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No. 96267-7

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THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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JOSE MARTINEZ-CUEVAS, et al.,  
Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC., et al.,  
Respondents,

and

WASHINGTON STATE DAIRY FEDERATION  
and WASHINGTON FARM BUREAU,  
Intervenor-Respondents.

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**BRIEF OF *AMICI CURIAE***  
**NATIONAL EMPLOYMENT LAW PROJECT,**  
**FAMILIAS UNIDAS POR LA JUSTICIA,**  
**UNITED FARM WORKERS OF AMERICA**

**IN SUPPORT OF PETITIONERS**

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## **I. IDENTITY OF INTEREST OF *AMICI CURIAE***

The National Employment Law Project (NELP) is a non-profit legal, policy and research organization with 50 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor laws. NELP's areas of expertise include the workplace rights of low-wage immigrant workers under state and federal employment laws, with an emphasis on wage and hour rights.

The United Farm Workers of America (UFW) is the nation's largest agricultural worker labor union and represents thousands of migrant and seasonal farm workers in various agricultural occupations throughout the country, including Washington State. UFW seeks to improve the lives, wages, and working conditions of farm workers and their families through collective bargaining, cooperation with employers, worker education, state and federal legislation, impact litigation, and public campaigns.

Familias Unidas por la Justicia (Familias) is an independent, Washington-based farmworker labor union affiliated with the Washington State Labor Council. Familias represents approximately 900 agricultural workers employed by Sakuma Brothers Berry Farms and other agricultural

businesses in Washington State. Families members hand harvest strawberries, blueberries, blackberries, and raspberries for Sakuma and other berry farms, they prune and harvest apples and other fruit, work in a variety of other industrial agricultural operations, harvesting flower bulbs and vegetables (broccoli, cauliflower, and cucumbers), and perform various other agricultural work to keep their families clothed and fed throughout the year.

## **II. INTRODUCTION**

The immunity granted to agricultural industry employers from paying overtime compensation otherwise required of other employers by the Minimum Wage Act (MWA or Act) implicates agricultural workers' (farmworkers) fundamental right to legal protections against the extreme dangers that agricultural labor entails. The exemption also infringes farmworkers' fundamental right to carry on their business of selling their labor. The exemption conflicts with the purposes of the Act and unconstitutionally deprives farmworkers of their rights to engage in the sale of their labor in reasonable safety.

## **III. ARGUMENT**

### **A. The Overtime Exemption Violates The Privileges And Immunities Clause Because It Unjustifiably Excludes Farmworkers From Constitutionally Mandated Safety Protections And From Exercise Of Their Fundamental Rights.**

**1. Together, Art I, § 12 and Art II, § 35 guarantee farmworkers’ rights to a safe work environment in their dangerous occupation.**

The purpose and command of Article II, Section 35 of the Washington Constitution are set forth in language both explicit and comprehensive. That section mandates that “[t]he legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.” Carrying out its duty under Article II, section 35, the Washington legislature enacted the MWA in 1959, which was patterned after the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*<sup>1</sup> Although the MWA has been recognized as necessary to protect workers from long hours of work, the Washington Legislature excluded farmworkers from overtime protections.

**2. The immunity from overtime compensation obligations granted to the agricultural industry obstructs the purpose of the MWA and arbitrarily favors agribusiness.**

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<sup>1</sup> *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871, 281 P.3d 289 (2012); *Peterson v. Hagan*, 56 Wn.2d 48, 56, 351 P.2d 127 (1960). Although the legislature did not include a statement of policy in the original enactment of the MWA, the purpose was the same as that of the FLSA, which was enacted 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. *See also Anfinson*, 174 Wn.2d at 870. In 1961 amendments the legislature stated that “the health, safety and the general welfare of the citizens of this state require ... the exercise of the police power of the state for the purpose of protecting the immediate and further health, safety and welfare of the people of this state.” Laws of 1961, Spec. Sess., ch. 18, § 1.

