

Case No. 17-15322

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR, U.S. DEPARTMENT
OF LABOR,

Plaintiff-Appellee

v.

BLAND FARMS PRODUCTION & PACKING, LLC

Defendant-Appellant

On Appeal from the United States District Court for the Southern District Of
Georgia, Case No. 6:14-CV-00053-JRH

Amici Curiae Brief of National Center for Law and Economic Justice and 11 Other
Organizations Dedicated to FLSA Enforcement In Support of Plaintiff-Appellee
and Urging Affirmance of the District Court's Judgment

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**CERTIFICATE OF INTERESTED PERSONS,
CORPORATE DISCLOSURE STATEMENT, AND STATEMENT
PURSUANT TO FRAP 29(C)(5)**

Pursuant to Federal Rules of Appellate Procedure 29(c), amici curiae hereby provide the following disclosure statements:

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Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for amici certifies that in addition to the persons and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement provided by Defendant-Appellant in its initial brief, the following persons and entities have interest in the outcome of this case.

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Pursuant to FRAP 29(c)(5), *amici* state that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was

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INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of the Adelante Alabama Worker Center, Florida Legal Services, Georgia Latino Alliance for Human Rights, Georgia Legal Services Program, Justice in Motion, Kentucky Equal Justice Center, The Legal Aid Justice Center’s Virginia Justice Project for Farm and Immigrant Workers, the National Center for Law and Economic Justice, the National Employment Law Project, Project South, Southerners on New Ground, and the Southern Poverty Law Center in support of Plaintiff-Appellees the United States Department of Labor. *Amici* Georgia Latino Alliance for Human Rights, Adelante Alabama Worker Center, and SONG have members residing in Eleventh Circuit states who would be adversely impacted by a ruling against the U.S. Department of Labor. *Amici* submit this brief not to repeat the arguments made by the parties, but to bring to the Court’s attention our unique perspectives on low-wage workers’ experiences and to shed light on the public policies embodied in the Fair Labor Standards Act.

Adelante Alabama Worker Center (“Adelante”) is a non-profit community organization based in Birmingham, Alabama that unites low-wage and immigrant workers and their families to defend their rights, promote their dignity, and pursue justice for all. Adelante engages in campaign-based organizing, media advocacy, community education, and legal representation and litigation to

challenge wage theft, workplace exploitation, deportation, prolonged detention, racial profiling and other unlawful practices that affect immigrant workers in Alabama. Adelante regularly works in coalition with other civil rights groups in Alabama and across the Southeast to challenge a wide array of attempts by state and private actors to undermine the legal rights, shared prosperity and political power of working-class people of color.

Florida Legal Services (“FLS”) is a statewide leader in advancing economic, social, and racial justice. FLS advocates for poor, vulnerable, and hard to reach people through impact litigation, legislative and administrative advocacy, education, and strategic partnerships. The Immigrant and Migrant Rights Project of FLS has provided over 20 years of legal assistance to farmworkers and immigrant families working in Florida. The project represents clients with work-related legal issues in federal and state courts or administrative proceedings, such as unpaid wages, violations of working and housing conditions, breach of employment contract matters, employment discrimination, and unemployment insurance. Affirmance of the district court’s opinion will help protect the employment rights of our farmworker clients.

The **Georgia Latino Alliance for Human Rights** (“GLAHR”) educates, organizes, and empowers Latinos in Georgia to defend and advance their civil and human rights. Established in 2001, GLAHR is a community-based organization

that develops statewide grassroots leadership in Latino immigrant communities. Over the past 10 years, GLAHR has established a powerful network of informed and engaged community members through base-building strategies that defend and advance the civil and human rights of Latinos and immigrants living in the Georgia. The outcome of this case will affect many of our members who work in low-wage industries.

The **Georgia Legal Services Program** (“GLSP”) is a non-profit legal services organization that provides legal representation to indigent clients in Georgia, including migrant and seasonal agricultural workers. Most of the cases handled by GLSP on behalf of agricultural workers are brought to vindicate the clients’ rights under the Fair Labor Standards Act. GLSP has an interest in the outcome of this matter because the Court’s decision may directly impact the rights of some GLSP clients to overtime compensation and liquidated damages under the Fair Labor Standards Act. Moreover, GLSP has further interest in the outcome of this matter because Bland Farms is a Georgia employer and employs hundreds of migrant and seasonal agricultural workers each year, and GLSP’s clients have worked for Bland Farms in the past and may work for Bland Farms in the future.

