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No. 96267-7

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.

On Appeal from the Yakima County Superior Court
No. 16-2-03417-8

**PETITIONERS' REPLY AND
RESPONSE TO CROSS-APPEAL**

Lori Jordan Isley, WSBA # 21724
Joachim Morrison, WSBA # 23094
Andrea Schmitt, WSBA # 39759
COLUMBIA LEGAL SERVICES
6 South Second Street, Suite 600
Yakima, WA 98901
(509) 575-5593 x.217
lori.isley@columbialegal.org
joe.morrison@columbialegal.org
andrea.schmitt@columbialegal.org

Marc Cote, WSBA # 39824
Anne Silver, WSBA # 51695
FRANK FREED SUBIT &
THOMAS LLP
705 Second Avenue, Suite 1200
Seattle, WA 98104-1798
(206) 682-6711
mcote@frankfreed.com
asilver@frankfreed.com

Attorneys for Petitioners

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I. INTRODUCTION

DeRuyter Brothers Dairy, Inc., Geneva DeRuyter, and Jacobus DeRuyter (“DeRuyters”) and the Washington State Dairy Federation and Washington Farm Bureau (“Industry Groups”) are the beneficiaries of the grueling work performed every day by farmworkers in the fields, orchards and dairy industry of this state, as are we all. Far from being innocent bystanders, the DeRuyters were compelled by this case to change their practices and compensate hundreds of farmworkers who had toiled in their dairy for their systemic failure to provide basic meal and rest breaks—another health and safety violation endemic in the agricultural industry recently recognized by this Court. *See* CP 45-51 & 69 ¶ 9. It is undisputed that the injury rate at the DeRuyters’ facility, like all other dairy facilities in the state, is nearly twenty percent higher than the already high injury rate for the agricultural sector as a whole. CP 152 & 157. While the DeRuyters would like this Court to ignore the racist origins of the agricultural exemption, doing so is irreconcilable with Washington’s long and proud tradition of protecting workers. That tradition should now fully extend to our state’s farmworkers as the constitution demands.

The Workers have demonstrated the agricultural exemption from overtime protection grants an immunity to one of our state’s most dangerous industries, depriving farmworkers of the right to the health and

safety protection guaranteed by Washington Constitution’s unique article II, section 35. The exemption cannot be justified on any reasonable ground. The Workers have also demonstrated the exclusion violates farmworkers’ right to equal protection of the law. Accordingly, this Court should declare the agricultural exemption from overtime protection is unconstitutional.

II. ARGUMENT

A. The agricultural exemption from overtime violates the privileges and immunities clause under the two-part article I, section 12 “privileges” test.

This Court has established a two-part test under the “privileges” prong of article I, section 12:

First, we ask whether a challenged law grants a “privilege” or “immunity” for purposes of our state constitution. If the answer is yes, then we ask whether there is a “reasonable ground” for granting that privilege or immunity.

Schroeder v. Weighall, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014)

(citations omitted). While the trial court erred in misstating the standard for the second part of the test and concluding the test presented an issue of disputed fact for trial, the court correctly acknowledged the establishment of a two-part test. *See* CP 1213. Similarly, the Industry Groups agree the court applies a two-step analysis. *See* Industry Groups’ Opening Brief at 7-8.¹ As shown previously, the Workers meet both parts of the test and

¹ The DeRuyters incorrectly suggest the application of a three-part test. *See* DeRuyters’ Opening Brief at 16 & 23 (referencing “three tests” and a “third

therefore this Court should conclude the agricultural exemption is unconstitutional.² Workers’ Opening Brief at 12-31.

1. The trial court correctly found the exemption grants a privilege or immunity under the first part of the test.

The statutory agricultural exemption grants a privilege or immunity for purposes of the first part of the article I, section 12 “privileges” test. This exemption triggers “privileges” analysis because it implicates fundamental rights of state citizenship. *See Schroeder*,

step”). There is no requirement under this Court’s privileges analysis to demonstrate discrimination between two classes of businesses. *See Schroeder*, 179 Wn.2d at 572-74 (limit on ability of certain plaintiffs, those whose injuries occurred during childhood, to bring claims granted an immunity triggering the reasonable ground test); *see also Andersen v. King Cnty.*, 158 Wn.2d 1, 124-25, 138 P.3d 963 (2006) (Chambers, J., concurring in dissent) (privileges analysis does not require a showing of discrimination; one “need only show that some person or class of which she is not a member has been singled out for a privilege she does not receive”).

