

79971-7

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 246370

MELANIE MORIN,

Appellant,

v.

CLARENCE HARRELL and HAZEL HARRELL, husband and wife,
and their marital community,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves a constitutional challenge to Initiative 518 and RCW 49.46.010(5)(b), which exempts from the Minimum Wage Act “[a]ny individual employed in casual labor in or about a private home, unless performed in the course of the employer’s trade, business, or profession”. Subsection (5)(b) was amended pursuant to Initiative 518, passed by the voters in November 1988, and took effect on January 1, 1989.

Prior to the passage of Initiative 518, subsection (5)(b) exempted “any individual employed in domestic service in or about a private home”. Respondents contend that changing the exemption from individuals employed in “domestic service” to those employed in “casual labor” was invalid, because the initiative violated article II, section 19 of the Washington Constitution. The trial court agreed, and dismissed Appellant’s claim for overtime wages on Respondents’ motion for summary judgment.

Appellant argues that (1) Initiative 518 did not violate article II, section 19, (2) that Respondents are barred by the doctrine of laches from asserting otherwise, and (3) in any event, Appellant should have been allowed to state a claim for relief under federal law, pursuant to the Fair Labor Standards Act. Appellant’s arguments are without merit.

II. RESTATEMENT OF THE CASE

A. The Parties and Facts.

Appellants, Clarence and Hazel Harrell, are both in their mid 70's; they reside in their family home in Ellensburg, Washington; and they have been married for over 50 years.¹ On January 26, 1996, Hazel Harrell suffered a disabling stroke, which required approximately three weeks of hospitalization followed by about six weeks of out-patient therapy.² Because she could no longer care for herself, caregivers were hired to provide at-home assistance for Mrs. Harrell during the day. This was Mr. Harrell's first experience in hiring caregivers.³ Due to a series of additional strokes and/or seizures, Mrs. Harrell became further disabled and in greater need of assistance. As a result, beginning in around March of 2003, she required fulltime at-home caregiving services, 24 hours a day, 7 days a week.⁴

Around March of 2001, Appellant was hired as a part-time caregiver.⁵ Appellant was initially paid \$10 per hour, and continued at this rate until around August of 2002, at which time she became the head caregiver for Mrs.

¹ CP 6, 43.

² CP 6, 43.

³ CP 6-7, 43-44.

⁴ CP 7, 44.

⁵ CP 7, 44.

Harrell, and her wages increased from \$10 per hour to \$12 per hour.⁶ Appellant continued in this capacity until her services were terminated in early January of 2005.⁷ None of the caregivers, including Appellant, were licensed nurses or otherwise held any professional licenses.⁸

Following her termination, Appellant filed suit against Respondents seeking, *inter alia*, unpaid overtime compensation in the amount of \$11,871.⁹

Prior to her termination, in the summer of 2004, Appellant had asked Mr. Harrell whether she was entitled to overtime compensation. Relying on the advice of his accountants, Mr. Harrell informed Appellant that she was not.¹⁰ Appellant did not again raise the issue of overtime compensation until after her termination in January of 2005.¹¹

B. Initiative 518 and RCW 49.46.010(5).

Washington's Minimum Wage Act (MWA) is found at chapter 49, RCW. The MWA establishes minimum hourly wages for all employees.¹² RCW 49.46.130 sets forth the general law requiring that employees who work more than 40 hours per week are entitled to receive overtime compensa-

⁶ CP 7, 44-45.

⁷ CP 8-9, 45-46

⁸ CP 7, 44.

⁹ CP 2-3.

¹⁰ CP 8, 45.

¹¹ CP 8-9, 45-46.

¹² RCW 49.46.020.

tion. However, an employer is not required to pay overtime compensation to “[a]ny person exempted pursuant to RCW 49.46.010(5)”.¹³ Subsection (5)(b) exempts “any individual employed in casual labor in or about a private home, unless performed in the course of the employer’s trade, business, or profession”.