**a. The MWA denies overtime protections to the agricultural industry employees.**

Despite the express legislative purpose to protect the health, safety and welfare of the people of Washington, and despite amendments over the last 60 years, the MWA continues to exclude farmworkers from overtime rights. This exemption is unexplained in Washington State legislative history—except that it echoed the exemption found in the federal Fair Labor Standards Act, after which the MWA was patterned. *Anfinson*, 174 Wn.2d at 871.<sup>2</sup>

Most importantly, it is inexplicable in light of the legislative purpose of the MWA’s overtime provision, which was adopted to protect against “long hours of work injurious to health.” *Anfinson*, 174 Wn.2d at 870 (quoting *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945) (internal quotations omitted)). This disconnect between purpose with actual effect condemns the exemption as unconstitutional. Washington courts have interpreted the Privileges and Immunities clause to protect “against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 806–07, 83 P.3d 419, 425–26 (2004). Here, the

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<sup>2</sup> Amici herein join in the view expressed by Petitioners and other amici that the racist origins of the exemption that passed from the FLSA into the MWA, and the current demographic reality that virtually all wage farm work is performed by Latinx workers demonstrate that the exemption deprives farmworkers of the equal protection of the law.

favoritism is accorded to employers in the agricultural industry. Agribusiness enjoys the privilege of not having to curb hours of work or incurring increased hourly labor costs when employees work longer than 40 hours per week. The effect of the exemption is to remove the disincentive that otherwise would protect agricultural workers from the increased dangers to their health and very lives associated with working overtime hours. That preferential treatment implicates agricultural workers fundamental rights under Const. art. II, § 35, which imposes an affirmative and persisting duty upon the legislature to protect employees engaged in dangerous or unhealthy work, such as farm work.

**b. Overtime work in the agricultural industry significantly escalates the peril to employees working in an already extremely dangerous industry.**

**i. Agricultural labor is extremely dangerous.**

Agriculture is consistently recognized by experts as one of the most, if not the most dangerous industry in the United States.<sup>3</sup> Agricultural workers risk high rates of occupational injuries, with an incidence rate nearly twice as high as the rate for workers overall,<sup>4</sup> and extremely high

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<sup>3</sup> See U.S. Dep't of Labor, OSHA Fact Sheet: Farm Safety 1 (2005), [https://www.osha.gov/OshDoc/data\\_General\\_Facts/FarmFactS2.pdf](https://www.osha.gov/OshDoc/data_General_Facts/FarmFactS2.pdf) (referencing the National Safety Council) (herein after all hyperlinked references have last been visited Sept. 9, unless otherwise indicated).

<sup>4</sup> Agriculture, forestry, fishing, and hunting had a rate of 5 incidents per 100 full-time, equivalent workers, compared to 2.8 per 100 full-time, equivalent workers overall. Bureau of Labor Stat., U.S. Dep't of Labor, *Injuries, Illnesses, and Fatalities*,

rates of fatal injury. Agriculture, forestry, fishing, and hunting (AFFH) workers die from work injuries at a rate six times higher than the rate for workers overall, and significantly higher than the rates in other dangerous occupations, such as construction or warehousing and transportation.<sup>5</sup> In 2017, these workers had the highest rate of fatal workplace injuries of any private industry, with agriculture accounting for 78% of those deaths.<sup>6</sup>

These devastating national statistics run true in Washington. The rate of fatal workplace injuries for AFFH workers is the highest of any industry in the state and is more than four times higher than the rate for workers overall.<sup>7</sup> Thirty-nine agricultural workers died on the job from 2012 to 2017.<sup>8</sup>

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<https://www.bls.gov/iif/soii-chart-data-2017.htm> ( last updated Nov. 8, 2018) (providing Charts 1 and 3 (hereinafter “*Injuries, Illnesses and Fatalities*”))

<sup>5</sup> The fatal injury rate for workers overall was 3.5 per 100,000 full-time, equivalent workers. The rate for warehousing and transportation was 15.1 per 100,000 full-time, equivalent workers. The rate for construction was 9.5 per 100,000 full-time, equivalent workers. Bureau of Labor Stat., U.S. Dep’t of Labor, *Graphics for Economic News Releases, Number and Rate of Fatal Work Injuries, By Industry*, <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm>.