² The appropriate standard of review for the constitutionality of a statute is de novo. *State v. Arlene’s Flowers*, No. 91615-2, 2019 WL 2382063, at *11 (Wash. June 6, 2019); *Schroeder*, 179 Wn.2d at 571; *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012); *see also Sch. Dists.’ Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 614, 244 P.3d 1 (2010) (“the entire discussion of the ‘beyond a reasonable doubt’ standard is unnecessary and distracting.”) (Stephens, J., concurring); Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 Univ. Puget Sound L. Rev. (now Seattle Univ. L. Rev.) 491, 507-09 (1984), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1178&context=sulr> (the “reasonable doubt” standard should be vigorously challenged when it threatens effective independent constitutional interpretation by courts, particularly in cases involving fundamental rights).

179 Wn.2d at 573 (citing *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). The fundamental rights implicated by the exemption are: 1) the right of workers in dangerous jobs to protection by the government as guaranteed by article II, section 35; and 2) the right to work and earn a wage, which is the right adopted by the trial court in concluding the Workers met the first part of the “privileges” test.

Both rights “may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law.” *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 778, 317 P.3d 1009 (2014). Article II, section 35, involves a specific mandate to protect workers in dangerous jobs. Both this protection and the right to work, recognized by the trial court, also fall within the enumeration of rights from the early cases. The *Vance* list is not an exclusive list; the authorities relied upon therein and this Court’s more recent examination recognize the more complete enumeration from *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). *See Workers’ Opening Brief* at 19-20. Those rights include: “protection by the government; and the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue happiness and safety.” *Corfield*, 6 F. Cas. at 551-52.

State constitutions serve as limitations on the plenary power of state governments to do anything not expressly forbidden by the state constitution or federal law, as distinct from the United States Constitution's grant of limited power. Utter, *supra* note 2, at 494-95. Consequently, state constitutions are typically more detailed, contain more specific provisions to regulate state conduct, and often protect individual rights that are not explicitly recognized in the federal Constitution.³ *Id.* at 495. That is the case with the two constitutional protections implicated here.

Accordingly, while the legislature has discretion in many areas, including enacting health and safety protections, that discretion is limited where fundamental rights are implicated. *See Schroeder*, 179 Wn.2d at 573 (recognizing the legislature may create statutes of limitations, but for common law causes of action it must do so within the constitutional bounds of privileges analysis); *Fain v. Chapman*, 89 Wn.2d 48, 53, 569 P.2d 1135 (1977) (noting that the legislative power is limited to enacting laws which do not conflict with specific restrictions found in the

³ Federal court analysis of the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution is not controlling because the rights protected by the state privileges and immunities clause are broader than those protected by the federal clause. *Compare* Workers' Opening Brief at 22-23 n. 6, *with* Industry Groups' Opening Brief at 14 (citing inapposite cases examining rights protected by the Fourteenth Amendment).

constitution). The Workers do not argue there is a fundamental right to overtime pay, as posited by Respondents. *See* Industry Groups' Opening Brief at 12; DeRuyters' Opening Brief at 16. Rather, as detailed below, the Workers show the legislature's exemption of agriculture from overtime protection implicates their fundamental right, as workers in dangerous jobs, to be protected by health and safety laws.

a. The Washington Constitution contains a fundamental right for all workers in dangerous jobs to be protected by health and safety laws.

The express protection for all workers in dangerous jobs in article II, section 35 is unique in that article. While the vast majority of sections in article II focus on the makeup of the legislature and related procedures, section 35 is the only section in that article that provides an affirmative protection to a particular group. *See* Const. art. II.⁴ There is no analogous provision in the federal constitution. Constitutional scholars have recognized the unique protection in section 35 and linked that provision with three other significant steps taken by the Washington framers to advance the populist movement of that era. Robert F. Utter & Hugh D.

⁴ Other sections in article II discuss other groups, but do not afford those groups additional protection. *See* section 29 (original provision for convict labor for the benefit of the state); section 33 (original provision restricting ownership of land by aliens) (repealed) (*see infra* Section II.C.3 for discussion related to article II, section 33).

Spitzer, *The Washington Constitution: A Reference Guide* 7-11 (2d ed. 2013) (CP 132-36).⁵ First, the framers provided protections for individual interests in article I, including the privileges and immunities clause, and protections for workers aimed at restricting the practice of hiring armed thugs to break up labor unions. *Id.* at 8 & 82 (CP 133 & 148). Second, the framers provided provisions in article XII to oversee and regulate “rapacious” businesses; the worker protection language of article II, section 35 is viewed as a corollary to these provisions in article XII. *Id.* at 8-9 & 82 (CP 133-34 & 148). And finally, the framers provided a guarantee of educational opportunity in article IX. *Id.* at 9 (CP 134).

While article I rights are generally framed as negative restrictions on government action, article II, section 35 provides a positive constitutional right. In this way, it is like the educational opportunity guaranteed in article IX. *See McCleary*, 173 Wn.2d at 519. Positive constitutional rights are subject to a different test:

⁵ *See also* Hugh D. Spitzer, *The Constitutionalism of American States, Washington The Past and Present Populist State* 772-79 (George E. Connor & Christopher W. Hammons eds., 2008) (providing additional context related to the nexus of these provisions and observing “the workplace-protection provisions in Washington’s constitution were not effectively implemented until the Progressive Era, when parts of the Populist Movement’s unfinished agenda were finally enacted” at 776 n.25); Utter, *supra* note 2, at 519 (the Washington populist framers sought to protect personal, political, and economic rights from both the government and corporations).