Prior to January 1, 1989, RCW 49.46.010(5)(b) exempted from overtime compensation “any individual employed in domestic service in or about a private home”.¹⁴ The statute was amended pursuant to Initiative 518, approved by the voters of this state in the general election of November 8, 1988, and took effect on January 1, 1989.¹⁵ The ballot title of Initiative 518, as presented to the voters in the 1988 general election, stated: “Shall the state minimum wage increase from \$2.30 to \$3.85 (January 1, 1989) and then to \$4.25 (January 1, 1990) and include agricultural workers?”¹⁶

The 1989 amendment, changing the exemption from individuals “employed in domestic service” to individuals “employed in casual labor,” is significant. The Washington Department of Labor & Industries, in its Administrative Policy, has stated: “Employment of housekeepers, caregivers, or gar-

¹³ RCW 49.46.130(2)(a).

¹⁴ See *West’s Revised Code of Washington Annotated*, historical and statutory notes following RCW 49.46.010.

¹⁵ *Id.*

¹⁶ CP 12, 39, 115, and 119-20.

deners on a regular basis is not considered 'employed in casual labor' and such workers may be subject to the protections of the MWA."¹⁷

However, under the pre-1989 version of the statute, an individual "employed in domestic service" would include those who provide companionship services (i.e., caregivers, such as Appellant in this case). Corresponding federal law, in this case the Fair Labor Standards Act (FLSA) serves to establish this point.¹⁸

Under the FLSA "[a]ny employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" is generally exempt from the minimum wage requirements of the FLSA.¹⁹ Because Washington's MWA is based upon the FLSA, federal cases and interpretations are deemed to be persuasive authority for Washington courts interpreting the MWA.²⁰

¹⁷ CP 11, 29.

¹⁸ Counsel for Respondents can find no Washington case specifically defining what constitutes "domestic services"; however, the FLSA does, and includes companionship services within the definition. See, e.g., 29 U.S.C.A. §213(a)(15).

¹⁹ 29 U.S.C.A. §213(a)(15); *McCune v. Oregon Sr. Services Div.*, 894 F.2d 1107 (9th Cir. 1990).

²⁰ *Tift v. Nursing Services*, 76 Wn. App. 577, 583, 886 P.2d 1158 (1995), review denied, 127 Wn.2d 1007, 898 P.2d 309 (1995).

C. The Procedural History.

On May 31, 2005, Appellant filed her unsigned “COMPLAINT FOR UNPAID WAGES & EXEMPLARY DAMAGES (Chap. 49.52 RCW)”.²¹ Although Appellant alleged that “[t]he Federal Fair Labor Standards Act and...Title 49 of the Revised Code of Washington governed all of her employment”, *she sought relief under state law only*, as follows:

II. CLAIM FOR WILLFUL FAILURE TO PAY WAGES

3.1 Defendants, after due notice and demand, by their acts, omissions, and through their material misrepresentations, have willfully failed to pay Plaintiff overtime wages due her pursuant to Chap. 49.46. The law authorizes employees to file lawsuits against employers for the wages unpaid, plus interest, plus reasonable attorney fees, plus exemplary damages of double the amount owed pursuant to RCW 49.52.070. WHEREFORE, Plaintiff prays...²²

On July 25, 2005, Respondents filed their motion for summary judgment, seeking to dismiss Appellant’s state law claim.²³ Respondents argued that Initiative 518 violated the subject-in-title requirement of article II, section 19 of the Washington Constitution, thus rendering the 1989 amendment to RCW 49.46.010(5)(b) invalid.²⁴ Appellants also pointed out that Initiative 518 was unconstitutional because it violated the single subject requirement of

²¹ CP 1-3.

²² CP 2.

²³ CP 4-16.

