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No. 96267-7

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS and PATRICIA AGUILAR, individually
and on behalf of all others similarly situated,
Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC.,
GENEVA S. DERUYTER, and JACOBUS N. DERUYTER
Respondents,

and

WASHINGTON STATE DAIRY FEDERATION
and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

**BRIEF OF AMICUS CURIAE WASHINGTON STATE TREE
FRUIT ASSOCIATION AND HOP GROWERS OF WASHINGTON
IN SUPPORT OF RESPONDENTS**

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I. IDENTITY AND INTEREST OF AMICUS

The Washington State Tree Fruit Association represents growers, packers, and marketers of tree fruits such as apples, pears, and cherries, and other seasonal tree fruits. Its members farm more than 240,000 acres in Washington state. Hop Growers of Washington members are Washington hop growers comprising 72% of the total U.S. hop production. Both provide statistical information, education, and training programs to their members and represent the industry on legislative and regulatory issues.

Petitioners bring a facial constitutional challenge to the agricultural exemption to the overtime provisions of Washington's Minimum Wage Act, chapter 49.46 RCW, asserting that "[n]o set of circumstances exist[] in which this provision can be constitutionally applied to any farmworker." Br. at 11. But by strategically focusing their arguments on the stable employment needs of a family-owned dairy operation, Petitioners' avoid addressing the foundational *seasonal* basis for the agricultural exemption. The seasonal growth cycles of hops and fruit trees correspond with extraordinarily volatile labor demands, peaking at harvest when tens of thousands of farm laborers bring Washington's tree fruits and hops to market.

Washington’s lawmakers have recognized this seasonal labor volatility in exempting agricultural employers from maximum hour laws for more than 60 years. And the demand for agricultural laborers in Washington has never been higher: In 2018, the U.S. Dept. of Labor’s Office of Foreign Labor Certification authorized 24,862 non-immigrant guest workers to come to Washington under the federal H-2A program in order to assist Washington farmers with their seasonal horticultural needs.¹

Amici submit that analysis of Petitioners’ constitutional challenges to this exemption must give effect to the Legislature’s recognition of the overwhelmingly seasonal nature of the agricultural industry and its recognition of the effect that a maximum hours restriction would have on a workforce that, on average, is employed on 5.8 months per year and works fewer than 1000 hours per year.

II. STATEMENT OF THE CASE

This case involves constitutional challenges to the agricultural exemption to the maximum hours law in Washington’s Minimum Wage Act (“MWA”). Washington’s maximum hours law is a statutory restriction on Washington’s employers and the exemption is a statutory right for certain employers to be exempt from that restriction.

¹See United States Department of Labor, Office of Foreign Labor Certification, *H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2018*, available at https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q4.pdf.

Washington adopted its first Minimum Wage Act in 1959. In 1961, the modern MWA was enacted “for the purpose of protecting the immediate and future health, safety and welfare of the people of this state.” LAWS OF 1961, EX. SESS., ch. 18 § 1; chapter 49.46 RCW. The 1961 MWA established a minimum wage to “establish minimum standards of employment” and to “encourage employment opportunities” within the state of Washington. *Id.* at §§1, 3. The Act did not provide for overtime and explicitly excluded several categories of workers, including agricultural workers, from its minimum wage provisions. *Id.* at § 2.

Washington’s MWA is based on the Fair Labor Standards Act of 1938 (“FLSA”), which is the federal statute establishing minimum wages and maximum hours.² *See* 29 U.S.C. §§ 201-219. Enacted during the Great Depression, the FLSA was intended to address abusive working conditions and high unemployment. *See* Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 *HAMLIN L. REV.* 649, 649-50 (1989). To do so, the FLSA set a minimum hourly wage and set a maximum hours of work per week. As enacted, the FLSA explicitly excluded “any employee employed in agriculture,” though it was amended in 1966 to provide certain agricultural employees with a minimum wage. 29 U.S.C. § 206 (1966).

² Though the MWA is based on the FLSA, the two are not identical and Washington is not bound by federal authority interpreting the FLSA. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000) (citations omitted).

The FLSA's maximum hours provision indeed has the effect of compensating those who work over the statutory maximum number of hours, but that is not the statute's purpose. Its purpose is to discourage employers from tasking their employees with longer hours, and to encourage employers to increase employment by hiring additional workers rather than paying overtime. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S. Ct. 1186, 92 L. Ed. 2d 1502 (1948).