Positive constitutional rights do not restrain government action; they require it. The typical inquiry whether the State has overstepped its bounds therefore does little to further the important normative goals expressed in positive rights provisions Instead, in a positive rights context we must ask whether the state action achieves or is reasonably likely to achieve “the constitutionally prescribed end.”

Id. at 518.⁶

The agricultural exemption does not achieve the constitutionally prescribed end of article II, section 35 because it excludes all farmworkers—who toil in an *extremely* dangerous industry—from the protection extended to other Washington workers in dangerous occupations. Therefore, instead of achieving the express constitutional protection, the agricultural exemption directly conflicts with what the framers intended when they adopted article II, section 35.

Contrary to the Respondents’ arguments, “privileges” analysis does not require the fundamental right implicated to be “self-executing” or contained in the restrictions in article I. *See supra* Section II.A.1.a; *contra* DeRuyters’ Opening Brief at 31 (asserting requirement that provision be

⁶ The Workers do not intend to suggest by this comparison that the fundamental right implicated by article II, section 35, for workers in dangerous jobs to be protected by health and safety laws, is equivalent to the *paramount* duty prescribed by article IX, section 1. The protection is a similar positive right such that state action should be analyzed in the context of whether the legislation furthers the important goals expressed. *See McCleary*, 173 Wn.2d at 519-20.

“self-executing”); Industry Groups’ Opening Brief at 15 (arguing alleged limitation to article I, declaration of rights).

Justice Utter’s concurrence in *State v. Smith*, 117 Wn.2d 263, 814 P.2d 652 (1991), demonstrates that provisions outside a constitution’s “declaration of rights” section can be the basis for privileges. There, the court rejected a challenge by a juvenile to the state’s ability to seek revision of a juvenile court commissioner’s order. *Id.* at 280. The Court conducted an article I, section 12 analysis with the assumption that analysis was substantially identical to federal Fourteenth Amendment protections. *Id.* This limited approach is no longer good law. *See Schroeder*, 179 Wn.2d at 571-72. However, in the concurring opinion, Justice Utter engaged in state-based “privileges” analysis (relying on Oregon law) and concluded the case implicated the privilege of a speedy trial. *Smith*, 117 Wn.2d at 287-91. While the speedy trial right is an article I right, the Oregon case on which Justice Utter relied involved article VII, section 5 of the Oregon Constitution (the article addressing the *judicial branch*). *See id.* at 288; *State v. Clark*, 291 Or. 231, 232 & 241, 630 P.2d 810 (1981).

The Oregon Supreme Court in *Clark* was examining whether procedures related to preliminary hearings in criminal matters were the source of a privilege. *Id.* The Oregon court, like Justice Utter, concluded

“there is no question that the opportunity of a preliminary hearing is a ‘privilege’ within the meaning of the constitutional guarantee.” *Smith*, 117 Wn.2d at 288 (quoting *Clark*, 291 Or. at 241). The Oregon court’s analysis demonstrates that constitutional provisions in sections other than the declaration of rights may trigger “privileges” analysis.

Similarly, the assertion that “privileges’ analysis is limited to constitutional provisions that are “self-executing” is contradicted by article I, section 29 which makes all sections mandatory “unless by express words they are to be declared otherwise,” as well as case law interpreting that protection. *See State ex rel. Lemon v. Langlie*, 45 Wn.2d 82, 97, 273 P.2d 464 (1954) (construing provisions of article III and concluding that these sections “like all other sections of our state constitution” are mandatory because they contain “no express declaration to the contrary”) (citing Const. art. I, § 29); *see also Utter*, *supra* note 2, at 508 & 515 (courts should reject standards contrived to limit fundamental protections of article I, including the scope and interpretation of the privileges and immunities clause).

The DeRuyters’ allegation that overtime does not make a workplace safer is inapposite. DeRuyters’ Opening Brief at 34-35. For “privileges” analysis, the issue is whether the agricultural exemption *implicates* the fundamental right of workers in dangerous jobs to the

protection of health and safety laws. Both the legislature and the courts have recognized that the Washington Minimum Wage Act's ("MWA's") provisions are health and safety protections. *See* Workers' Opening Brief at 17-18; *see also* DeRuyters' Opening Brief at 32 (conceding maximum hour provision enacted in 1911 was a worker safety statute); Industry Groups' Opening Brief at 16 & 21 (conceding, at least in part, that the MWA addresses health and safety).