²⁴ CP 10-16; *see, also*, Respondents’ Reply Brief at CP 105-110.

article II, section 19.²⁵

The trial court heard oral argument on August 29, 2005, and on September 12, 2005, the trial court issued its Memorandum Decision granting Respondents' motion for summary judgment.²⁶

On September 26, 2005, the trial court issued its "ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND JUDGMENT FOR DEFENDANTS", in which it incorporated its Memorandum Decision of September 12, 2005.²⁷ The court's order stated, *inter alia*:

1. Initiative 518, as it relates specifically to the removal of the exemption from the Minimum Wage Act of any individual employed in domestic service in or about a private home, is unconstitutional in violation of the subject in title rule;
2. Plaintiff, Melanie Morin, was an individual employed in domestic service in or about the private home of the defendants, and therefore was exempt from the Minimum Wage Act, pursuant to RCW 49.46.010(5)(b) as said statute was written prior to Initiative 518;
3. Because plaintiff Morin was exempt from minimum wage, she has failed to state a claim upon which relief can be granted;
4. Summary judgment dismissal of plaintiff Morin's complaint, with prejudice, is therefore granted; and

²⁵ CP 110.

²⁶ CP 117-121.

²⁷ CP 122-124.

5. Defendants are entitled to recover their statutory attorney fees in the amount of \$200, pursuant to RCW 4.84.080.²⁸

On October 6, 2005, Appellant filed her motion for reconsideration of the trial court's order granting summary judgment. Appellant argued she should be allowed to pursue a federal law claim, based upon the FLSA.²⁹ On October 6, 2005, Respondents filed their motion to strike Appellant's motion for reconsideration on the grounds (1) it was untimely, and (2) it raised a completely new theory of relief.³⁰ On October 10, 2005, the trial court issued its order denying Appellant's motion for reconsideration for the reasons stated in Respondents' motion to strike.³¹

III. ISSUES PRESENTED

Issue No. 1: Did Initiative 518 violate article II, section 19 of the Washington Constitution, thus rendering the amendment to RCW 49.46.010(5)(b) unconstitutional?

Issue No. 2: Does the equitable doctrine of laches bar Respondents from raising a constitutional challenge to Initiative 518 and RCW 49.46.010(5)(b)?

Issue No. 3: Should Appellant have been allowed to pursue a claim under the FLSA, when her complaint failed to seek relief under the federal statute

²⁸ CP 123-24.

²⁹ CP 125-131.

³⁰ CP 132-33.

³¹ CP 134-35.

and when she failed to properly raise the issue with the trial court?

IV. ARGUMENT

A. Summary of Argument.

Initiative 518 violated the subject-in-title and single subject requirements of article II, section 19. The ballot title of the initiative was restrictive. Moreover, the initiative contained two separate and distinct subjects: (1) increasing the minimum wage and applying it to agricultural workers, and (2) including casual laborers in private homes under the MWA.

No reasonable mind would infer that “agricultural workers” include “[a]ny individual employed in *casual labor in or about a private home*”; nor would the voters who passed the initiative be put on inquiry notice that the unambiguous reference to “agricultural workers” encompassed an individual performing “casual labor” in “a private home.” The average voter reading the ballot title would most certainly conclude that the reference to “agricultural workers” meant individuals working outdoors in fields, orchards, or in some other activity related to agriculture, and nothing more.

Appellant’s reliance on the doctrine of laches to bar Respondent’s constitutional challenge is without merit. Appellant admits that no Washington court has applied the doctrine to bar a constitutional challenge to a statute,

and the Montana case on which Appellant relies is inapposite. Appellant's appeal to policy considerations to invoke the doctrine cannot be considered in resolving the constitutional challenge. Furthermore, Respondents did not sit on their rights before raising the constitutional challenge. Until they were sued by Appellant, Respondents had no reason to believe that Appellant might be entitled to overtime compensation.

Appellant's effort to seek remand to allow it to pursue a federal FLSA claim is also without merit. Appellant did not seek relief under the FLSA in her complaint, nor did Appellant raise the issue in opposing the summary judgment motion. Instead, Appellant first raised the issue in her motion for reconsideration, which was itself procedurally improper. Moreover, the proper forum for asserting a claim under the FLSA is in federal court, and there is simply no reason why Appellant could not have done so. In short, Appellant was not prejudiced by the trial court's ruling.