In 1975, Washington's Legislature amended the MWA to conform state minimum wage laws to the FLSA. *Inniss v. Tandy Corp.*, 141 Wn.2d 517, 523, 7 P.3d 807 (2000) (citations omitted). In particular, this amendment created a maximum work week of forty hours. LAWS OF 1975, EX. SESS., ch. 289 §§ 1-3. Like the FLSA, the MWA excludes several categories from overtime, including employers of any individual employed in agriculture. *See* RCW 49.46.130(2); *see also* Brief of Respondent-Intervenor and Cross-Petitioners at 3-4 (listing exemptions). Many of these exemptions mirror those found in the FLSA and the Legislature has amended RCW 49.46.130 to recognize federal exemptions. *See, e.g.*, LAWS OF 1998, ch. 239 § 1 ("federal law exempts airline employees from the provisions of federal overtime regulations. This act is intended to specify that airline industry employers are not required to pay overtime compensation . . .").

Though it was adopted to conform with the FLSA, Washington's MWA has departed from the federal act as necessary to establish fair, modern labor standards. As currently enacted, Washington has a

progressive MWA that guarantees the highest minimum wage in the country to employees, including agricultural workers; Washington has maintained one of the nation's highest minimum wages since 1988. *See* U.S. Dep't of Labor Consolidated Minimum Wage Table, available at <https://www.dol.gov/whd/minwage/mw-consolidated.htm>. However, the maximum hours provisions in the MWA and the FLSA do not and have never applied to agricultural employers. *See* RCW 49.46.130(2)(g); 29 U.S.C. § 213(b)(12)-(16).

III. ARGUMENT

Both the FLSA and MWA have and continue to exclude agricultural employers from the maximum hours provision because lawmakers recognize that agriculture is different: most of Washington's agriculture is seasonal; agricultural goods must be harvested before they perish; there is an extreme shortage of available workers; and agricultural workers would suffer from even lower annual earnings if economic incentives compelled employers to divide the limited number of seasonal hours available amongst more workers. These legitimate policy choices defeat Petitioners' privileges and immunities challenge.

Further, there is no evidence of discriminatory intent in passing the maximum hours exemptions. Petitioners' arguments and cited authorities criticize the racial discrimination and admittedly paltry justifications surrounding the decision to exclude agricultural workers from the federal minimum wage. But that is not the subject of this litigation—the federal exception was removed in 1966 and Washington currently extends the

highest minimum wage in the country to its agricultural workforce. None of Petitioners' authorities relate to Washington's overtime exemption. Indeed, some recognize that Congress had legitimate concerns and rationale for exempting agricultural employers from the maximum hours provision in the federal legislation.

A. Washington Growers Compete in National and Global Market with the Highest Labor Costs in the United States

Farming is vitally important to Washington state. The agricultural industry generates more than \$10.6 billion³ in production alone and employs over 200,000 farm workers. U.S. Dep't of Agriculture, Nat'l Agricultural Statistical Serv., *2017 Census of Agriculture* (April 2019).

Ninety-five percent of Washington's nearly 36,000 farms are family farms. Most are also small—less than 50 acres—and generate under \$250,000 in annual revenues. *Id.*

Historically, Washington's tree fruit industry, and specifically its apple, cherry, and pear crops, have generated the largest number of agricultural jobs in the state. WASHINGTON STATE EMPLOYMENT SECURITY DEP'T, *Labor Market and Performance Analysis September 2016: 2015 Agricultural Workforce Report* at 7 (2016). Regardless of the crop, the majority of agricultural workers are seasonal. *Id.* at 6-7. The Employment Security Department defines seasonal workers as employees who work fewer than 1500 hours per year for a given employer. *Id.* Though there is

³ See WSDA's Washington Agriculture Snapshot, available at <https://cms.agr.wa.gov/getmedia/f3db67bd-5c56-44a6-9963-8f45974a120d/641-AgSnapshotWeb>.

little month-to-month variation in non-seasonal employment, the seasonal workers see considerable variation, ranging from a low of 28,831 in December's dormancy to more than 90,000 in June's cherry harvest, based on the type of crop, weather, and market forces. *See id. figure 3*. In contrast, agricultural employers in Washington employ approximately 40,000 non-seasonal agricultural employees throughout the growing year. *Id.* (showing a low of 40,411 workers in December and a high of 43,253 in June). Overall, agricultural workers in Washington (seasonal and non-seasonal together) work on average 997 hours per year or an estimated 5.8 months of covered employment. WASHINGTON STATE EMPLOYMENT SECURITY DEP'T, *Labor Market and Performance Analysis December 2013: 2012 Agricultural Workforce Report* at 32 (2013).