<sup>6</sup> The fatal injury rate was 23 per 100,000 full-time equivalent workers in 2017. Injuries in crop production, animal production, aquaculture, and their support activities made up 78% of injuries reported. Bureau of Labor Stat., U.S. Dep’t of Labor, *Graphics for Economic News Releases, Number and Rate of Fatal Work Injuries, By Industry*, <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm>.

<sup>7</sup> The 2017 fatal occupational injury rate for agriculture, forestry, fishing, and hunting was 11.7 per 100,000 full-time, equivalent workers, compared to 2.5 per 100,000 full-time, equivalent workers overall and a rate of 6.2 per 100,000 full-time, equivalent workers in the industry with the second-highest rate, construction. *Injuries, Illnesses, and*

AFFH workers in Washington also suffer high rates of nonfatal occupational injuries, with a rate more than twice as high as workers overall.<sup>9</sup> Washington’s agricultural industry workplaces are dramatically riskier than those in other states; farmworkers in Washington experience “by far the highest rate of workplace injury and illness at 8.1 per thousand.”<sup>10</sup> The occupational injury and illness rate specifically for crop workers in the state was 53% higher than the rate nationally.<sup>11</sup>

Long hours can be debilitating and deadly for crop workers. The Center for Disease Control (CDC) reports that between 1992 and 2006, sixty-eight agricultural workers died on the job from heat stroke.<sup>12</sup> Although some states, including Washington, require cool-down breaks and access to water and shade, enforcement agencies have “found that

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*Fatalities: Fatal Injury Rates by State of Incident and Industry, 2017*, <https://www.bls.gov/iif/oshwc/foi/staterate2017.htm>, *supra* note 4. (updated 12/18/18).

<sup>8</sup> Bureau of Labor Stat., U.S. Dep’t of Labor, *One-Screen Data Search: Census of Fatal Occupational Injuries (2011 Forward)*, <https://data.bls.gov/PDQWeb/fw>.

<sup>9</sup> *Injuries, Illnesses, and Fatalities, State Occupational Injuries, Illnesses, and Fatalities: Overview of State Data Available*, <https://www.bls.gov/iif/oshstate.htm#WA> (last updated Jul. 19, 2019) (providing incidence rates of nonfatal occupational injuries and illnesses by industry and case type in Washington). A third of these injuries were serious enough to make workers miss days of work. *Id.* (providing incidence rates of nonfatal occupational injuries and illnesses by industry and case type in Washington)

<sup>10</sup> Bon Appétit Mgmt. Co. Found. & United Farm Workers, *Inventory of Farmworker Issues and Protections in the United States 33* (2011), <https://s3.amazonaws.com/oxfam-us/www/static/oa3/files/inventory-of-farmworker-issues-and-protections-in-the-usa.pdf>. (hereinafter “Farmworker Issues and Protections”)

<sup>11</sup> Farmworker Issues and Protections 33.

<sup>12</sup> RC Luginbuhl, *Heat-Related Deaths Among Crop Workers --- United States, 1992--2006*, (June 20, 2008), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm>.

more than half of the farms [] audited did not follow the rules.”<sup>13</sup> Serious illnesses also results from heat-stress, pesticide exposure, and soil-borne fungal infections.<sup>14</sup>

Workers on dairy farms additionally risk the contraction of zoonic diseases, injuries from animals and machinery, amputations, slip and falls, and carpal tunnel.<sup>15</sup> Working with large animals and machinery is dangerous work and health and safety violations are common on dairy farms. Between 2015 and 2018 there were eighteen dairy worker fatalities or hospitalizations, including workers whose extremities had been amputated or smashed by machinery, who had been kicked by cows, who had been burned by hot cow manure, who had slipped and broken bones, and who had been harmed by exposure to chemicals.<sup>16</sup>

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<sup>13</sup> Ruxandra Guidi, *Farmworkers Face Illness and Death in the Fields*, High Country News (Aug. 20, 2018), <https://www.hcn.org/issues/50.14/agriculture-californias-farmworkers-face-illness-and-death-in-the-fields>.

