 P. 1037 (1918).....	3
<i>UFCW Local 1001 v. Mutual Benefit Life Insur. Co.</i> , 84 Wn.App. 47, 52, 925 P.2d 212 (1996).....	8
<i>Spokane Hotel Co. v. Younger</i> , 113 Wash. 359, 194 P. 595 (1920).....	3

Federal Cases

<i>Adkins v. Children's Hospital</i> , 261 U.S. 525, 43 S. Ct. 394, 67 L.Ed. 785 (1923).....	5
<i>Alvarez v. IBP, Inc.</i> 2001 WL 34897841 (E.D. Wash.), <i>aff'd</i> , 339 F.3d 894 (9th Cir. 2003), <i>aff'd</i> on other issues sub nom. <i>IBP v. Alvarez</i> , 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005).....	passim
<i>Reich v. Department of Conservation and Natural Resources</i> , 28 F.3d 1076 (10th Cir. 1994).....	8
<i>Reich v. IBP, Inc.</i> , 820 F.Supp. 1315 (D.Kan. 1993), <i>aff'd</i> , 38 F.3d 1123 (10th Cir. 1994), on remand, 3 BNA Wage & Hour Cases 2d 324 (D.Kan. 1996) and 3 BNA Wage & Hour Cases 2d 863 (D.Kan. 1996), <i>aff'd sub nom Metzler v. IBP,</i> <i>Inc.</i> , 127 F.3d 959, 962-66 (10th Cir. 1997).....	7
<i>Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123</i> , 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944)	9

<i>West Coast Hotel Co. v. Parrish</i> , 300 U.S. 379, 57 S. Ct. 578, 81 L.Ed. 703 (1937), <i>aff'g Parrish v. West Coast Hotel Co.</i> , 185 Wash. 581, 55 P.2d 1083 (1936).....	5
---	---

State Statutes

Laws of 1899, ch. 101, § 1, codified at RCW 49.28.010	4
Laws of 1903, ch. 44, §1, codified at RCW 49.28.040.	4
Laws of 1913, ch. 174.....	5
Laws of 1959, ch. 294	10

Federal Statutes

29 U.S.C. §§ 201-19.....	5
29 U.S.C. § 203(g).....	8
29 U.S.C. § 254(a)	10

Other Authority

Justice Gerry L. Alexander, <i>Parrish v. West Coast Hotel Co., Did This Washington Case Cause the Famous “Switch in Time That Saved Nine”?</i> , WASHINGTON STATE BAR NEWS 24 (2010).....	5
Thomas Friedman, <i>Iowa Beef Revolutionized Meat-Packing Industry</i> , New York Times, June 2, 1981.....	7

I. INTRODUCTION

The Washington Wage Claim Project and the Washington Employment Lawyers' Association file this brief to address the issue of pay for time spent performing activities outside of production work, *i.e.*, non-production work. Amici focus on the importance of proper compensation for non-production work in wage and hour law jurisprudence. A principal function of wage and hour law has been to assure that non-production work is recognized as work, recorded as hours worked and properly compensated. Washington State has been a pioneer in assuring workers' non-production work is properly compensated.

Amici discuss slaughterhouse donning and doffing litigation. In *Alvarez v. IBP, Inc.* 2001 WL 34897841 (E.D. Wash.), *aff'd*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other issues sub nom. IBP v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005), Pasco, Washington slaughterhouse workers were held entitled under state law to compensation at the minimum wage for pre-production and post-production activities. This holding applied to workers whose pay was incentivized, the rationale being that incentive pay was for more efficient production work – not for non-production activities. Equally important, by so holding, *Alvarez* and other slaughterhouse donning and doffing cases gave employers reason to apply the same amount of industrial engineering savvy to non-production work as

they did to their highly-efficient production work. The result was that non-production times were substantially decreased for the benefit of all. *Alvarez* provides an example of how requiring compensation for non-production work on an hourly basis accomplishes the purposes of the minimum wage laws.

The *amici* address the issue of pay for non-production time from the perspective of Washington workers generally. Although the present case involves agricultural workers, the issue equally impacts non-agricultural piece rate workers.