Justice in Motion is dedicated to exposing and overcoming injustices facing migrant workers. Through a network of on-the-ground human rights partners, Justice in Motion makes sure that wherever migrants go, their rights will follow.

The application of the overtime provisions of the Fair Labor Standards Act and the award of liquidated damages in cases where packing shed workers process the produce of external farms are important precedent that must be upheld in order to protect farmworkers in the United States.

Kentucky Equal Justice Center (“KEJC”) is a non-profit poverty law center that provides multi-disciplinary direct legal services to and policy advocacy on behalf of low income Kentuckians. KEJC’s Employment Law Project provides legal assistance to individuals encountering federal and state wage and hour violations and educates and advocates for policy on many other employment law topics.

The **Legal Aid Justice Center’s Virginia Justice Project for Farm and Immigrant Workers** serves the agricultural community throughout the Commonwealth. It visits farmworkers whose living and working conditions provide testament to the fact that laborers on the farms and in the packing sheds have few legal protections and those that exist are inconsistently enforced. It is imperative that the few protections afforded these workers be upheld by the courts and that employers do not violate the rights of the workers without fear of legal consequence.

The **National Center for Law and Economic Justice** (“NCLEJ”) exists to protect the legal rights of people with limited financial means, including people

receiving public entitlements and low-wage workers. NCLEJ focuses on impact litigation that will establish important principles for the protection of such individuals, and is committed to ensuring that all workers are afforded dignity and fair treatment on the job. It has been involved, as counsel or *amicus curiae*, in many significant cases involving the rights of low-income individuals over the more than 50 years since it was founded in 1965.

The **National Employment Law Project** (“NELP”) is a non-profit legal organization with over 50 years of experience advocating for the employment and labor rights of low-wage workers under federal employment and labor laws. NELP has litigated and participated as amicus in numerous cases addressing workers’ rights under the FLSA and works with public enforcement agencies to ensure a broad and consistent application of our nation’s wage and hour rules. Our work has given us the opportunity to learn about working conditions across low-wage jobs where basic fair pay violations are common.

The **North Carolina Justice Center** (“Justice Center”) is a non-profit legal advocacy organization serving clients throughout North Carolina. The mission of the Justice Center is to secure economic justice for disadvantaged persons and communities. The Justice Center provides legal assistance in civil matters to poor people, including civil matters involving the rights of workers, many of whom are directly affected by the issue before this Court in this case. The Justice Center has

a particular focus on the employment rights of farmworkers and regularly litigates on their behalf. The Justice Center participates in a coalition of organizations that promotes enhanced protections for agricultural workers, including wage and hour protections.

Project South was founded as the Institute to Eliminate Poverty & Genocide in 1986. The work of Project South is rooted in the legacy of the Southern Freedom Movement, and four primary work areas achieve its mission of cultivating strong social movements in the South powerful enough to contend with some of the most pressing and complicated social, economic, and political problems facing society today. Upholding the rights of low-wage workers is an important part of our work.

Southerners On New Ground (“SONG”) is a regional Queer Liberation organization made up of people of color, immigrants, undocumented people, people with disabilities, working class and rural and small town, LGBTQ people in the South. SONG builds a beloved community of LGBTQ people in the South who are ready and willing to do our part to challenge oppression in order to bring about liberation for ALL people. We develop leadership, build our membership base, and identify and carry out community organizing projects and campaigns. All of our work strives to bring together marginalized communities to work towards justice

and liberation for all people. An adverse ruling against the rights of low-wage workers would negatively impact our members.

The **Southern Poverty Law Center** (“SPLC”) is a non-profit organization founded in 1971 that throughout its history has worked to make the nation’s constitutional ideals a reality for everyone. The Immigrant Justice Project of the SPLC addresses the unique legal needs of migrant workers, and has represented thousands of low-wage agricultural workers, including U.S. citizen workers, documented and undocumented noncitizen workers, and foreign guestworkers in employment and other civil rights cases in federal courts throughout the southern United States, including this one. SPLC is interested in the proper application of the Fair Labor Standards Act to packing work performed in the rural Southeast and the robust enforcement of workplace laws to promote fair pay in communities within the Eleventh Circuit.