The legislature's stated purpose in the MWA is to protect health and safety. RCW 49.46.005. Courts interpreting similar provisions have long recognized that restrictions on hours are worker health and safety protections. *See State v. Buchanan*, 29 Wash. 602, 610, 70 P. 52 (1902); *Holden v. Hardy*, 169 U.S. 366, 380-821, 398, 18 S. Ct. 383, 42 L. Ed. 780 (1898); *see also Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 587 & 597, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937) (recognizing both long hours and low wages as evils which are harmful to health). More recently, this Court affirmed that the MWA's overtime protections are health and safety provisions which disincentivize long hours of work injurious to health. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 870, 281 P.3d 289 (2012) (quoting *United States v. Rosenwasser*, 323 U.S. 360, 361, 65 S. Ct. 295, 89 L. Ed. 301 (1945)).

In addition, this Court has long recognized that farmworkers “are engaged in an extremely dangerous occupation.” *Macias v. Dep’t of Labor & Indus.*, 100 Wn.2d 263, 274, 688 P.2d 1278 (1983). The undisputed facts of this case demonstrate that agricultural jobs continue to be extremely dangerous for farmworkers. *Compare* Workers’ Opening Brief at 18, *with* DeRuyters’ Opening Brief at 7 (no factual dispute noted related to the dangerous nature of the work). To show a privilege is implicated, there is no requirement that the Workers demonstrate excessive hours in agricultural work have caused injuries or that inclusion in overtime protection will reduce injury. The legislature has already made that determination. The Workers need only show they work in a dangerous industry, and once that has been established, their right to be protected by health and safety laws, including the MWA’s overtime protection is implicated.

Finally, the Respondents’ assertions that no court has specifically recognized article II, section 35 as implicating a fundamental right does not foreclose the Workers’ challenge. Rather, the cases cited by the Industry Groups do not involve constitutional challenges related to article II, section 35, and so do not address—much less, foreclose—the issue. *See Peterson v. Hagan*, 56 Wn.2d 48, 57-58 & 61-62, 351 P.2d 127 (1960) (invalidating two sections of the MWA neither of which dealt with the

agricultural exemption⁷); *Cerrillo v. Esparza*, 158 Wn.2d 194, 198, 142 P.3d 155 (2006) (holding certain truck drivers were workers covered by the agricultural overtime exemption); *Berrocal v. Fernandez*, 155 Wn.2d 585, 588, 121 P.3d 82 (2005) (affirming summary judgment that sheepherders were covered by the MWA exclusion related to individuals who reside or sleep at the workplace); *see also Rodriguez v. Brand W. Dairy*, 356 P.3d 546, 552 (N.M. 2015) (finding cases that analyzed whether certain workers fell within the category of farmworkers covered by the agricultural exemption to workers' compensation not pertinent to a determination of the constitutionality of the exemption itself).

Moreover, that no court has yet held that the denial of health and safety protections to farmworkers implicates their fundamental right under article II, section 35, does not preclude this Court from so holding now. Courts have found constitutional violations when conditions change and have a special duty to act when the conditions are dangerous and where fundamental rights are implicated. *See Macias*, 100 Wn.2d at 266 (recognizing the evolution of agricultural work and trends toward larger farms and mechanization resulting in a dangerous, industrial occupation); *see also State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 147,

⁷ In fact, at the time *Peterson* was decided farmworkers were entirely excluded from the MWA. *Peterson*, 56 Wn.2d at 56.

247 P.2d 787 (1952) (“constitutional provisions should be interpreted to meet and cover changing conditions of social and economic life.”) (citations omitted); *Holden*, 169 U.S. at 387 & 392) (recognizing that the law will be forced to adapt to new conditions of society, particularly to worker protections as dangerous occupations increase); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605-06, 192 L. Ed. 2d 609 (2015) (acknowledging the changing meaning of the right to marry over decades, attendant referenda, legislation, and litigation and concluding the role of courts in our constitutional system is to protect fundamental rights). For all these reasons, the Workers have demonstrated the agricultural exemption implicates their right, as workers in dangerous jobs, to the health and safety protections of overtime.

b. The agricultural exemption also implicates the right to work and earn a wage.

The trial court found the fundamental right implicated for the first part of the “privileges” analysis was the right to work and earn a wage. CP 1213. The early cases following *Corfield* support this holding. *See supra* Section II.A.1 and Workers’ Opening Brief at 19-23. The Industry Groups’ assertion that such a right has never been recognized by a Washington appellate court ignores history. *See* Industry Groups’ Opening Brief at 13. Early 1900’s cases in Washington and elsewhere were

premised on the right to contract one's labor. *See City of Seattle v. Smyth*, 22 Wash. 327, 328, 60 P. 1120 (1900); *Buchanan*, 29 Wash. at 604; *In re Broad*, 36 Wash. 449, 461, 78 P. 1004 (1904); *see also Holden*, 169 U.S. at 396-97. While employers or industry can no longer seek to invalidate worker health and safety protections based on the right to work or contract for one's own labor, as in the *Lochner* era, courts have never overruled the cases' recognition of the right to work as it inures to workers. *See Peterson*, 56 Wn.2d at 54-55.⁸ For workers in dangerous jobs, the agricultural exemption from overtime protection implicates the fundamental right to work subject to the same conditions afforded other wage earners engaged in the business of selling their labor.