B. The Standard of Review and Article II, Section 19.

An appellate court "reviews the constitutionality of legislation de novo."³² The party raising a constitutional challenge to a legislative act "bears the heavy burden of establishing its unconstitutionality beyond a reasonable doubt"; any reasonable doubts are resolved in favor of constitu-

tionality.”³³

“Article II, section 19 serves to protect serious constitutional interests. [Our Supreme Court] has articulated these important interests and the court’s role in vouchsafing them in a family of cases. The most succinct interpretation of this provision is in *State ex rel. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 24, 200 P.2d 467 (1948):

“The purposes of this constitutional mandate are threefold: (1) to protect and enlighten the members of the legislature against provisions in bills of which the titles give no intimation; (2) to apprise the people, through such publication of legislative proceedings as is usually made, concerning the subjects of legislation that are being considered; and (3) to prevent hodge-podge or log-rolling legislation. We have declared that when laws are enacted in violation of this constitutional mandate, the courts will not hesitate to declare them void.”³⁴

Article II, section 19 has been interpreted “as containing two separate prohibitions: (1) No bill shall embrace more than one subject; and (2) the subject of every bill shall be expressed in the title”³⁵ Violation of either of the two prohibitions “alone is sufficient to render the relevant bill provisions

³² *State Grange v. Locke*, 153 Wn.2d 475, 486, 105 P.3d 9 (2005).

³³ *Id.* at 486 (quoting *Pierce County v. State*, 150 Wn.2d 422, 430, 78 P.3d 640 (2003), quoting *Amalgamated Transit v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 27 P.3d 608 (2000)); *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 631, 71 P.3d 644 (2003).

³⁴ *Patrice v. Murphy*, 136 Wn.2d 845, 851-52, 966 P.2d 1271 (1998).

³⁵ *Id.* at 852 (quoting *State ex rel. Toll Bridge Auth.*, 32 Wn.2d at 23).

unconstitutional.”³⁶

C. The Subject-In-Title Rule.

The Supreme Court “has long interpreted article II, section 19 to require the titles of bills give clear information as to their contents:

‘The wisdom of the rule suggests itself, in that the reader, whether a member of the legislature or otherwise, may, by a mere glance at a few catch words in the title, be apprised of what the act treats, *without further research*. Does the title of the act in question contain such a statement of the subject-matter?’³⁷

In *Amalgamated Transit*, the Court “recognized the particular importance of [the subject-in-title] requirement in the context of an initiative, noting that often voters will not read the text of a measure or the explanatory statement, but may instead cast their votes based upon the ballot title.”³⁸

Another purpose underlying article II, section 19 “is to prevent the attachment of an unpopular bill to a popular one on an unrelated subject in order to guarantee the passage of the unpopular provision.”³⁹ In order to comply with the subject-in-title rule, the title must provide “notice that would lead to an inquiry into the body of the act, or indicate to an inquiring

³⁶ *Id.* at 852.

³⁷ *Id.* at 852 (quoting *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 321, 68 P. 957 (1902) (emphasis added)).

³⁸ *Amalgamated Transit*, 142 Wn.2d at 217 (citing *Wash. Fed’n*, 127 Wn.2d at 553-54).

mind the scope and purpose of the law.”⁴⁰ In determining whether this requirement has been met, the court will evaluate “the sufficiency of the titles of both initiatives and bills by considering the meaning that the title would convey to the typical reader. Then the court determines whether the contents of the text of the legislation are reflected in the title.”⁴¹

When the constitutionality of an initiative is challenged under article II, section 19, the court must review the initiative’s *ballot title*, not the *legislative title*.⁴² “The ballot title is the relevant title where an initiative is voted on by the people, since it is the ballot title with which the voters are faced when voting.”⁴³

In *Washington Federated of State Employees v. State*, 127 Wn.2d 544, 556, 901 P.2d 1028 (1995), we again articulated the test for determining whether the subject of an act is reflected in its title. First “[u]nder Const. art. II, §19, the title is construed with reference to the language used in *the title*.” *Id.* (emphasis added) (citing *Great N. Ry. Co. v. Cohn*, 3 Wn.2d 672, 680, 101 P.2d 985 (1940) (“[T]he title must be construed with reference to the language used in the title only *and not in the light of the context of the act*.” (emphasis added))). Then the court must “examine[] the body of the act to determine whether the title reflects the subject matter of the act.” *Wash. Fed’n*, 127 Wn.2d at 556.⁴⁴

³⁹ *State Grange*, 153 Wn.2d at 491 (citing *Pierce County*, 150 Wn.2d at 429-30).