Summary of Argument

Congress enacted the Fair Labor Standards Act (“FLSA”) to ensure that workers are fairly compensated for work performed, and to limit the number of work hours necessary for a worker to attain a basic standard of living. Agricultural workers endure low wages in an industry with high rates of FLSA violations, and therefore need robust enforcement of the FLSA’s protections. Although much farm work is exempt from the overtime provisions of the FLSA, the FLSA requires farm employers who pack produce purchased from independent growers to pay workers time and a half for packing work performed. In this case, Bland Farms Production and Packing, LLC (“Bland Farms”) did not pay its employees for overtime hours as the FLSA requires.

The District Court correctly found that Bland Farms’ employees were not subject to the agricultural exemption under the FLSA, 29 U.S.C. § 213(b). The District Court correctly further found that Bland Farms was subject to the liquidated damages provision of the FLSA, 29 U.S.C. § 216(b), for failure to pay overtime wages even after the United States Department of Labor (“U.S. DOL”) had filed a complaint for non-payment of overtime in federal court, putting Bland on clear notice of its violation. *Amici* submit this brief in support of the District Court’s rulings and to demonstrate the importance of the FLSA protections at 29

U.S.C. § 207(a)(1) and § 216(b) for low-wage workers, especially those from rural areas working in produce packing sheds on farms such as Bland Farms.

Argument

I. Farmworkers Need Robust Enforcement of the FLSA to Protect their Workplace Rights and Remedy Extreme Poverty.

The District Court found that Bland Farms “failed to pay its employees overtime in violation of the FLSA.” *Acosta v. Bland Farms Prod. & Packing, LLC*, 276 F. Supp. 3d 1370, 1372 (S.D. Ga. 2017). Bland Farms stipulated to a prima facie violation of Section 7 of the FLSA, which requires that covered employers pay time and a half for those hours that an employee works in excess of a forty-hour work week. 29 U.S.C. § 207(a)(1). Bland Farms further agreed that it is covered by the FLSA and that its packing shed employees worked in excess of 40 hours per week while packing onions grown by other farmers, and its packing shed workers were not paid overtime compensation for that work. Based on these undisputed facts, the District Court correctly applied the FLSA and found Bland Farms owed its workers back wages for unpaid overtime for the years 2012 – 2017. *Acosta*, 276 F. Supp. 3d at 1380.

a. Farmworkers Endure Extreme Poverty and Low Wages.

Like the packing shed workers illegally denied overtime pay at Bland Farms, an estimated 2.5 million farmworkers work at dangerous, seasonal jobs for very little

pay.¹ Farmworkers in the U.S. earn extremely low wages: their average annual individual income is \$15,000 to \$17,499, according to the most recent Department of Labor’s National Agricultural Workers Survey (“NAWS”)². For the same time period, the federal poverty level for an individual was \$11,490, and for a family of three was 19,530.³

Many farmworkers labor for long hours, with respondents to the NAWS reporting working an average of 44 hours a week.⁴ Packing shed work involves particularly long hours, as workers who were performing packing and sorting work at the time they were interviewed by the NAWS reported working an average of 53 hours in the previous week.⁵ This packing shed work beyond forty hours in a week is compensated with the FLSA’s overtime premium when a farm employer’s packing of outside produce makes the FLSA’s narrow agricultural exemption

¹ Farmworker Justice and Oxfam America, *Weeding Out Abuses: Recommendations for a law-abiding farm labor system* (2010), available at <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.7%20weeding-out-abuses.pdf>.

² Findings from the National Agricultural Workers Survey (NAWS) 2013 - 2014: A Demographic and Employment Profile of United States Farmworkers. U.S. Department of Labor, Employment and Training Administration, Office of Policy Development and Research, Report No. 12. December 2016, available at https://www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf.

³ 2013 Poverty Guidelines issued by the Department of Health and Human Services, available at <https://aspe.hhs.gov/2013-poverty-guidelines>.

⁴ NAWS at 20.

⁵ *Id.*

inapplicable. *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 766 n.15 (1949).

Thirty percent of farmworker households in the United States live in poverty, according to data from the 2013-2014 NAWS survey.⁶ This is partly due to the seasonal nature of agricultural work: farmworkers on average are employed in agricultural jobs only 35 weeks out of the year.⁷ The problem of low wages is compounded by the exclusion of the majority of farm work from the overtime provisions of the FLSA.

Along with wages in other low-wage industries, farmworker wages have essentially stagnated since the early 1970s.⁸ For workers like the employees of Bland Farms, wages have fallen in inflation-adjusted terms, meaning wages have

⁶ *Id.* at 37.

⁷ *Id.* at 27-28.