⁸ During the *Lochner* era, courts invalidated the regulation of hours of labor based on the alleged interference with freedom to contract. *See Parrish*, 185 Wash. at 582-83. This Court, early on, objected to efforts by employers, industry and contractors to reap the benefits by invoking the *workers' right to contract* for their own labor. *See In re Broad*, 36 Wash. at 461 ("It is a notable fact in this connection that the alleged constitutional right of the laborer to contract his labor at any price which seems to him desirable is not in this or any other reported case a claim urged by the laborer, but the earnest contention in his behalf is made by the contractors who are reaping the benefits of the violation of that contract in paying the laborer a less remuneration than he is entitled to under the statute."). The origins of that right go back to the Magna Carta and perhaps beyond. *See Learned Hand, Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 495 (1908). The conditions of factory life and life in the mines precipitated regulation of hours of work and wages. *Id.* at 497. The impact of industrialization on social, economic, and legal theories does not alter the long recognized right inuring to workers to own their labor, a fundamental right protected by article I, section 12.

2. *There is no reasonable ground for the agricultural exemption as a matter of law.*

It is well established, and not contradicted by Respondents' briefing, that the reasonable ground test for "privileges" analysis is more exacting than rational basis review for equal protection analysis. *See Schroeder*, 179 Wn.2d at 574; Industry Groups' Opening Brief at 19; DeRuyters' Opening Brief at 23. There would be no reason to limit "privileges" analysis to fundamental rights if the reasonable ground test were not more rigorous. *See Ockletree*, 179 Wn.2d at 797 (Stephens, J., dissenting). The alleged grounds asserted by Respondents fall far short of this rigorous standard.

Respondents fail to demonstrate that the legislature considered *any* grounds when first passing the agricultural exemption in 1959.⁹ To meet

⁹ The only legislative history proffered by Respondents related to agricultural interests are two statements made in 1987, one by a tree farmer and one by an industry representative. DeRuyters' Opening Brief at 9. In both sources cited, the testimony related to potential economic consequences to the industry of including farmworkers in *unemployment insurance*. Duane Kaiser, Testimony to House Commerce and Labor Committee, Jan. 19, 1987, minutes 21:45-24:30, <https://www.digitalarchives.wa.gov/Record/View/BEB3CAB007048D137BE190420CDCAA5>; Frank DeLong, Testimony to the House Commerce and Labor Committee, Jan. 15, 1987, minutes 1:05:20- 1:07:45, <https://www.digitalarchives.wa.gov/Record/View/FDE3FCD72D37618B992B902C07A6BB2B>. The legislature must not have been terribly concerned about this issue, as it repealed the agricultural exemption to unemployment insurance in the very next biennium. *See* Laws of 1989, ch. 380, §§ 78-83 (codified in various sections of title 50 RCW). There are no citations to support the assertions of "legislative recognition" of the witnesses' concerns discussed later in that brief. DeRuyters'

the reasonable ground test, the “law must be justified *in fact* as well as *theory*.” *Schroeder*, 179 Wn.2d at 575 (emphasis added). There are no facts that support finding that the legislature considered *any* of the theories alleged by Respondents to justify the agricultural exemption.

Moreover, for a reasonable ground analysis the court must “scrutinize the legislative distinction to determine whether it *in fact* serves the legislature’s stated goal.” *Id.* at 574. The stated goal of the MWA is to protect worker health and safety. RCW 49.46.005(1). This Court has long recognized that the MWA, and overtime protection specifically, reflects this stated purpose. *See Anfinson*, 174 Wn.2d at 870.

The Industry Groups’ attempt to justify the agricultural exemption based on the MWA’s declaration of necessity clause, which includes the language “encourage employment opportunities within the state,” is insufficient. *See* Industry Groups’ Opening Brief at 21. Contrary to this purported justification, the DeRuyters acknowledge that overtime

Opening Brief at 24-25. Similarly, there is no documentation that the legislature was concerned about economic impacts to the agricultural industry. *Contra* Industry Groups’ Opening Brief at 23 (insinuating the legislature was so concerned without supporting authority).

protection may result in reducing hours worked.¹⁰ See DeRuyters' Opening Brief at 35.