⁴⁰ *Id.* at 491 (quoting *Young Men’s Christian Ass’n v. State*, 62 Wn.2d 504, 506, 383 P.2d 497 (1963)).

⁴¹ *Id.* at 492.

⁴² *Citizens for Wildlife Mgmt.*, 149 Wn.2d at 632.

⁴³ *Id.* at 632 (citing *Wash. Fed’n*, 127 Wn.2d at 555).

⁴⁴ *State Grange v. Locke*, 153 Wn.2d at 493-94.

In determining whether a subject-in-title violation has occurred, the court must confine its inquiry “to the common and ordinary meaning” of the words used in the title itself, and “references to the text . . . are irrelevant to the construction of the *title* The text . . . is only relevant insofar as [the court] must examine the contents . . . in order to discern whether its subject is adequately reflected in the title.”⁴⁵

D. Initiative 518 Patently Violated the Subject-in-Title Rule.

The ballot title of Initiative 518 is clearly restricted to an incremental increase in the minimum wage and inclusion of agricultural workers under the MWA. The plain meaning of the words “agricultural workers” is straightforward and unambiguous. There is nothing whatsoever in these words to put the voters on inquiry notice that by voting for Initiative 518 they were also including under the MWA “[a]ny individual employed in *casual labor* in or about a *private home*.”

Indeed, there is no rational unity or nexus whatsoever between an “agricultural worker” (who presumably works outdoors with some sort of agricultural product) and an “individual employed in casual labor in or about a private home” (who presumably works indoors providing domestic services).

⁴⁵ *Id.* at 495 (italics original).

As such, Initiative 518 clearly violates the subject-in-title rule of article II, section 19 of the Washington Constitution.

The test is what “the meaning of the title would convey to the typical reader.”⁴⁶ There is nothing whatsoever in the plain language of the ballot title that would lead the average voter to suspect that the act itself would apply to casual laborers in private homes. To hold otherwise would defeat the very purpose behind the subject-in-title rule. This should be clear beyond any reasonable doubt; indeed, reasonable minds could not conclude otherwise.

Moreover, to uphold Initiative 518 would defeat the fundamental purposes behind the subject-in-title rule, such as (1) to guarantee that members of the public are given notice of the true subject matter of an act, and (2) to prevent the backdoor attachment of an unpopular provision to a popular one on an unrelated subject in order to guarantee the passage of the popular provision.⁴⁷ Upholding such policies is of “particular importance in the context of initiatives since voters will often make their decision based on the title of the act alone, without ever reading the body of it.”⁴⁸

⁴⁶ *Id.* at 492.

⁴⁷ *Id.* at 491.

⁴⁸ *Citizens for Wildlife Mgmt.*, 149 Wn.2d at 639.

E. Initiative 518 Also Violated the Single Subject Rule.⁴⁹

“In making the determination of whether an initiative violates the single subject clause [the court will] first look to the ballot title to determine whether it is general or restrictive. [citation] The type of title determines the type of analysis [the court will] undertake in reviewing an initiative under article II, section 19.”⁵⁰ A general title is one “which is broad and comprehensive, and covers all legislation germane to the general subject stated.”⁵¹ By contrast, “a restrictive title is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.”⁵²