⁸ Economic Policy Institute, *The Productivity-Pay Gap* (October 2017), available at <https://www.epi.org/productivity-pay-gap/> (showing that between 1948 and 1973 worker's productivity averaged 96.7% to an hourly compensation rate of 91.3%, while for 1973-2016, average productivity was 73.7% compared to hourly compensation of only 12.3%); Coalition of Immokalee Workers, *Facts and Figures on Florida Farmworkers* (Nov. 2011), available at https://ciw-online.org/wp-content/uploads/12FactsFigures_2.pdf (“At the current rate, a worker must pick nearly 2.5 tons of tomatoes to earn minimum wage in a typical 10-hour workday – nearly twice the amount a worker had to pick to earn minimum wage thirty years ago. . . . in real terms, per bucket, tomato pickers today actually earn significantly less than half of what they earned 30 years ago”) (citing Inflation Calculator, Bureau of Labor Statistics <http://www.bls.gov/data/inflation_calculator.htm>).

much lower purchasing power than they had in the past.⁹ Since the federal minimum wage is not indexed to rise without congressional action, it has failed to maintain its value.¹⁰ Congress last voted to raise the minimum wage in 2007, effective in 2009, in the 9 years since the current minimum wage of \$7.25 an hour has these been in effect has lost 13 percent of its value., making it even more difficult for farmworkers to make ends meet.¹¹

During the harvest of the Vidalia onion season, Bland Farms employees typically worked in the shed beginning at 8 a.m. and not ending until after midnight. Trial Transcript at p. 363 line 8 to p. 364 line 3. They did not stop working until the orders for onions for that day had been fulfilled. *Id.* at p. 371 lines 18-24. Indeed, records of packing shed employees' hours worked during the 2012 through 2017 Vidalia onion seasons reflect many employee workweeks of

⁹ Josh Bivens *et al.*, Economic Policy Institute, *Raising America's Pay: Why It's Our Central Economic Policy Challenge* (June 2014), available at <http://www.epi.org/publication/raising-americas-pay/>.

¹⁰ John Schmitt, *Minimum Wage: Catching Up to Productivity*, Democracy Journal (2013), available at <https://democracyjournal.org/magazine/29/minimum-wage-catching-up-to-productivity/>.

¹¹ Leadership Conference Education Fund, *Bare Minimum: Why We Need to Raise Wages for America's Lowest-Paid Families* 4 (2018), available at <https://leadershipconferenceedfund.org/reports/bare-minimum-need-raise-wages-americas-lowest-paid-families/> (citing David Cooper, Georgetown Center on Poverty and Inequality, *Another year of congressional inaction has further eroded the federal minimum wage* (2017)).

more than 50 or 60 hours, and some of more than 70, 80, or 90 hours.¹² This is common for produce packing workers.¹³ Indeed, the short onion harvest is, for many rural low-wage workers in the area surrounding Bland Farms, the only time of year with steady employment opportunity. Yet when it rains, it pours, and these community members face seasons of 16-hour-a-day jobs, followed by long periods of little or no employment.

For these long, grueling days on their feet packing onions, Bland Farms paid the packing shed employees in this case the minimum wage of \$7.25 an hour, followed by an increase of \$0.25 per hour in 2015. Trial Transcript at 368. At the wage of \$7.25, workers earned a mere \$116 for a 16-hour workday, leaving only 8 hours to travel to and from their workplace, and sleep. To ask workers to labor for 16-hour days without an overtime premium clearly frustrates the FLSA's remedial purpose, and ensures those workers' ongoing poverty.

b. Farmworkers are Excluded from Many Employment and Labor Law Protections.

Agricultural workers labor without the protections enjoyed by the majority of other workers, which reinforces the need for robust enforcement of the protections that do exist. Agricultural workers do not have collective bargaining rights under

¹² See DOL App. 12-23 (examples of packing shed employees' hours worked).

¹³ NAWS at 20.

the National Labor Relations Act (“NLRA”).¹⁴ Agricultural workers are also exempt from minimum wage requirements if they work on small farms.¹⁵ The child labor provisions of the FLSA treat agricultural work differently from work in other industries. While the minimum age to work in most industries is 16, the standard minimum age for agriculture is 14; on small farms, there is no minimum age for children to work outside of school hours with their parents’ permission.¹⁶ Although agricultural work includes some of the most dangerous work in the country,¹⁷ OSHA does not enforce federal workplace health and safety standards on farms with fewer than 11 employees, effectively excluding a third of all farmworkers.¹⁸ Similarly, agricultural employers may require or allow 16- and 17-year-olds to work in particularly hazardous occupations, including handling dangerous pesticides, working with volatile and dangerous livestock, and working long hours

¹⁴ National Labor Relations Act Section 2(3), 29 U.S.C. § 152(3).