The Industry Groups moreover concede that the MWA was based on the federal Fair Labor Standards Act ("FLSA"), and overtime protection in that context has long been recognized as a way to incentivize employers to reduce hours, and, if needed, to hire more workers to perform the extra hours of work, thus providing more employment opportunities. See *supra* Section II.A.1.a (citing *Anfinson*, 174 Wn.2d at 870); Industry Groups' Opening Brief at 8. The primary purpose of the MWA is protecting worker health and safety, and the constitution demands that protection.

In addition, Respondents' position ignores "Washington's long and proud history of being a pioneer in the protection of employee rights" and recognition of the "Legislature's concern for the health and welfare of Washington's workforce" when construing the MWA. See *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000);

¹⁰ In the 1987 MWA legislative history referenced in the DeRuyters' Opening Brief at 9, an industry representative, Bruce Briggs, testified that one response to extending overtime protection to farmworkers would be to "hire more people to get the job done and not pay the time and a half." Bruce Briggs, Testimony to House Commerce and Labor Committee, Jan. 19, 1987, minutes 17:00-19:15, <https://www.digitalarchives.wa.gov/Record/View/BEB3CAB007048D137BE190420CDCAA5>.

Industry Groups’ Opening Brief at 21. The MWA is remedial legislation which is interpreted liberally to benefit those it was intended to protect—workers. *See Anfinson*, 174 Wn.2d at 870; *Carranza v. Dovex Fruit Co.*, 190 Wn.2d 612, 625, 416 P.3d 1205 (2018).

Two additional rationales proffered by the Industry Groups are similarly contrary to the stated goal to protect worker health and safety and far too attenuated to meet the reasonable ground test. First, protecting the agricultural industry from alleged costs does not further the worker health and safety purpose of the MWA. There are no facts indicating that the legislature considered the need for any such cost savings for agriculture.¹¹ Moreover, cost savings could be used to justify nearly every exemption, so the alleged ground does not rationally distinguish

¹¹ In addition, the factual allegations related to impacts on competition with neighboring states are not supported. California, the largest agricultural economy in the nation, has already begun the phase-in of overtime protection for its farmworkers. Sharon Bernstein, *California First U.S. State to Promise Overtime to Farmworkers*, Reuters (Sept. 12, 2016), <https://www.reuters.com/article/us-california-workers-farming-idUSKCN11I2ED>. Even premier agricultural economists conclude it is difficult to predict the economic impact of overtime on the agricultural industry. *See* Julia Mitric, *Changes in Overtime Rules Coming for California Farmworkers*, Capital Public Radio (Dec. 21, 2018), <http://www.capradio.org/articles/2018/12/21/changes-in-overtime-rules-coming-for-california-farmworkers/>. Legislation is also pending before Congress to extinguish the agricultural exemption nationwide. S.385, Fairness for Farm Workers Act, 116th Cong. (2019-2020); *see* Dave Jamieson, *Democrats Propose Overtime Pay for Farmworkers to Rectify Racial Injustice*, Huffington Post (Jun. 25, 2018), https://www.huffpost.com/entry/democrats-propose-overtime-pay-for-farm-workers-to-rectify-racial-injustice_n_5b2fd809e4b0321a01d26609.

agriculture from any other covered industry. *See Rodriguez v. Brand W. Dairy*, 378 P.3d 13, 28 (N.M. 2016) (applying rational basis review to the agricultural exemption from workers' compensation benefits and rejecting alleged costs to the industry as rational justification, even where the purpose of statute allowed for the consideration of costs and provided for the balancing of employer and worker interests, which is distinct from MWA's liberal construction in favor of workers).

Similarly, there is no indication the legislature considered the seasonality of agriculture as a basis for the exemption. As with alleged increase in costs, this justification cannot be reconciled with the health and safety purpose of the MWA. The New Mexico Supreme Court in *Rodriguez* rejected seasonality as arbitrary and irrational for two main reasons. First, as in this case, because the exemption included workers who were employed year-round in the dairy industry, the exemption was grossly over-inclusive. *Rodriguez*, 378 P.3d at 30. The Industry Groups ignore the fact that the dairy industry for which they are advocating is not seasonal, but year-round. *See* CP 845 & 849 (DeRuyter audit identifying only 2 seasonal workers, truck drivers, and confirming three milking shifts which keep the facility running 24 hours a day throughout the year). The generalized assertion by the Farm Bureau that weather impacts milking schedules does not refute the fact that large dairies are year-round

operations. *See* CP 890 ¶ 3.¹² As in *Rodriguez*, there is no basis to distinguish the full-time, year-round workers from workers in other industries afforded protection of the statute.

Second, many other industries, like construction, seasonal service-related industries and roofing, were similarly subject to seasonality, yet none of these industries were exempted from workers' compensation coverage. *Id.* at 29-30. The exemption was therefore grossly under-inclusive. *Id.* Similarly, here, the MWA is grossly under-inclusive in addressing any purported issues relating to seasonality in the construction or service industries—for example seasonal retail sales and outdoor recreational related services, which are not exempt from overtime protection.