Washington pays its workers some of the highest agricultural wages in the United States. U.S. Dep't of Labor, Employment and Training Admin., *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2019 Adverse Effect Wage Rates*, 83 Fed. Reg. 66306 (Dec. 20, 2018). The Adverse Effect Wage Rate (AEWR), which is based upon USDA wage data, for Washington is currently \$15.03 an hour, tied with Oregon for the highest AEWR in the United States and well above the national average of \$12.96.⁴ *Id.* Skilled piece rate workers make significantly more than the

⁴ The AEWR is the annual weighted average hourly wage for field and livestock workers (combined) published annually by the U.S. Department of Agriculture based on a quarterly wage survey. 20 C.F.R. § 655.103(b). Although the

AEWR, often more than \$20 an hour.⁵ Less productive and non-piece rate workers are still guaranteed at least the minimum wage of \$12 per hour, tied with Massachusetts for the highest minimum wage in any state. U.S. Dep't of Labor Consolidated Minimum Wage Table, available at <https://www.dol.gov/whd/minwage/mw-consolidated.htm>.

These wages result in some of the highest labor costs in the United States. While farmers in the United States devote approximately 9% of their total farm expenses to labor, Washington farmers report average labor expenses of 22%. Kristi Pahl, *State's farm labor costs increase 36% in a year*, Tri-Cities Herald, Aug. 26, 2013. This is partially attributed to the fact that Washington's leading agricultural commodities require hand-harvesting as well as other daily manual work—unlike crops such as grains and corns, where both cultivation and harvest have mechanized, with resulting decreased labor costs. For tree fruits and other crops that rely on hand labor, reports indicate labor comprises approximately 40% of all variable costs. Karina Gallardo, *Fruit Growers, and the U.S., Would Suffer*, New York Times, Aug 18, 2011. Further, field labor for cherries and other berries can consume as much as 60% of an orchardist's annual production expense. American Farm Bureau Federation, *Why Is Labor Important to Farmers?*, <https://www.fb.org/issues/immigration-reform/agriculture-labor-reform/economic-impact-of-immigration>.

AEWR applies only to employers using the H2-A guest worker program, it is based upon actual wages paid in the state.

⁵ See https://www.capitalpress.com/ag_sectors/orchards_nuts_vines/harvest-means-big-paychecks-for-tree-fruit-pickers/article_d40773de-b48c-11e9-8f60-67453a5ee07b.html.

Farmers cannot simply pass these ever-increasing costs⁶ off to consumers because agriculture is not a purely market-driven industry. Many Washington farmers are limited in their ability to mitigate higher costs because the prices for certain agricultural goods (including dairy products) are established by a federally administered regulatory regime. *See, e.g.* CP 891. Further, Washington farmers compete in national and global markets against other states and countries, all of which have lower labor costs—many significantly lower. These regulations and price controls are illustrative: agriculture is different.

B. The Legislature Chose to Carve Out Agricultural Employers from Washington’s Maximum Hours Restriction

Petitioners assert that RCW 49.46.130(2)(g) is unconstitutional.

RCW 49.46.130 provides:

(1) Except as otherwise provided in this section, **no employer** shall employ any of his or her employees for a workweek longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed.

(2) This section does not apply to:

...

⁶ That the effects of these ever-increasing agricultural costs are not mere hyperbole is evidenced in part by the creation of the Family Farmer Relief Act of 2019, passed in reaction to a 50% increase in chapter 12 bankruptcy filings by family owned farms since 2014. 116th Congress, Public Law No.: 116-51 (August 26, 2019).

(emphasis added). By its plain language, the overtime rules apply to employers rather than employees. Subsection (1) prohibits employers from working employees longer than forty hours in a week. *Id.* However, subsection (1) also provides an exception to this prohibition: employers may employ employees more than 40 hours in a week, if the employer pays the worker for those extra hours “at a rate not less than one and one-half the regular rate.”

Reading the provision as a restriction on employers is consistent with the statute’s purpose: “The purpose of overtime wage laws is to encourage employers to spread employment by hiring additional workers rather than paying overtime.” *Inniss v. Tandy, Corp.*, 141 Wn.2d 517, 538, 7 P.3d 807 (2000) (Talmadge, J. dissenting) (citing *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68 S. Ct. 1186, 92 L. Ed. 1502 (1948)). Extending the maximum hours restriction to Washington’s agricultural workforce would undermine this legislative purpose, to the detriment of Washington’s growers and workers alike.