¹⁵ FLSA, 29 USC Sections 201 *et seq.*; US Department of Labor, Wage and Hour Division, *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)* (revised July 2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs12.htm>.

¹⁶ FLSA, 29 USC Sections 201 *et seq.*; US Department of Labor, Wage and Hour Division, *Fact Sheet #40: Federal Youth Employment Laws in Farm Jobs* (revised July 2008), available at <http://www.dol.gov/whd/regs/compliance/whdfs40.htm>.

¹⁷ US Department of Labor, Bureau of Labor Statistics, “Census of Fatal Occupational Injuries,” <http://www.bls.gov/iif/oshcfoi1.htm>.

¹⁸ Bon Appetit Management Company and United Farm Workers, *Inventory of Farmworker Issues and Protections in the United States* (March 2011), available at <http://www.bamco.com/timeline/farmworker-inventory/>.

in the hot sun, risking heat stroke and exhaustion,¹⁹ while in nonagricultural occupations, the minimum age for particularly hazardous work is 18.²⁰

Agriculture is one of the most hazardous industries, with workers facing a higher risk of fatal and nonfatal injuries than workers in most other industries. Between 2003 and 2011, 5,816 agricultural workers died from work-related injuries in the US.²¹ In 2011, the fatality rate for agricultural workers was 7 times higher than the fatality rate for all workers in private industry: agricultural workers had a fatality rate of 24.9 deaths per 100,000, while the fatality rate for all workers was 3.5.²²

Despite the assertion by the *amici* Georgia Fruit and Vegetable Growers' Association ("GFVGA") *et al.*, farmworkers' general exclusion from overtime requirements is not to "give farmers a break" from the cost of labor. Brief of *amicus curiae* GFVGA *et al.* at 7. Rather, the historical record shows that

¹⁹ OSHA, *Farm Safety Fact Sheet* 2005 ("Farm workers—including farm families and migrant workers—are exposed to hazards such as the following: Chemicals/Pesticides; Cold; Dust; Electricity; Grain bins; Hand tools; Highway traffic; Lifting; Livestock handling; Machinery/Equipment; Manure pits; Mud; Noise; Ponds; Silos; Slips/Trips/Falls; Sun/Heat; Toxic gases; Tractors; Wells") available at https://www.osha.gov/OshDoc/data/General_Facts/FarmFactS2.pdf.

²⁰ 29 U.S.C. 213(c).

²¹ US Department of Labor, Occupational Health and Safety Administration, *Agricultural Operations*, available at <http://www.osha.gov/SLTC/agriculturaloperations/>.

²² *Id.*

farmworkers were specifically excluded as part of a compromise between President Franklin D. Roosevelt and Southern lawmakers who wanted to preserve the social and racial order on which the South's plantation system depended.²³ Farmworkers, along with domestic workers, were denied maximum hour protections not because of a reasoned policy choice, but in a political trade off necessitated by antiquated racial biases.²⁴ The continued exclusion of farmworkers from employment law protections is a historical relic that does not reflect our nation's current values.

Given the limited protections available under federal law for farmworkers, enforcement of the few existing protections is critical.

c. Farmworkers Face Obstacles Enforcing their Legal Protections.

One of the factors driving low wages and long hours for workers on farms and in packing is the prevalence of legal exemptions that exclude such workers from protections afforded most other workers, described above. However, even the limited labor and employment protections that do exist for farmworkers are often

²³ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, (1987).

²⁴ Sarah Childress, Frontline, *Courting Foodies: The Modern 'Fair Food' Movement* (June 25, 2013), available at <http://www.pbs.org/wgbh/pages/frontline/social-issues/rape-in-the-fields/courting-foodies-the-modern-fair-food-movement/>.

violated, and farmworkers face significant obstacles in seeking redress of these violations.²⁵

Studies of working conditions of farmworkers consistently show high rates of FLSA and other employment law violations.²⁶ Violations of wage and hour protections are rampant. A study surveying more than 1,000 grape workers in California found that 49.8 percent of them reported that their paystubs did not include all hours worked.²⁷ A report on the North Carolina tobacco industry found 25% of surveyed workers reported being paid less than the federal minimum wage.²⁸ Twenty-eight percent (28%) of New York dairy workers reported experience an employment law violation in a 2014-2015 survey.²⁹ A recent survey in Oregon's Marion County reported pervasive minimum wage violations, with 90

²⁵ Southern Poverty Law Center, *Injustice On Our Plates* 25 (2010), available at <https://www.splcenter.org/20101107/injustice-our-plates> ; Bon Appetit and United Farm Workers, *Inventory of Farmworker Issues and Protections*.