While Respondents may seek to hypothesize whether farmworkers would be entitled to overtime protection had the legislature never acted, that is not the issue before this Court. The legislature did act, and when it chose to provide protection for some workers in dangerous jobs, it was required to do so equally for all. *See Andersen*, 158 Wn.2d at 123-24.

¹² The court in *Rodriguez* also rejected industry alleged justifications related to federal regulations of agricultural prices including minimum prices for milk because those regulations are in fact designed to provide “special assistance to farmers by stabilizing markets for agricultural commodities.” 378 P.3d at 30. *See Industry Groups’ Opening Brief* at 22-23 (alleging similar justifications related to milk pricing).

There is no reasonable ground consistent with MWA’s stated purpose to protect worker health and safety, including alleged costs to and seasonality of portions of the industry, to justify the agricultural exemption.

B. The racist history of the agricultural exemption is fully cognizable by this Court, is supported by the weight of historical scholarship, and is of central importance to equal protection analysis.

Contrary to Respondents’ assertion, there is no need for “record evidence” on the issue of the legislative history and historical racist underpinnings of the overtime exclusion. *See* DeRuyters’ Opening Brief at 7-8.¹³ The court can and should consider this history as a matter of “legislative” rather than “adjudicative” fact—that is, a body of fact that addresses broad questions of law or policy rather than facts specific to the case and the parties. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980) (noting that legislative facts of which courts may take judicial notice include scholarly works, scientific studies, and social facts); *Tobin v. Dep’t of Labor & Indus.*, 145 Wn. App. 607, 616 n.7, 187 P.3d 780 (2008) (stating courts “may take judicial notice of the legislative history of a statute”);¹⁴ *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091,

¹³ The Industry Groups acknowledge that, at least for the purposes of rational basis review, no “courtroom fact-finding” is necessary. Industry Groups’ Opening Brief at 32.

¹⁴ The DeRuyters appear to continue to insist that legislative history materials obtained from the state archives and submitted by counsel should not

192 L. Ed. 2d 83 (2015) (“The briefs of the parties and amici, which have been of considerable assistance to the Court, give a more complete account of the relevant history, as do the works of scholars in this field.”). In *State v. Gregory*, this Court recently recognized courts may cognize legislative facts where the underlying studies are “not necessarily indisputably true, but . . . more likely [true] than not true.” 192 Wn.2d 1, 22, 427 P.3d 621 (2018) (internal quotation marks omitted) (quoting *State v. Santiago*, 318 Conn. 1, 127-29, 122 A.3d 1 (2015)). In *Santiago*, the case relied on in *Gregory*, the court noted that the process of taking judicial notice of social science in constitutional cases, while imperfect, is widely accepted and necessary to avoid considerable inefficiency at the trial court level. 381 Conn. at 128-29.

The great weight of historical scholarship and the congressional legislative history demonstrate that the exemption from the Fair Labor Standards Act’s “maximum hours” provision was not based on legitimate grounds (i.e., worker health and safety) but instead has racist origins. It is widely accepted that Southern Democrats dominated leadership positions

be considered. DeRuyters’ Opening Brief at 5 n.3. Yet courts regularly take judicial notice of documents, memoranda, and letters relating to the passage of a law even when the records are *not in the official legislative file* because such documents have “value in the search for ‘legislative intent.’” *Seattle Times Co. v. Benton Cnty.*, 99 Wn.2d 251, 255 n.1, 661 P.2d 964 (1983).

in Congress during the New-Deal era giving them the power to block any measure that threatened the stratified racial structure of the South.¹⁵ This specifically meant blocking wage-and-hour law protections to black workers in the South in order to structurally embed wage differentials between blacks and whites.¹⁶

It was clear by 1937, when the FLSA legislation was introduced, that the legislative strategy for obtaining the support of Southern Democrats on New Deal social legislation was to exclude large numbers of Southern blacks in a facially race-neutral way.¹⁷ The exclusion of agricultural and domestic workers served as an openly-recognized and effective proxy for racial exclusions in both the National Industrial

¹⁵ Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origin of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio State L.J. 95, 102-03 (2011); Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue: The Depression Decade* 34-35 (30th Anniversary ed. 2009); Robert C. Lieberman, *Shifting the Color Line: Race and the American Welfare State* 36 (1998); Ira Katznelson, Kim Geiger & Daniel Kryder, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 Pol. Sci. Q. 283, 291-93, 297 (1993) (CP 1011-13).

¹⁶ Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* 154 (1992) (CP 961); David Potter, *The South and the Concurrent Majority* 70 (1972); see Lieberman, *supra*, at 28.

¹⁷ Linder, *supra*, at 132-152 (CP 939-59); see Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 4, 31 & 155-56 (1st ed. 2017).