<sup>14</sup> Twilight Greenaway, *Potentially Deadly Valley Fever is Hitting California Farmworkers Hard, Worrying Researchers*, NBC News (June 17, 2019, 2:00 AM), <https://www.nbcnews.com/news/us-news/potentially-deadly-valley-fever-hitting-california-farmworkers-hard-worrying-researchers-n1017806> (noting also that cases often go unreported); U.S. Dep’t of Labor, *Safety and Health Topics: Agricultural Operations*, <https://www.osha.gov/dsg/topics/agriculturaloperations/>.

<sup>15</sup> Nat’l Ctr. for Farmworker Health, Inc., *Dairy Workers 2–3* (2014); Rebecca Boone, *Mexican Veterinarians Sue Idaho Dairy for Human Trafficking*, Associated Press (Jan. 4, 2017), <https://apnews.com/9ef0aa97b61942de89b8cc7b5405ec74>; Wash. State Dep’t of Labor & Indus., *Dairy Industry: Overview*, <https://www.lni.wa.gov/Safety/Topics/AToZ/DairyFarms/>.

<sup>16</sup> Wash. State Dep’t of Labor & Industries, Div. of Occupational Safety & Health, *DOSH Enforcement Activities at Dairy Worksites: NAICS 112120 January 1, 2015 – March 31, 2019 1–2* (Revised Apr. 2019).

Farmworkers also experience high rates of musculoskeletal pain and disorders.<sup>17</sup> These disorders are associated with jobs that involve awkward positions, sustained standing, heavy lifting, and repetitive motions—common features of agricultural work exacerbated by long hours.<sup>18</sup> Musculoskeletal pain and disorders interfere with daily functioning and can even force workers into early retirement. The strain can be even more damaging for farmworkers paid on a piecework basis, who are incentivized to work at high speeds in order to maximize their earnings.<sup>19</sup> The toll on even young farmworkers is high—54% of workers aged ten to seventeen years in 2017 had experienced musculoskeletal pain in the previous year.<sup>20</sup>

**ii. Overtime work increases the rate of injury and illness.**

The many health and safety risks associated with agriculture are dramatically compounded by the industry’s frequent requirement to work in excess of forty hours a week. During the period 2005-2009, domestic

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<sup>17</sup> K. Walker-Bone & K. T. Palmer, *Musculoskeletal Disorder in Farmers and Farm Workers*, 52:8 *Occupational Med.* 441, 442 (2002).

<sup>18</sup> Jae-Gwang Lee, Guang Hwi Kim, Sung Won Jung, Sang Woo Kim, June-Hee Lee & Kyung-Jae Lee, *The Association Between Long Working Hours and Work-Related Musculoskeletal Symptoms of Korean Wage Workers: Data from the Korean Working Conditions Survey (a Cross-Sectional Study)*, 30:67 *Annals of Occupational & Env’tl. Med.* 1, 1 (2018).

<sup>19</sup> Nat’l Ctr. for Farmworker Health, Inc., *Occupational Health & Safety Factsheet: Agricultural Worker Occupational Health & Safety* 4 (2017), [http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-occ\\_health.pdf](http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-occ_health.pdf).

<sup>20</sup> *Id.*

farmworkers worked on average forty-five hours per week, with 59% of individuals working more than forty hours per week, and 57% working more than five days per week.<sup>21</sup> In some agricultural businesses this number can be significantly higher. For example, farmworkers harvesting field crops and employees on dairy farms reported to the Department of Labor working an average of fifty-four hours a week.<sup>22</sup>

The long hours also make the work more dangerous, because of the causal connection between overtime work and higher rates of occupational injuries. Long hours means more strain put on farmworkers' bodies from the physically demanding nature of the work, leading to higher rates of musculoskeletal disorders and other negative health effects.<sup>23</sup>

Fatigue from long hours can mean more mistakes on the job. The CDC reports that workers in their ninth to twelfth hours of work experience decreased alertness and increased fatigue, lower cognitive function, declines in vigilance on task measures, and increased injuries. When those

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<sup>21</sup> Farmworker Issues and Protections, *supra* note 10, 2, 14.