²⁶ See generally, Farmworker Justice and Oxfam America, *Weeding out abuses: Recommendations for a law-abiding farm labor system* (2010), available at http://www.fwjjustice.org/files/reports/Farmworker_Justice-lowres-spreads.pdf.

²⁷ Mark Schact *et al.*, California Rural Legal Assistance Foundation, *A 2004 Survey of 1,028 California Agricultural Workers Found Widespread Wage and Hour Violations* (January 2005).

²⁸ Oxfam America and the Farm Labor Organizing Committee, *A state of fear: Human rights abuses in North Carolina's tobacco industry* 22 (2011), available at <https://www.oxfamamerica.org/static/media/files/a-state-of-fear.pdf>.

²⁹ Workers' Center of Central New York and Worker Justice Center of New York, *Milked: Immigrant Dairy Farmworkers in New York State* (2017), available at https://milkedny.files.wordpress.com/2017/05/milked_053017.pdf.

percent of workers consistently earning below the state's minimum wage of \$8.25, instead earning an average hourly wage of \$5.30.³⁰ In interviews of 59 workers under the age of 18 who had worked in agricultural, Human Rights Watch found the majority were paid less than the minimum wage.³¹ A Southern Poverty Law Center report found 41 percent of Latino immigrants surveyed in the South had experienced wage and hour violations.³²

Health and safety violations are also widespread: a report from surveys of more than 300 poultry processing workers found that only 33 % of workplaces complied with Occupational Safety and Health Administration ("OSHA") guidelines for providing safety training.³³

These reports, spanning more than a decade and covering the geographic expanse of the United States, show that the workplace rights of farmworkers,

³⁰ Results from PCUN Survey, "PCUN survey indicates that minimum wage violations are rampant in Marion County berry harvests," February 2010, reported in Bon Appetite Inventory at 11.

³¹ Human Rights Watch, *Fields of Peril: Child Labor in US Agriculture* 14; 26-27 (2010), available at <http://www.hrw.org/reports/2010/05/05/fields-peril-0>.

³² Southern Poverty Law Center, *Under Siege: Life for Low-Income Latinos in the South* (2009), available at <http://www.splcenter.org/getinformed/publications/under-siege-life-for-low-income-latinos-in-the-south>.

³³ Alabama Appleseed and Southern Poverty Law Center, *Unsafe at These Speeds: Alabama's Poultry Industry and its Disposable Workers* (2013), available at http://www.splcenter.org/sites/default/files/Unsafe_at_These_Speeds_web.pdf.

already extremely limited by exclusion from many worker protection statutes, are routinely violated.

Further, seeking enforcement of FLSA rights and compensation for wage violations is difficult for low-wage workers like farmworkers. Agricultural workers frequently lack knowledge of their employment rights; and even when they are aware that their employer is violating the law, seeking redress is difficult. Private lawsuits are an “insufficient vehicle for challenging wage-and-hour violations”, given the “inaccessibility of the legal system, [] the significant effort and expenses required to recover a frequently small unpaid wage” that discourage low-wage workers from asserting claims in court.³⁴ Free legal services programs for farmworkers are limited in their capacity to represent the enormity of the employment law violations workers face. The private bar faces deterrents to representing farmworkers that include problems accessing the frequently isolated population, navigating the complicated employment structures within agriculture, and the relatively small contingency fee awards available even for successful representation of minimum-wage earning workers.

³⁴ Andrew Brunsdon, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 Berkley J. Emp. & Lab. L 269, 272 (2008).

d. Poverty Wages and Insufficient Enforcement Lead to High Rates of Sexual Harassment of Farmworker Women.

The low wages paid to workers on farms and in packing sheds contribute to their vulnerability to sexual harassment and reduce workers' ability to seek redress for such harassment. Even in an industry frequently paying poverty wages, women farmworkers are paid significantly less than their male counterparts.³⁵ The Southern Poverty Law Center analyzed data from the 2004-2006 NAWS survey and reported that the average personal yearly income of female agricultural workers was \$11,250, far below the average income of \$16,250 for male workers in the same positions.³⁶ The causes of this pay gap include the assignment of women to less lucrative work tasks and fewer work hours, the provision of fewer opportunities for professional advancement to women, and the payment of lower hourly wages to female than to male farmworkers.³⁷

³⁵ Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 Me. L. Rev. 157, 168 (2002), available at http://nationalaglawcenter.org/wp-content/uploads/assets/bibarticles/ontiveros_lessons.pdf.