If the legislature seeks this method, and notwithstanding a

⁴⁹ This violation was pointed out to the trial court; however, Respondents reserved challenging Initiative 518 on this ground, and the trial court’s order was, therefore, limited to finding that Initiative 518 violated the subject-in-title rule. In asking the trial court to reserve ruling on the single subject violation, counsel for Appellants was concerned that a violation of the single subject rule could result in a total invalidation of Initiative 518 and the subsequent legislative enactment, including incrementally increasing the minimum wage and including agricultural workers under the MWA. (CP 110) Upon further research, however, counsel for Respondents now believes otherwise, and that this Court may find unconstitutional only the provision including individuals employed in casual labor in or about a private home, while leaving the rest of the legislation intact. The MWA contains a severability clause (RCW 49.46.900) that allows this Court to invalidate only that portion of the act deemed unconstitutional, which is RCW 49.46.010(5)(b). See, e.g., *Gerberding v. Munro*, 134 Wn.2d 188, 197-98, 949 P.2d 1366 (1998); *Amalgamated Transit*, 142 Wn.2d at 227-28; *Leonard v. City of Spokane*, 127 Wn.2d 194, 201, 897 P.2d 358 (1995). Because this issue involves a party’s right to maintain a claim, as well as an issue of constitutional law, it may be addressed for the first time on appeal. See, e.g., RAP 2.5(a); *Parentage of M.S.*, 128 Wn. App. 408, 412, 115 P.3d 405 (2005); *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003). Accordingly, a discussion of the single subject rule violation is presented here for the Court’s review.

⁵⁰ *City of Burien v. Kiga*, 144 Wn.2d 819, 825, 31 P.3d 659 (2001) (citing *Amalgamated Transit*, 142 Wn.2d at 207-10 and at 205-06).

⁵¹ *Gruen v. State Tax Commission*, 35 Wn.2d 1, 22, 211 P.2d 651 (1949).

⁵² *Id.* at 23.

general title could have been adopted which would have covered the entire subject and authorized legislation upon the whole of it, the body of the act must be confined to the particular portion of the subject which is expressed in the limited title. The courts cannot enlarge the scope of the title. They are invested with no dispensing power. The constitution has made the title the conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been more comprehensive, if, in fact, the legislature has not seen fit to make it so.⁵³

“If the title is general and comprehensive, it will be given a liberal construction . . . If, however, the title is a restricted one, it will not be regarded so liberally, and provisions which are not fairly within such restricted title will not be given force.”⁵⁴

The single subject requirement of article II, section 19 requires that “[n]o bill shall embrace more than one subject”⁵⁵. A fundamental purpose behind the rule is “to prevent the attachment of an unpopular bill to a popular one on an unrelated subject in order to guarantee the passage of the unpopular provision.”⁵⁶

Initiative 518 is unconstitutional because the title itself embraces two separate and distinct subjects. The two subjects are (1) whether the minimum wage should be incrementally increased, and (2) whether agricultural workers

⁵³ *Id.* at 23.

⁵⁴ *State ex rel. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 26, 200 P.2d 467 (1948).

⁵⁵ *State Grange*, 153 Wn.2d at 491.

⁵⁶ *Id.* at 491.

should come within the purview of the MWA. Thus, it violates the single subject rule “that no bill shall embrace more than once subject.”

In *Amalgamated Transit*, the Court concluded that where an initiative has more than one subject and purpose, and where there is “no rational unity between the subjects”, and “neither subject is necessary to implement the other”, the initiative violates the single subject rule.⁵⁷

Such is the case with Initiative 518. There is simply no rational unity between incrementally increasing the minimum wage and including agricultural workers under the MWA; neither subject is necessary to implement the other. The Court’s discussion in *Amalgamated Transit* makes this abundantly clear.⁵⁸

In *Amalgamated Transit*, the Court addressed the issue of whether I-695 violated the single subject rule. The ballot title of I-695 stated: “Shall voter approval be required for any tax increase, license tab fees be \$30 per year for motor vehicles, and existing vehicle taxes be repealed?”⁵⁹ In addressing the single subject violation, the Court stated:

In deciding whether a measure contains a single subject, however, the constitutional inquiry is founded on the question whether a measure is drafted in such a way that those voting

⁵⁷ *Amalgamated Transit*, 142 Wn.2d at 216-17.

⁵⁸ *Id.* at 208-11, where the Court provides numerous examples of cases involving comprehensive titles and those involving restrictive titles.