<sup>22</sup> Trish Hernandez & Susan Gabbard, JBS Int'l, Findings from the National Agricultural Workers Survey (NAWS) 2015-2016: A Demographic and Employment Profile of United States Farmworkers, Research Report No. 13, 21-22 (2018), [https://www.doleta.gov/naws/research/docs/NAWS\\_Research\\_Report\\_13.pdf](https://www.doleta.gov/naws/research/docs/NAWS_Research_Report_13.pdf); See also Nat'l Milk Producers Fed'n, The Economic Impacts of Immigration on U.S. Dairy Farms 4, 6 (2009) (also reporting 54 hour per week for dairy workers).

<sup>23</sup> Claire C. Caruso et al., U.S. Dep't of Health & Human Serv., Overtime and Extended Work Shifts: Recent Findings on Illness, Injuries, and Health Behaviors 21 (2004), <https://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf> (herein after "Overtime and Extended Work Shifts").

mistakes happen they can be deadly. The CDC found that “overtime was associated with poorer perceived general health, increased injury rates, more illnesses, or increased mortality in 16 of 22 studies” it surveyed, including an exponential increase in the risk of accidents during long shifts, so that the risk of accident in the twelfth hour was more than double the risk during the first eight.<sup>24</sup>

Another recent study found that working overtime was associated with a 61% higher injury hazard rate. The study found that “jobs with long working hours are not more risky merely because they are concentrated in inherently hazardous industries or occupations, or because of the demographic characteristics of employees working those schedules” but rather were consistent with a causal relationship between long hours and higher risk.<sup>25</sup> Indeed, this Court recently recognized that rest “mitigates” the “dangers” of farmworker workplace injuries. *Lopez Demetrio v. Sakuma Bros. Farms, Inc.*, 183 Wn. 2d 649, 658, 355 P.3d 258 (2015).

- c. No reasonable ground exists for granting immunity from overtime obligations to employers in an industry that is extremely dangerous for workers and not exceptional in any material way from other industries.**

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<sup>24</sup> *Id.* at iv.

<sup>25</sup> A. E. Dembe, J. B. Erickson, R. G. Delbos, & S. M. Banks, *The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States*, 62 Occupational Envtl. Med. 588, 592, 594 (2005).

**i. The MWA goal of protecting safety of workers in dangerous occupations is undercut by the agricultural overtime exemption.**

Workers in the agricultural industry already work in highly dangerous conditions, and the lack of overtime protections incentivizes their employers to require overtime work, thus exponentially increasing the danger to the workers, a privilege denied to non-agricultural employers. Employers of workers in dangerous occupations are not treated equally by the law, as required by Const. art II, § 12. *Ockletree*, 179 Wn.2d at 783. The right to legislation necessary to protect workers in highly dangerous work conditions, such as those agricultural workers experience, is a fundamental right that is implicated by this grant of favoritism to the agricultural industry. The exemption from overtime protections cannot withstand scrutiny unless there is a “reasonable ground for distinguishing between those who fall within the class and those who do not.” *Id.* To meet the reasonable ground requirement, distinctions must rest on “real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.” *Ockletree*, 179 Wn.2d at 783.

The legislature’s oft repeated goal for the MWA is “protecting the immediate and future health, safety and welfare of the people of this state.” RCW 49.46.005(1). Yet, the agricultural overtime exemption

concretely frustrates, rather than serves, that goal and the legislation’s goal of protecting the immediate health and safety of workers is obstructed.

**ii. Agricultural businesses are not unique in any way that could justify a conclusion that their exemption from overtime obligations serves the goal of the MWA.**

This case is not about—as Respondents would have it—the right to overtime compensation. The “goal” of the MWA is the safety and health of Washington’s workers, and is enacted in furtherance of Const. art. II § 29, and the fundamental right of workers to pursue and obtain safe working conditions. Thus, the exemption cannot be justified by speculation, rather the Court must “scrutinize [it] ... to determine whether it *in fact* serves the legislature's stated goal.” *Schroeder v. Weighall*, 179 Wn.2d 566, 574, 316 P.3d 482, 486 (2014). Certainly, the exemption has been shown to frustrate rather than serve the MWA’s purpose.