³⁶ Southern Poverty Law Center, *Injustice On Our Plates* at Facts About Immigrant Women Working in the U.S. Food Industry; see also Maria M. Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 J. of Gender & the Law 231, 240-42 (1997) (reporting substantial wage gaps between male and female farmworkers found in data from 1989, 1992 and 1993).

³⁷ Southern Poverty Law Center, *Injustice on Our Plates* at Facts About Immigrant Women Working in the U.S. Food Industry; Dominguez, *Sex Discrimination & Sexual Harassment in Agricultural Labor*, 6 J. of Gender & the Law at 234-35, 240-42.

The result is tragic; several studies have recognized workplace sexual violence and harassment against women farmworkers as a pervasive problem, as incidents of violence and harassment ranging from verbal abuse to rape are common.³⁸ For example, a 2010 survey of 150 farmworker women in California's Central Valley found that 80 percent had suffered some form of sexual harassment, while a report by the Southern Poverty Law Center found that a majority of their 150 interviewees had also suffered sexual harassment.³⁹

Several studies have further identified poverty and fear of job loss as key reasons why women farmworkers often do not report sexual violence at work,

³⁸ See, e.g., Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16(3) *Violence Against Women* 247-54 (2010) (study finding that 97 percent of women who reported sexual violence experienced gender harassment from supervisors and coworkers (which includes generalized sexist comments and behavior that convey insulting, degrading, and sexist attitudes), 53 percent experienced unwanted sexual attention (ranging from unwanted and offensive physical or verbal sexual advances to gross sexual imposition, assault, or rape) and 24 percent experienced sexual coercion (i.e., the solicitation or coercion of sexual activity by promise of reward or threat of punishment)); Southern Poverty Law Center, *Injustice On Our Plates* at 41-53; Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, at 15 (2012), available at http://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf; Farmworker Justice & Oxfam America, *Weeding out Abuses*.

³⁹ Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women* at 247-54; Southern Poverty Law Center, *Injustice on Our Plates* at 44-46.

which, together with other factors, permits those problems to fester unresolved.⁴⁰ Thus, the low pay and poverty wages are a significant contributing factor to the alarmingly high levels of farmworker sexual harassment. The evidence strongly suggests that if women working in packing houses were correctly paid the overtime premium for their hours worked, as a measure towards fairer wages and reducing poverty, it would contribute to ending workplace sexual violence against farmworker women.

II. Overtime Pay Effectuates the FLSA’s Remedial Purpose.

The extreme poverty, low wages, and difficult working conditions of farmworkers make it particularly critical that they benefit from the limited FLSA

⁴⁰ See Jeanne Murphy, et al., *“They Talk Like That, But We Keep Working: Sexual Harassment and Sexual Assault Experiences Among Mexican Indigenous Farmworker Women in Oregon*, 17(6) J. Immigrant Minor Health 1834 (2015); Bon Appetit Management Co. Found. & United Farm Workers, *Inventory of Farmworker Issues and Protections in the United States* at 9-11, 45 (2011); Dominguez, *Sex Discrimination & Sexual Harassment In Agricultural Labor*, 6 J. of Gender & the Law at 255-57 (noting, *inter alia*, that “[b]ecause many of the women farmworkers earn just enough to make ends meet, unemployment could have severe economic repercussions, especially if they support children”); Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: The Case of Migrant Farmworker Women*, 20(4) J. Social Policy & the Law 871 (2012); Human Rights Watch, *Cultivating Fear* (adding that, in addition to pervasive sexual comments toward, and sexual contact with, farmworker women that was clearly unwanted or coercive, “[i]n many cases, moreover, relationships that appear consensual may be the product of psychological coercion or desperate economic circumstances”).