⁵⁹ *Id.* at 212.

on it may be required to vote for something for which the voter disapproves in order to obtain approval of an unrelated law. [citations] Thus, regardless of what is in the *Voter's Pamphlet* or the history of the initiative, the rational relationship inquiry centers on what is in the measure itself, i.e., whether the measure contains unrelated laws.⁶⁰

Although the title of I-695 was general, the Court found it nonetheless violated the single subject requirement, as follows:

We conclude that I-695 has a general title. However, there is no rational unity between the subjects of I-695. Similar to the act in *Wash. Toll Bridge Auth. v. State*, I-695 also has two purposes: to specifically set license tabs fees at \$30 and to provide a continuing method of approving all future tax increases. Further, neither subject is necessary to implement the other. I-695 violates the single-subject requirement of article II, section 19 because both its title and the body of the act include two subjects: repeal of the MVET and a voter approval requirement for taxes.⁶¹

In light of the Court's holding and discussion in *Amalgamated Transit*, this Court should likewise find that Initiative 518 violates the single subject rule. Simply stated, there is no rational unity between increasing the minimum wage and applying it to agricultural workers, the subject disclosed in the ballot title, and casual laborers employed in private homes, the subject buried in the text of the initiative. The subjects are separate and distinct, and

⁶⁰ *Id.* at 212 (citing *Wash. Fed'n*, 127 Wn.2d at 552; *Wash. Toll Bridge Auth.*, 489 Wn.2d at 525).

⁶¹ *Id.* at 216-17.

more appropriately the subject of separate initiatives. Thus, in order to enact one subject, which a group of voters might find desirable, they are forced to enact the other, which they might find undesirable.⁶²

F. Appellant's Reliance on the Equitable Doctrine of Laches is Without Merit.

Appellant argues that the doctrine of laches should bar Respondents from raising a constitutional challenge to Initiative 518. Appellant's argument is a thinly veiled appeal to policy considerations. Such considerations, however, cannot be considered. It is not "the province of the courts to declare laws passed in violation of the constitution valid based upon considerations of public policy."⁶³

Furthermore, the doctrine of laches simply does not apply to Respondents' constitutional attack on Initiative 518. "Laches is an equitable remedy that applies when a party: (1) had knowledge of facts constituting a cause of action or a reasonable opportunity to discover these facts; (2) there was an unreasonable delay in commencing the action; and (3) the delay caused dam-

⁶² It is arguable that Initiative 518 actually contains three independent subjects, and that there is no rational unity between (1) casual laborers in a private home, (2) agricultural workers, and (3) increasing the minimum wage. However, because the second and third subjects were disclosed in the ballot title, and to minimize the impact of finding Initiative 518 unconstitutional, Respondents request that the Court limit its ruling to the arguments raised.

⁶³ *Amalgamated Transit*, 142 Wn.2d at 206.

age to the other party.”⁶⁴ Moreover, “delay is only deemed unreasonable if it occurs ““under circumstances permitting diligence””⁶⁵.

The record below establishes that Respondent, Clarence Harrell, reasonably relied on the advice of his accountants in determining Appellant was not entitled to overtime wages. It was not until after Appellant filed her complaint that he first learned otherwise. Indeed, if anything, the record below establishes that it is Appellant herself against whom the doctrine of laches is most applicable. Appellant worked for Respondents for several years without receiving overtime compensation. Although Appellant previously asked about such compensation, it was only after she was terminated that she actually demanded it. Thus, it was Appellant who sat on her rights to the prejudice of the Respondents.

Appellant concedes no Washington authority exists for applying the doctrine of laches in this case. The only legal authority cited by Appellant is Montana Supreme Court’s decision in *Cole v. State ex rel. Brown*.⁶⁶ In *Cole*, the Montana Supreme Court applied the doctrine of laches to bar Plaintiffs from challenging *the procedure* by which the voters approved a constitutional

⁶⁴ *Marriage of Anderson*, 134 Wn. App. 111, 118, 138 P.3d 1118 (2006).