Nor is agribusiness in some way a distinct class of employers for whom immunity is justified on the ground that there are “real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.” *Ockletree*, 179 Wn.2d at 783. Agriculture is a business and as with all businesses, it comes with unique characteristics, but none that justify the privilege accorded it.

Although agribusiness may have different seasonal demands, to state that “[t]he working rhythm of farming is seasonal, not hourly, daily, or

weekly,” Resp. Op. Brief at 9, is simply misleading even as to traditional farm work.<sup>26</sup> That characterization also ignores the fact that agriculture encompasses many sub-industries, with different rhythms.<sup>27</sup> Thus, farmworker schedules vary significantly. For example, dairy work is year-round, although milk production may slow in summer months.<sup>28</sup> Furthermore, other industries such as retail, construction and landscaping, experience seasonal fluctuations in labor demands and unpredictable work schedule disruptions, but are not exempted from overtime obligations.<sup>29</sup>

Nor can agricultural employers in any material way be considered “small operations.” Agricultural employers in the United States, and in

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<sup>26</sup> Thus, farmworker schedules vary significantly. For example, dairy work is year-round, although milk production may slow in summer months. Beth LeBlanc, *Dairy Farms Have Consistent Work, But Search for Workers*, Times Herald (May 4, 2016, 2:47 PM), <https://www.thetimesherald.com/story/news/local/2016/04/26/dairy-farms-have-consistent-work-but-search-workers/82126534/>.

<sup>27</sup> RCW §§ 49.30.010(1), 50.04.150 (agriculture includes raising or harvesting any agricultural or horticultural commodity, including raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wild life, ... [work on a farm] in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment; packing, packaging, grading, storing, or delivering to storage, market or a carrier any agricultural or horticultural commodity as an incident to ordinary farming operations.)

<sup>28</sup> Beth LeBlanc, *Dairy Farms Have Consistent Work, But Search for Workers*, Times Herald, <https://www.thetimesherald.com/story/news/local/2016/04/26/dairy-farms-have-consistent-work-but-search-workers/82126534/>.

<sup>29</sup> Stanley W. Gilbert, U.S. Dep’t of Commerce, Characterization of the U.S. Construction Labor Supply, NIST Special Publication 1135, 16 (2012), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1135.pdf>; Lauren Zumbach, *Retailers Face Competition for Seasonal Workers*, San Francisco Chronicle (Sept. 20, 2018), <https://www.sfchronicle.com/business/article/Retailers-face-competition-for-seasonal-workers-13245886.php>.

Washington, have shifted to large corporate operations. Growth in farm size has occurred across the agricultural sector. When Washington's MWA was first passed in 1959, there was a single dairy farm in the state with more than 500 cows.<sup>30</sup> There are now hundreds. In the time since the Washington legislature last considered the exclusion of farmworkers from portions of the MWA in 1975, there has been a 442% increase in the number of these very large dairy farms.<sup>31</sup>

These trends are not slowing down. In the ten years between 2007 and 2017, the number of dairy farms with more than 2,500 cows doubled.<sup>32</sup> Similarly, from 1978 to 2017, the number of farms with more than 100 harvested acres of apple trees increased by 97% while the number with 1-49 harvested acres decreased by 72%. The number of apple farms with more than 1,000 harvested acres has tripled in the past twenty years, while

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<sup>30</sup> U.S.D.A., 2017 Census of Agriculture, Wash. State and County Data, [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Census\\_by\\_State/Washington/](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Census_by_State/Washington/), Tables 12, 20 (hereinafter 2017 COA-WA); U.S.D.A., 1959 Census of Agriculture, Wash. and Counties (hereinafter 1959 COA-WA), [http://agcensus.mannlib.cornell.edu/AgCensus/getVolumeOnePart.do?year=1959&part\\_id=473&number=46&title=Washington](http://agcensus.mannlib.cornell.edu/AgCensus/getVolumeOnePart.do?year=1959&part_id=473&number=46&title=Washington), Tables 12, 21. Even though approximately half of dairy farms nationally have fewer than 50 cows, those farms rarely hire workers, so those small dairies are not the employers most enjoying the privilege of exemption from overtime obligations. Nat'l Milk Producers Fed'n, *The Economic Impacts of Immigration on U.S. Dairy Farms* 4, 6 (2009).