protections that do exist. In this case, the long-recognized broad remedial purpose of the FLSA is well-served by applying the FLSA’s overtime and liquidated damages provisions. Congress enacted the FLSA “to correct and as rapidly as practicable to eliminate . . . labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.” 29 U.S.C. § 202. To that end, the FLSA mandates all covered workers are paid minimum wage and overtime for hours over forty worked in a week. *Barrentine v. Arkansas Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (“The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours[.]”); *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942) (“‘A fair day’s pay for a fair day’s work’ was the objective stated in the Presidential message which initiated the [FLSA]. That message referred to a ‘general maximum working week,’ . . . and the evil of ‘overwork’ as well as ‘underpay.’) (quoting 81 Cong. Rec. 4983 (1937)). These remedial measures were designed “to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked.” 28 H.R. Rep. No. 75-1452, at 9 (1937); *see also Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706 (1945) (“The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours

which endangered the national health and well-being and the free flow of goods in interstate commerce.”); *Southland Gasoline Co. v. Bayley*, 319 U.S. 44, 48 (1943) (“The Fair Labor Standards Act sought a reduction in hours to spread employment as well as to maintain health.”); *United States v. Darby*, 312 U.S. 100, 109–10 (1941) (“[The purpose of the FLSA] is to exclude from interstate commerce goods produced . . . under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of . . . spreading and perpetuating such substandard labor conditions among the workers of the several states.”).

In this case, the District Court properly applied the FLSA, and the result clearly effectuates the FLSA’s remedial purpose. “Provisions of the FLSA are remedial and humanitarian in purpose. Such a statute must not be interpreted or applied in a narrow, grudging manner.” *Tennessee Coal Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

III. The District Court Correctly Awarded Liquidated Damages, Which Effectively Deter Violations of the FLSA.

Liquidated damages will properly deter Bland Farms and other employers who violate the FLSA from doing so in the future. Under the FLSA, a district court generally must award a plaintiff liquidated damages that are equal in amount to the actual damages. *Rodriguez v. Farm Grocery Stores, Inc.*, 518 F.3d 1259, 1272

(11th Cir. 2008) (*see also Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1163 (11th Cir. 2008)). The FLSA provides that an employer found to have violated its provisions “shall be liable” to the affected employees “in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” 29 U.S.C. § 216(b). Liquidated damages are not penal in nature but constitute “compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.” *Snapp v. Unlimited Concepts*, 208 F.3d 928, 934 (11th Cir. 2000) (*citing Brooklyn Sav. Bank*, 324 U.S. 697 at 707; *Overnight Motor Transp. Co.*, 316 U.S. 572 .

Moreover, section 216(b) has an important deterrent effect. *Snapp v. Unlimited Concepts Inc.*, 208 F.3d 928 n.13 (“even though the purpose of section 216(b) is compensation, the actual effect of the liquidated damages provision provides further deterrence to an employer’s violation of the FLSA[.]”); *see also Brooklyn Sav. Bank*, 324 U.S. at 709-10 (Congress “plainly intended” Section 216(b) to have “deterrent effect”). Without the liquidated damages required by this section, the only damages an employer could be found liable for violating the minimum wage and overtime provisions of the FLSA are the wages it should have paid its employees in the first place. Thus, an employer inclined to violate the FLSA would have no incentive to comply with the Act, as the only consequence

would be eventually having to pay the same amount of money the FLSA requires at the first instance of payment to the worker. As the Supreme Court has explained, “[n]ot the least effective aspect of this remedy is the possibility that an employer who gambles on evading the Act will be liable for payment not only of the basic minimum originally due but also damages equal to the sum unpaid.” *Brooklyn Sav. Bank*, 324 U.S. at 709.

The District Court here exercised its discretion to award liquidated damages only commencing from the date when the U.S. DOL filed suit: “[w]hen Plaintiff filed suit, Bland Farms should have known — whether it agreed with the DOL or not — that the DOL believed that Bland Farms owed overtime wages to its employees when the employees processed onions grown by other growers, even if Bland Farms purchased entire fields of onions.” *Acosta*, 276 F. Supp. 3d at 1380. The result is incredibly fair to Bland Farms and should be upheld.

CONCLUSION

For the foregoing reasons, this Court should uphold the District Court’s rulings on application of the overtime exemption and the award of liquidated damages.

Dated: April 25, 2018

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CERTIFICAT OF COMPLIANCE

1. This brief complies with the type volume limitation of FRAP 32(a)(7)(B) because this brief contains 4,515 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using 14-point Times New Roman Font.

Dated: April 25, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2018, a true and correct copy of the foregoing Motion for Leave to File an *Amicus* Brief and accompanying proposed *Amicus* Brief was served on counsel of record for each of the following parties, by causing the same to be deposited in the United States mail properly addressed and with adequate postage affixed thereto, and that the original and six copies of the same were filed via U.S. Overnight Mail to Clerk of Court, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St. N.W., Atlanta, Georgia.

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