One result of the extreme seasonality of agriculture is that agricultural workers in Washington work on average only 997 hours per year.⁷ WASHINGTON STATE EMPLOYMENT SECURITY DEP’T, *Labor Market and Performance Analysis December 2013: 2012 Agricultural Workforce Report* at 32 (2013). This is an average of 5.8 months of covered employment, with long hours during the cherry, apple, and hop harvests

⁷ This number is likely inflated because it includes the hours worked by non-seasonal employees, defined as those who work 1,500 hours or more for the same employer. *Id.*

but little or no employment activity in the dormant months. *See id.* Thus, workers’ annual income is directly tied to their ability to maximize their hours during the productive season.

Requiring agricultural employers to either limit their workers to 40 hours per week or pay overtime would force Washington’s growers to choose between (i) limiting their harvest and leaving crops to rot; (ii) absorbing extraordinary additional labor costs, on top of the highest labor costs in the country; (iii) or spreading employment by hiring additional workers. This last choice would reduce the workers’ annual compensation by limiting them to 40-hours per week per employer—likely without reducing the wear and tear on their bodies as they commuted (without compensation) to a second employer’s fields—or other manual labor job—to maximize their earnings during these critical months.

Moreover, Washington would not enjoy the typical benefits of spreading employment because its agricultural industry is facing a historic labor shortage. “The number of the H-2A temporary agricultural workers coming into the state of Washington to harvest crops has grown by more than one thousand percent since 2007.” In 2018, the U.S. Dept. of Labor’s Office of Foreign Labor Certification authorized 24,862 non-immigrant guest workers to come to Washington under the federal H-2A program.⁸

⁸ The H-2A visa program allows agricultural employers who anticipate a shortage of domestic workers to bring non-immigrant foreign workers to the U.S. to perform seasonal agricultural tasks. The program is part of the Immigration Reform and Control Act of 1986. Under the program, a single U.S. employer may hire foreign temporary workers for a fixed period under contractual terms that have been approved by the U.S. Department of Labor. *See* 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1188(a)(1); 20 C.F.R. § 655.101(b)(1) (2006). For additional information on the federal H-2A program, *see*,

See n. 1, *supra*. In light of this extraordinary shortage, the Legislature recently passed legislation “to provide adequate protections for foreign and domestic workers and . . . to help growers maintain the stable workforce they need.” *See* LAWS of 2019, ch. 441 § 1.

The extraordinary growth of the H-2A program demonstrates that seasonal agricultural employers have resorted to recruiting additional workers from the only sources available—non-immigrant guest workers under the federal H-2A program. But this option is not available to the majority of Washington’s family farms, who lack the resources to participate in the H-2A program because they cannot provide the necessary services (such as housing). These employers cannot hire additional workers; they would simply be deprived of the flexibility intended by the overtime exemption.

There are many legitimate grounds for Washington to continue to distinguish between agricultural employers and other employers: 1) Washington farmers are faced with seasonal surges in labor needs while facing a historic shortage of available workers; 2) Washington farmers pay higher wages than the farmers in other states with whom they compete, and their labor costs comprise a higher percentage of production costs than other employers; and 3) the Legislature’s purpose of discouraging excess hours in order to increase employment would simply result in farmers

e.g., *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1284-86 (11th Cir. 2016).

allocating available work between more employees,⁹ which would have the effect of reducing the incomes of their year-round employees.

This Court recently acknowledged that agriculture is different. *Sampson v. Knight Transp., Inc.*, Case No. 96264-2, Slip Op. at 15 (Sept 5, 2019). The Legislature did not exceed its authority in recognizing that fact.

C. Petitioners’ Fail to Reconcile the Legislature’s Recognition of the Fact that Agriculture is Different

Respondents and Intervenor-Respondents’ briefing, as well as this Court’s own article I section 12 jurisprudence, shows that RCW 49.46.130(2)(g) does not violate the privileges and immunities clause. The maximum hours provision within the MWA is “a creature of statutory enactment,” rather than a fundamental right; the federal government did not provide for a minimum wage until 1931; Washington’s MWA was passed in 1961; and Washington’s overtime provisions were not enacted until 1975. Overtime simply did not exist in Washington until 1975 and there is no evidence—neither in the statute nor in Washington jurisprudence—that overtime is constitutionally mandated.¹⁰

⁹ This would likely not increase the size of the agricultural labor force, which from the perspective of the industry is maxed out. Rather, the likely result is that the number of workers on any farmer’s payroll would expand as workers would be forced to find multiple employers to income that they to earn in just 5.8 months. This dynamic would harm both farmers and laborers.