<sup>31</sup> 2017 COA-WA, Tables 12, 20; U.S.D.A., 1978 Census of Agriculture, Wash. State and Counties, Table 20, 12, [http://agcensus.mannlib.cornell.edu/AgCensus/getVolumeOnePart.do?year=1978&part\\_id=181&number=47&title=Washington](http://agcensus.mannlib.cornell.edu/AgCensus/getVolumeOnePart.do?year=1978&part_id=181&number=47&title=Washington).

<sup>32</sup> 2017 COA-WA Tables 12, 20; U.S. D.A., 2007 Census of Agriculture, Washington State and Counties, Table 17, 21.

in that same time period, the number of wheat farms with more than 5,000 harvested acres has increased by 150 percent.<sup>33</sup>

Very large farms are increasingly owned by investors and investment firms, not family farmers.<sup>34</sup> Between 2012 and 2019, the number of farms with fewer than 1,999 acres decreased significantly, and the number of farms with more than 2000 acres did not decline.<sup>35</sup> During that same seven years, the number of corporate owned farms in Washington increased by 7%, and the number of family owned farms decreased by 4%.<sup>36</sup> These large, mostly corporate farms are the employers granted immunity by RCW 49.46.130(2)(g).

Significantly, small family farm operations, like mom and pop shops in other industries, have no employees or just a few. Less than a quarter of family or individual-owned farms reported having any expenses for hired

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<sup>33</sup> 2017 COA-WA Tables 37, 35; U.S.D.A., 1987 Census of Agriculture, Washington State and Counties Table 45, 37. Nationally, over the same period, family farms declined by 4% and corporate owned farms increased by 9%. 2017 COA-US Table 2, Figure 1, Table 6; 2017 COA-WA Tables 37, 35; 1978 COA-WA Tables 28, 19.

<sup>34</sup> COA-WA Tables 2, 6 *See also*, Dan Wheat, *Firm confirms purchase of Washington fruit companies*, Capital Press (Jan. 22, 2019), [https://www.capitalpress.com/ag\\_sectors/orchards\\_nuts\\_vines/firm-confirms-purchase-of-washington-fruit-companies/article\\_d145731c-1e8c-11e9-a929-47cb67727398.html](https://www.capitalpress.com/ag_sectors/orchards_nuts_vines/firm-confirms-purchase-of-washington-fruit-companies/article_d145731c-1e8c-11e9-a929-47cb67727398.html). *See also*, Eric O’Keefe, *Bill Gates Pays \$171 Million for Washington State Farmland*, The Land Report (Sept. 27, 2018) <https://www.landreport.com/2018/09/bill-gates-pays-171-million-for-washington-farmland/>.

<sup>35</sup> *Id.*, Table 3, Figure 3.

<sup>36</sup> COA-WA Tables 2, 6.

labor in 2017, down from nearly half in 1978.<sup>37</sup> Of the farms that did have hired labor in 2017, nearly half reported labor expenses below \$5,000, which could include paid family members.<sup>38</sup> In contrast, corporate owned farms require large workforces.<sup>39</sup> Thus, agribusiness, not family farming, is the economic reality for most farm labor.

While overtime payment for farmworkers nationwide is rare, California (the country's largest agricultural state) recently adopted such pay,<sup>40</sup> demonstrating that the agricultural industry is profitable despite overtime obligations. Moreover, Washington's agricultural industry would not be at a competitive disadvantage if Washington's farmworkers receive the same safety protection from overtime obligations as other Washington workers receive.

**3. The exemption of farmworkers from overtime protections also violates their fundamental right to carry on the business of selling their labor and obtaining safety at work.**

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<sup>37</sup> 2017 COA-WA Tables 74, 158; 1978 COA-WA Tables 30, 33.