II. IDENTITY OF INTEREST OF AMICI CURIAE

The Washington Wage Claim Project (“WWCP”) is a non-profit corporation founded in 2015 whose goal is to promote access to justice for low wage workers. Many WWCP clients are immigrant construction workers who perform mostly piece rate work on Western Washington residential and small commercial projects. In this industry, piece rate workers regularly perform non-production work, such as set up, post-shift cleaning, attending safety meetings, driving between sites and waiting at the site for materials to arrive.¹

¹ The WWCP author of this brief was also counsel for the *Alvarez* workers, along with the Seattle law firm of Schroeter Goldmark & Bender. *Alvarez* dealt entirely with non-production work, including slaughter division workers whose production work was paid under an incentivized piece-rate-like system. *See infra*.

The Washington Employment Lawyers Association (“WELA”) is an organization of approximately 188 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.²

III. ISSUE ADDRESSED BY AMICI

Does Washington law require agricultural employers to pay their pieceworkers for time spent performing activities outside of piece-rate picking work (e.g., “Piece Rate Down Time” and similar work)?

IV. STATEMENT OF THE CASE

The *amici curiae* do not see the need to address the parties’ statement of the case.

V. ARGUMENT

A. Washington’s Long and Proud History in Wage and Hour Law Began With A Holding that Non-Production Activity Was Work, Notwithstanding a Contrary Industry Custom.

Washington’s earliest wage and hour case involved an issue of how

² This brief is authored by WELA *amicus* committee members who are not associated with the law firms of Frank Freed Subit & Thomas LLP and the Terrell Marshall Law Group PLLC.

to analyze non-production work. At the end of the 19th Century and beginning of the 20th Century, Washington State passed legislation establishing the 8-hour work day for laborers on public works projects.³ In *Davies v. Seattle*, 67 Wash. 532, 121 P. 987 (1912), this Court held that hours worked included non-production work by road construction crews, consisting of harnessing horses, driving the team to the road site and performing the reverse at shift's end. Seattle offered evidence that "in the cities of Seattle, Tacoma, Spokane, Everett, and Bellingham, a custom has obtained, since the enactment of this law, requiring teamsters to work eight hours a day 'on the job'", *i.e.*, at the road construction site. *Id.* at 534 (underlining added). The non-production work was described by the cities as "'choring' or 'preparing for the day's work.'" *Id.* at 534. In the absence of regulations or wage and hour case law, this Court affirmed based on the trial court's analysis: "It would seem, as the learned trial court observed at the close of the trial, that there could not be two opinions as to whether the [teamsters] were working more than eight hours a day. If the excess time put in the by the [teamsters] was not work, then the inquiry is: What is work, and where is the dividing line?" *Id.* at 535.

³ Laws of 1899, ch. 101, § 1, codified at RCW 49.28.010 and Laws of 1903, ch. 44, §1, codified at RCW 49.28.040. The 1899 law applied to contractors' employees, while the 1903 law applied to publicly-employed laborers. *See id.*

A year after *Davies*, Washington State enacted its first minimum wage law, which provided protection for women and children. Laws of 1913, ch. 174. This Court repeatedly upheld the constitutionality of the minimum wage laws.⁴ Finally, the United States Supreme Court agreed in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L.Ed. 703 (1937), *aff'g Parrish v. West Coast Hotel Co.*, 185 Wash. 581, 55 P.2d 1083 (1936), and overruling *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394, 67 L.Ed. 785 (1923).⁵ *Parrish* was the impetus for the federal Fair Labor Standards Act of 1938 (“FLSA”), codified at 29 U.S.C. §§ 201-19.

B. IBP Slaughterhouse Workers Were Awarded Hour-by-Hour Minimum Wage Pay for Non-Production Work, Without an Offset for Productivity Pay.

In *Alvarez v. IBP, Inc.* 2001 WL 34897841 (E.D. Wash.), *aff'd*, 339 F.3d 894 (9th Cir. 2003), *aff'd on other issues sub nom IBP v. Alvarez*, 546 U.S. 21, 126 S.Ct. 514, 163 L.Ed.2d 288 (2005), Pasco, Washington slaughterhouse workers sought damages under state and federal law for pre-shift and post-shift non-production work. The trial court held that the workers were engaged in a variety of compensable pre-shift and post-shift

⁴ *Larsen v. Rice*, 100 Wash. 642, 171 P. 1037 (1918); *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 P. 595 (1920).

⁵ See Justice Gerry L. Alexander, *Parrish v. West Coast Hotel Co., Did This Washington Case Cause the Famous “Switch in Time That Saved Nine”?*, WASHINGTON STATE BAR NEWS 24 (2010).

non-production work activities, such as pre-production donning protective gear in locker rooms, walking between the locker rooms and plant floors, preparing equipment and post-shift washing gear, walking and doffing. *Id.* at 11-13. The trial court held that under Washington law the workers had a right to the minimum wage pay for their non-production work. *Id.* at 20.