⁶⁵ *Id.* at 118 (quoting *In re Marriage of Hunter*, 52 Wn. App. 265, 270, 758 P.2d 1019 (1988) (quoting *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 949, 640 P.2d 1051 (1982))).

⁶⁶ 308 Mont. 265, 482 P.3d 760 (2002).

enactment.⁶⁷ Here, the constitutional challenge does not concern a procedural defect; rather, the challenge is *substantive*, and goes to the heart of whether the enactment itself violates article II, section 19 of the Washington Constitution.

G. Appellant’s Effort to Pursue a Federal Claim Under the FLSA is Misplaced Because (1) Appellant’s Complaint Did Not Seek Such Relief and (2) Appellant Did Not Properly Raise the Issue During the Summary Judgment Proceeding Below.

Although Appellant’s complaint made passing reference to the FLSA, Appellant expressly limited her claim for relief to recovery under Washington’s MWA. Prior to the trial court’s Memorandum Decision and order granting summary judgment, Appellant made no mention whatsoever of asserting a claim under the federal FLSA. Indeed, the first time Appellant raised the issue was in her motion for reconsideration of the trial court’s summary judgment order. Moreover, the motion for reconsideration was itself improper, for the reasons stated in Respondents’ motion to strike and in the trial court’s Memorandum Decision denying the motion for reconsideration.

Specifically, as stated in the trial court’s Memorandum Decision:

This matter came before the court on plaintiff’s motion for reconsideration filed without an adjoining affidavit on the tenth

⁶⁷ *Id.* at 266, 269, 271, and 274.

day following the entry of the court's order granting summary judgment of dismissal. The motion sets forth no reasons under CR 59(a) on which to base a motion for reconsideration. Rather, the plaintiff advances a new theory based on the application of federal law, which was not plead in plaintiff's complaint for unpaid wages and exemplary damages. The court denies the motion for reconsideration on the basis of and for the reason that no grounds have been set forth on which the court can even consider granting relief pursuant to CR 59(a). Moreover, the court denies the motion on the basis of and for the reason that it is technically untimely because the purported affidavit was not served with the motion within 10 days as required by CR 59(b) and (c).⁶⁸

Moreover, Appellant has not been prejudiced. There is nothing preventing her from filing an action under the FSLA in federal court. This is particularly true since the trial court's Memorandum Decision made clear that it was not ruling on the untimely raised federal claim. Finally, because Appellant's only remaining theory of relief, if any, would be under federal law, the proper forum in which to bring the action is in federal court.

V. CONCLUSION

The judiciary plays a critical constitutional role in providing a check and balance on the other branches of government. When a legislative act violates the constitution, it is imperative that the judiciary not allow it to stand.

⁶⁸ CP 134. *See, also*, Respondent's motion to strike at CP 132-33. Appellant's "motion raises new facts (those that [she] purports to submit by way of a belated affidavit) and a new legal theory based upon the application of federal law. Such new matters are completely improper on a motion for reconsideration, and plaintiff has failed to meet any requirements justifying reconsideration as set forth under CR 59(a)". CP 133.

Our system of government depends upon such checks and balances.

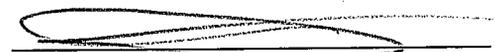
There can be no reasonable doubt that Initiative 518 violated article II, section 19 of the Washington Constitution. Appellant's attempt to invoke the equitable doctrine of laches, and her attempt to raise a new theory of relief under the FLSA, are without merit. Accordingly, this Court should find that Initiative 518, and the legislative act based thereon, RCW 49.46.010(5)(b), are unconstitutional and invalid, solely to the extent that "[a]ny individual employed in casual labor in or about a private home, unless performed in the course of the employer's trade, business, or profession" has been included under Washington's MWA. The severability provision of RCW 49.46.900 expressly allows this.⁶⁹

DATED this 8th day of November, 2006.

Respectfully submitted,

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⁶⁹ RCW 49.46.900 states: "If any provision of this chapter, or the application thereof to any person or circumstances, is held invalid, the remainder of the chapter and the application thereof to other persons or circumstances shall not be affected thereby."