<sup>38</sup> *Id.*

<sup>39</sup> See Martin and Calvin, *Immigration Reform: What Does It Mean for Agriculture and Rural America?*, *Applied Economic Perspectives and Policy* (2010) volume 32, number 2, pp. 233. (The 2007 COA reported that 43,100 U.S. farm employers hired 10 or more workers. These employers comprised less than 10% of the 482,186 U.S. farm employers, but accounted for 58% of the total 2.6 million workers hired.)

<sup>40</sup> Cal. Industrial Welfare Commission Order No. 14-2001(3)(A). Or. Rev. Stat. § 652.020(6).

Privileges and immunities guaranteed by Const. art I §12 extend beyond rights enumerated in the Washington Constitution; they include “those fundamental rights which belong to the citizens of the state by reason of such citizenship,” including the right to “carry on business” “and to enforce other personal right[s].” *State v. Vance*, 29 Wash. 435, 458, 70 P. 34, 41 (1902). Those personal rights include the rights to “pursue and obtain happiness and *safety*.” *Madison v. State*, 161 Wash. 2d 85, 119, 163 P.3d 757, 777 (2007) (J.M. Johnson, concurring) (emphasis added).

Here, the trial court recognized that the exemption found in RCW 49.46.130(2)(g) implicated farmworkers’ fundamental rights because it “treats a class of workers in a significantly different fashion than other wage earners engaged in the business of selling their labor.” CP 1213-14. This holding is consistent with longstanding precedent holding that distinctions between businesses that implicated the right to carry on a business violated the Privileges and Immunity Clause.<sup>41</sup>

While the right to carry on a business is not implicated where the challenged legislation infringes only on the manner of conducting

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<sup>41</sup> See e.g., *Ralph v. City of Wenatchee*, 34 Wash.2d at 638–39, 643, 209 P.2d 270 (1949) (municipal ordinance that distinguished and favored resident and from itinerant photographers their ability to solicit business); *Ex parte Camp*, 38 Wash. 393, 396, 80 P. 547, 548 (1905) (municipal ordinance that allowed farmers to peddle produce within the city, but allowed no other peddler of produce to do so).

business, it is implicated where the legislation effectively prevents the carrying on of the business. *Ass'n of Washington Spirits & Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 360, 340 P.3d 849, 858 (2015). Here, the exemption prevents farmworkers from carrying on their business in reasonable safety, which is their fundamental right. *Cf. Myrberg v. Baltimore & S. Min. & Reduction Co.*, 25 Wash. 364, 372–73, 65 P. 539, 541 (1901) (“Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all, without all reasonable precautions against such dangers afforded by science.”) Where the right to carry on the business of labor is burdened by an unreasonable exemption from an established safety standard which has no reasonable ground in light of the purpose of the legislation, the disparate regulation must be struck down. *Cotten v. Wilson*, 27 Wn.2d 314, 320, 178 P.2d 287, 290 (1947) (striking down limitation on liability of “victory vehicle” carriers transporting defense workers as granting a privilege to other defense workers who took common carriers to work).

Farmworkers’ already extremely dangerous work is made exponentially more dangerous by unfettered overtime hours that are well

documented as contributing in increased illness, injury and death.<sup>42</sup> In 2018 six farmworkers in Washington died at work.<sup>43</sup> It is time to strike down their arbitrary exclusion from overtime protection.

#### IV. CONCLUSION

For these reasons, the Court should strike down the exemption of agricultural workers in RCW 49.46.130(2)(g).

RESPECTFULLY SUBMITTED this 9th day of September, 2019.

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<sup>42</sup> Occupational hazards are one of the prime factors contributing to the much shorter life expectancy of farmworkers (age 49) compared to the general population (age 75). Hansen E., Donohoe M., Health issues of migrant and seasonal farmworkers, *Journal of Health Care Poor Underserved* 2003 14:153–64 [doi:10.1353/hpu.2010.0790](https://doi.org/10.1353/hpu.2010.0790).

<sup>43</sup> Wash. State Dep't of Labor & Indus., *Washington State: Work-Related Fatalities Report 12* (2018).

## CERTIFICATE OF SERVICE

I hereby certify on the date noted below, I served the foregoing *Brief of Amici Curiae* upon the following counsel of record electronically via the court portal:

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Dated this 9th day of September, 2019 in Seattle, WA.



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