A large group of workers were paid under a productivity plan referred to as “sunshine pay,” which the trial court described as follows:

Since October 1995, slaughter division employees have been eligible for “sunshine pay” for the time by which a shift’s scheduled hours exceed the killout time of the scheduled number of head.” Sunshine pay “is possible where downtime is minimized during the shift and/or where chain speed is increased.” (Exhibit 73a) Sunshine pay is extra compensation for working more efficiently and more quickly.

Id. at 2. The trial court rejected IBP’s effort to do what Dovex is trying to do in this case, *i.e.*, use productivity pay to offset hourly pay for non-production work, stating:

IBP has sought to treat Sunshine payments as an off-set. The Court finds that these Sunshine payments are in the nature of incentive pay, *i.e.*, a reward for working more efficiently and at greater speeds. In effect, IBP has been making these payments to slaughter division employees for the production floor performance during their work shift. Sunshine pay is not payment for off-the-clock work, nor is it the type of premium pay that could offset overtime pay obligations under [29] U.S.C. § 207(h). Similarly, Sunshine pay is not compensation for MWA off-the-clock work and does not offset MWA damages.

Id. at 24. In *Alvarez*, the trial court concluded that under Washington law non-production work had to be paid at the state minimum wage and that productivity pay could not be used to offset liability for unpaid non-production work.⁶ IBP was not allowed to do what Dovex Fruit Company seeks to do in this case. It was not allowed to use above-minimum-wage productivity payment to offset minimum wage pay for non-production work. Dovex Fruit Company's Answering Brief, at pages 28-29, is written without an awareness of the Sunshine pay aspect of the *Alvarez* trial court's opinion.

C. IBP Reacted as Most Employers Would React – It Applied Efficiencies to Reduce the Non-Production Work.

In the 1960s, IBP transformed the meatpacking industry in the United States. It applied industrial engineering principles to meat slaughter and processing, doing what Henry Ford did for automobile production.⁷ However, it was not until after IBP was held liable for pre- and post-production work in the 1990s that IBP applied those same principles of

⁶ The Ninth Circuit affirmed, although IBP did not make the sunshine pay offset argument on appeal. 339 F.3d at 894. The Supreme Court considered a separate federal wage and hour law issue and affirmed. 546 U.S. at 21.

⁷ Thomas Friedman, *Iowa Beef Revolutionized Meat-Packing Industry*, New York Times, June 2, 1981. Iowa Beef Processors later became known as IBP. Its processing plant disassembly line put an end to large sides of beef being shipped to regional butchers. Instead the Pasco plant and other modern plants ship boxes of meat directly to supermarkets and restaurant suppliers.

industrial engineering to non-production work. Only when IBP had to pay for the work, did it stream-line the process and assigned tasks to designated employees who were able to reduce the burdens on production workers.⁸

The requirement that employers record and pay for non-production time aligns the incentives in a way that furthers MWA policy. Employers who must pay for non-production tasks at minimum wage have an incentive to value and therefore reduce the employees' non-production time. This is consistent with MWA policy, under which employers are required to pay for all work they permit and to prevent any work they do not wish to be performed.⁹ By allowing production incentive pay to subsume unpaid non-production time, the employer has little or no incentive to reduce inefficiencies in non-production work.

⁸ For example, non-production workers were assigned to sharpen everyone's knives and washup sinks were added to avoid post-shift delays. See *Reich v. IBP, Inc.*, 820 F.Supp. 1315 (D.Kan. 1993)(liability), *aff'd*, 38 F.3d 1123 (10th Cir. 1994), *on remand*, 3 BNA Wage & Hour Cases 2d 324 (D.Kan. 1996) and and 3 BNA Wage & Hour Cases 2d 863 (D.Kan. 1996), *aff'd sub nom Metzler v. IBP, Inc.*, 127 F.3d 959, 962-66 (10th Cir. 1997); *accord, Alvarez*, 2011 WL 34897841 at 2 & n. 3 (IBP's efforts to reduce non-production work); *Alvarez*, 339 F.3d at 899 & n. 4 (discussing same).