¹⁰ Many states do not have minimum wage or overtime laws. *See* U.S. Dep’t of Labor Consolidated Minimum Wage Table, *supra*. Further, were the right to overtime pay constitutionally mandated, this Court would inevitably have to confront each of the exemptions from overtime in the MWA.

Petitioners' reference to article II, section 35 does not transform the MWA's statutory restriction on maximum hours for some into a fundamental right of all Washington citizens. Article II, section 35 was enacted to ensure that laborers in specified dangerous occupations were protected by mandatory health and safety standards.¹¹ Like the Occupational Safety and Health Administration Act of 1970 ("OSHA"), this provision mandates safe and healthful working conditions by requiring the Legislature to set and enforce safety standards. Currently, these constitutional requirements are codified within the Washington Industrial Safety and Health Act, ("WISHA") chapter 49.17 RCW. *See id.*; RCW 49.17.010.

This is not the purpose or origin of the MWA. The MWA was first enacted in 1961, more than 70 years after the adoption of article II, section 35, and it neither references nor relies upon article II, section 35. *Compare* RCW 49.17.010 (Industrial Safety and Health Act passed "in keeping with the mandates of Article II, section 35 of the state Constitution"), *with* RCW 49.46.005 (MWA "enacted in the exercise of the police power of the state"). Given the timing of the overtime exemption's enactment and the absence of any connection to article II, section 35 or any other constitutional guarantee, the rights and obligations at issue here are not fundamental to state citizenship.

¹¹ Notably, the Legislature extended the protections of the Industrial Safety and Health Act to agricultural employers in 1995. *See* LAWS OF 1995, ch. 371 § 2.

Further, “the [exemption] applies equally to ‘all persons within the designated class’” *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 783, 317 P.3d 1009 (2014) (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 725-31, 42 P.3d 394 (2002), *reversed on rehearing on other grounds*, 150 Wn.2d 791, 83 P.3d 419 (2004); *see also id.* at 798-99 (same) (Stephens, J. dissenting). The “designated class” is similarly situated businesses (Washington agricultural employers) and the overtime exemption for agricultural employers applies equally to all. *Cf. id.* at 783 (designated class is not Washington employers but rather Washington non-profits), 798 (same) (Stephens, J. dissenting); *compare Rodriguez v. Brand West Dairy*, 378 P.3d 13, 22-23 (N.M. 2016) (invalidating an exemption for certain agricultural employees from the worker compensation scheme applicable to other agricultural employees, finding no unique characteristics warranting a distinction between the similarly situated groups and that such a distinction was not necessary to the legislation’s purpose).

Finally, this Court should reject Petitioners’ framing of the privileges and immunities issue. Petitioners argue that “RCW 49.46.130 creates a class of employees entitled to the protection of overtime” and that “[a]gricultural employees who are excluded [from that entitlement] are similarly situated to other employees who are entitled to protection.” CP at 0019 ¶¶ 107-08. Petitioners further argue that farm workers are similarly situated to miners and other workers in physically demanding,

hazardous positions. Br. at 18-19 (citing *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 271, 668 P.2d 1278 (1983)).

These arguments miss the distinction that the Legislature drew, which is between agricultural employers and other employers, not between agricultural workers and other workers. Thus, the issue presented is whether the Legislature was justified in distinguishing between agriculture and other industries, not whether it is fair to deny agricultural employees “benefits” that other employees receive. Because this distinction between industries is supported by rational grounds and not based on any discriminatory purpose, it is constitutional and therefore permissible

D. There is No Evidence of Discriminatory Intent in Passing the Maximum Hours Exemptions

Because their privileges and immunities challenge fails, Petitioners assert that RCW 49.46.130(2)(g) violates the equal protection guarantee of the state and federal constitutions. Unlike a typical equal protection challenge, Petitioners do not argue that the Washington Legislature had a discriminatory purpose in excluding agricultural employers from the MWA—and for good reason. The MWA overtime provisions and exemptions were passed in 1975, followed in 1989 with an amendment extending the minimum wage to agricultural employees. When these provisions passed, the majority of affected individuals were non-Hispanic whites. CP 903-06.