⁹ The MWA – like the Fair Labor Standards Act – defines work to include the “permit to work” concept, under which employers must pay for all work that is allowed to occur. Compare RCW 49.46.010(2)(“‘employ’ includes to permit to work”) with 29 U.S.C. § 203(g)(“‘employ’ includes to suffer or permit to work”); *accord Anfinson v. Fedex Ground Package System, Inc.*, 174 Wn.2d 851, 868 & n.2, 281 P.3d 289 (2012)(suffer is synonymous with permit; therefore, there is no substantive difference between the MWA and FLSA definitions). “[A]n employer ‘permits’ work when it has either actual or constructive knowledge of the allegedly uncompensated work.” *UFCW Local 1001 v. Mutual Benefit Life Insur. Co.*, 84 Wn.App. 47, 52, 925 P.2d 212 (1996). An employer has an obligation to exercise its control to see that work is not performed if it does not want it performed. E.g., *Reich v. Department of Conservation and Natural Resources*, 28 F.3d 1076, 1083 (10th Cir. 1994).

Employees sell their time to the employer. All work time – whether it is production work or non-production work – is time the employees have given to the employer and do not have for themselves. It is unfair for employers to saddle employees with unpaid non-production work which is paid with above-minimum-wage compensation for production work. It means the employees are not receiving much if any pay for their non-production work. It also gives employers little or no incentive to reduce the time and burden of non-production work.

In *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944), the United States Supreme Court first held that work may include non-production activity, in a case involving miners who traveled underground to and from the areas in the mine where coal was being extracted. The Court wrote:

[T]hese provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade, but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.

321 U.S. at 597. The Court defined work – including non-production work – “as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” 321 U.S. 598. Moreover, the Court rejected the argument that industry custom could

supersede a proper construction of the FLSA, stating that the FLSA “was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee’s time while compensating him for only a part of it.” 321 U.S. at 602.¹⁰

The issue under the MWA in this case is what is the proper measure of compensation for non-production work. The same remedial principles should guide this Court to a construction which pays laborers at least the minimum wage for all non-production hours and provides employers an incentive to minimize hours worked which they do not wish to compensate at minimum wage.

D. This Issue Affects Significant Segments of Non-Agricultural Workers.

These efficiencies affect many workers. For example, residential construction workers in Western Washington are often paid piece rates. In the present economy they can usually earn above minimum wages for their production work. The workforce is largely comprised of immigrants. When non-production work is unpaid, workers are not receiving any additional

¹⁰ In the Portal-to-Portal Act of 1947, 61 Stat. 84, 86-87 (codified at 29 U.S.C. § 254(a)), Congress restricted FLSA claims for certain preliminary and postliminary work, including travel. *See Alvarez*, 546 U.S. at 24-30. However, Washington State’s Minimum Wage Act, RCW ch. 49.46, – which was originally enacted in Laws of 1959, ch. 294 – did not adopt the Portal-to-Portal Act of 1947 restrictions. *Anderson v. DSHS*, 115 Wn.App. 452, 457, 63 P.3d 134 (2003) (“The MWA does not include language similar to the Portal to Portal Act.”). The MWA thus provides greater protections to workers as regards preliminary and postliminary non-production work than does federal law.

pay for work such as attending safety meetings, set up time, travelling between sites or delays while waiting for supplies. Their only option when non-production time becomes excessive is to quit.

Requiring employers to record and pay for non-production work assures workers that at least minimum wage compensation will be paid for this non-production time. It also gives employers an incentive to structure the workday to limit non-production work as much as they can for the mutual benefit of the employers and the employees.

Meanwhile, productivity pay can continue. Employees can still have incentives to perform their production work in a faster and more efficient manner. With employees paid at least the minimum wage for non-production work, productivity systems can be focused more clearly on efficiency and speed in the production work.

VI. CONCLUSION

The *amici curiae* respectfully submit that question one be answered by holding that Washington law requires agricultural employers to pay their pieceworkers for time spent performing activities outside of piece-rate picking work, *i.e.*, non-production work.

RESPECTFULLY SUBMITTED this 31th day of July, 2017.

/s/ David N. Mark

David N. Mark, WSBA No. 13908
WASHINGTON WAGE CLAIM PROJECT
810 Third Avenue, Suite 500
Seattle, WA 98104
Tel. (206) 340-1840

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
119 First Avenue South, Suite 200
Seattle, WA 98104
Telephone: (206) 447-1560
*Attorney for Washington Employment
Lawyers Association*