Rather, Petitioners argue that the exclusion of agricultural and domestic workers from the minimum wage and overtime provisions under

the 1939 FLSA were the direct result of racial discrimination and that this impermissible purpose may be imputed to the Washington Legislature's passage of the MWA. WSTFA generally concurs with Respondents and Intervenor-Respondents' responses to that contention and will not repeat those arguments here. RAP 10.3(e). WSTFA writes separately to emphasize that, even if this Court were to analyze Congress's motives in passing the FLSA and impute those motives to Washington's Legislature and the MWA, Congress had a legitimate purpose for exempting agricultural employers from the maximum hours' restriction.

Petitioners' argument that the initial exemption in the FLSA preventing agricultural workers from earning the minimum wage is supported by citation to a handful of academic articles. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95 (2011); Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* (1992) (available at CP 963-82). These articles address the alleged compromises—perceived to be necessary to ensure New Deal legislation—that the Roosevelt administration entered into that allegedly preserved the social and racial plantation system in the South. Linder, *supra*. These articles are particularly critical of the paltry justifications for the minimum wage exemption. However, none of Petitioners' authorities support the proposition that Congress's decision to exempt agricultural employers from the FLSA's **overtime provisions** was racially motivated.

To the extent that amici are aware of any law review articles addressing the maximum hours exemption, these authorities acknowledge that the overtime exemptions were supported by legitimate concerns. *See, e.g.,* Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649, 654-55 (1989) (“[t]he opposition to coverage by the maximum hours provision seems to have been based on the legitimate concern that agricultural production is seasonal and long hours may be required to put up the produce in good condition.”). These arguments continued to carry the day in 1966, when the FLSA was amended to provide farmworkers with a minimum wage but continued to exempt agricultural employers from the maximum hours provisions. *Id.* at 664 (“The primary factor in continuing this exemption was the seasonal nature of agriculture which creates sporadic periods of long hours of harvesting perishable goods. It was felt that the extraordinary number of potential overtime hours accumulated by these workers could lead to unacceptably high costs of labor for producers, which would be passed on to consumers in the form of higher prices.”) (citing Fritsch, *Exemptions from the Fair Labor Standards Act, Agriculture, Agricultural Services and Related Industries*, 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 97, 99 (1981)). As one article put it:

Congress also perceived that employers would make compensating adjustments which would adversely affect the employees. For instance, they might reduce wages during slack times to compensate for overtime pay, thus rendering the overtime pay ineffective. Or, worse,

employers might simply hire more workers to get the job done more quickly, thus avoiding overtime pay and reducing the number of payable hours worked by each employee.

Anderson, *supra* at 664 (emphasis added).

Put simply, Congress expressly did not want agricultural employers to avoid overtime penalties by hiring more workers—usually a goal of overtime laws—because that would reduce the total number of payable hours that each employee worked. *Id.* Any reduction would severely impact a workforce living below the poverty level in part because it is already employed fewer than 1,000 hours per year. These are, again, legitimate legislative concerns.

IV. CONCLUSION

Washington has a long and proud history of being a pioneer in the protection of employee rights. *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). This commitment to advancing worker rights is encapsulated in the MWA, which extends the nation's highest minimum wage to agricultural workers and has resulted in average hourly wages that not only exceed that minimum wage but are higher than any other agricultural wages in the United States.

But Washington's commitment to workers' rights does not require this Court to accept Petitioners' arguments, which neither benefit agricultural workers nor their employers. Not at all types of employment

or workforce tasks are the same. Washington's agricultural industry, and specifically its tree fruit and other crops that involve intensive hand-labor, is a seasonal industry that requires periods of concentrated activity, followed by less intense months. As Congress and Washington's Legislature recognize, the goal of overtime laws as incentivizing agricultural employers to avoid overtime penalties by hiring more workers is a poor fit for a workforce employed only 5.8 months out of the year. If Washington farmers were required to pay overtime, the likely result would be a cap on hours for existing employees, followed by the frantic efforts of laborers to replace that lost income by finding additional opportunities for work—increasing the burdens of unpaid travel time on an already largely migrant workforce. This would be detrimental to Washington's domestic laborers who rely on the increased hours they receive during the truncated employment periods in order to support their families.

The exemption from Washington's overtime rules for agricultural employers is not an unconstitutional privilege and does not violate the Constitution's equal protection guarantee. Petitioners' cannot sustain their facial challenge and, to the extent that this Court construes this as an as applied challenge, that challenge fails as to dairies and cannot affect Washington's other agricultural employers.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of September, 2019, I electronically filed the attached document via the Washington State Appellate Court's Portal and caused service of same on all counsel of record via the Portal.

Dated this 9th day of September, 2019, at Yakima, Washington.

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