Recovery Act (the precursor to the FLSA)¹⁸ and the Social Security Act, which excluded *three-fifths* of black southern workers using a mechanism that was not explicitly racial.¹⁹ By the time the FLSA was introduced in Congress, its proponents knew enough to exclude agricultural workers from the start.²⁰

¹⁸ Linder, *supra*, at 133 (CP 940).

¹⁹ Perea, *supra*, at 109-13 (three-fifths of black southern workers were excluded by the agricultural and domestic labor exemptions); *Economic Security Act: Hearings before the S. Comm. on Finance*, 74th Cong., 1st Sess. 640-44 (1935) (CP 987-91); *Unemployment, Old Age, and Social Insurance: Hearings before the H. Comm. On Labor*, 74th Cong, 1st Sess. 147 (1935) (CP 995-96). The hearings on the Social Security Act included a cynical colloquy between a Northern and a Southern congressman that laid bare the southern desire to exclude blacks in a “not unconstitutional” way. *Economic Security Act: Hearings before the H. Comm. on Ways & Means*, 74th Cong., 1st Sess. 976-77 (1935) (CP 1000-01).

²⁰ Linder, *supra*, at 153 (CP 960); *see* Perea, *supra*, at 114 & n.106 (Chairman of the National Committee on Rural and Social Planning stating in FLSA hearing: “No purpose will be served by beating around the bush. You, Mr. Chairman, and all your associates on this Committee know as well as I do that agricultural laborers have been explicitly excluded from participation in any of the benefits of New Deal legislation, from the late (but not greatly lamented) N.R.A. [NIRA], down through the A.A.A., the Wagner-Connery Labor Relations Act [NLRA] and the Social Security Act, for the simple and effective reason that it has been deemed politically certain that their inclusion would have spelled death of the legislation in Congress. And now, in this proposed Black-Connery wages and hours bill, agricultural laborers are again explicitly excluded.”). Southern lawmakers expressed clearly that they believed blacks should remain excluded for the sake of the southern “social structure.” 82 Cong. Rec. 1404 (1937) (Workers’ Opening Brief App. Ex. D at 179) (Rep. Wilcox of Florida); 82 Cong. Rec. App. 442 (1937) (Workers’ Opening Brief App. Ex. E at 185) (Rep. Cox of Georgia).

The fact that the FLSA as first introduced conformed to the New-Deal pattern of excluding agricultural and domestic labor helps explain the DeRuyters' misreading of the legislative history excerpts provided by the Workers. *See* DeRuyters' Opening Brief at 11-12 n.23. Neither Representative Wilcox of Florida²¹ nor Representative Cox of Georgia spoke about the need to exempt agricultural workers because the bill already exempted them. And far from being genuinely concerned about the plight of farmworkers, both cynically cited the agricultural exemption as evidence that the proponents of the law knew that its protections were "bad" or "unimportant" and thus wanted to limit its application. Workers' Opening Brief, App. Ex. D at 178, column 1; App. Ex. E at 184, column 2. In fact, in short order, Rep. Wilcox expressed his true fear: that the exemptions in the bill would actually be eliminated after the FLSA and the incumbent federal bureaucracy were in place. *Id.* Ex. D at 178, column 2.

Southern lawmakers had good reason for their fear that the Southern socioeconomic system would be greatly disturbed by coverage of agricultural workers. Farms (plantations) that were too large for a family operation—and thus had employees subject to employment

²¹ DeRuyters' brief erroneously identifies Rep. Wilcox's remarks as those of Representative Eaton of New Jersey, who ends his remarks on page 177 of Ex. D to the Workers' Opening Brief.

protections—were overwhelmingly concentrated in the South.²²

Farmworkers in the South were paid far less than they were in the North at the time.²³ Because racism was a central and inextricable component of the Southern socioeconomic system, rather than fearing in some neutral way that they would lose money, southerners had identified a threat to the racial/social order and the inexpensive and quasi-captive labor force left to them by the vestiges of slavery.²⁴

The Declaration of Claire Strom proffered by the DeRuyters is contrary to the primary historical sources—which she conspicuously fails to cite—and against the weight of the specific scholarship on these issues. Rather than engage with the robust collection of works cited by the Workers, Strom instead insists that agriculture is “special.” *See* DeRuyters’ Opening Brief at 8-9 (citing, *e.g.*, CP 803 ¶ 13). This doesn’t explain why both agricultural workers *and* domestic workers were excluded from the protections in every major New-Deal program, *see supra* notes 23-25, nor does it negate the fact that no matter who else may have opposed the FLSA, the Southern Democrats’ votes were needed for

²² Linder, *supra*, at 169 (CP 976).

²³ *Id.* at 171-75 (CP 978-82).

²⁴ Linder, *supra*, at 131-32, 145, 147-49, 151, 174 (CP 938-39, 952, 954-56, 958, 981); Perea, *supra*, at 115-16.

its passage, *see supra* note 21. The historical scholarship confirms that the FLSA statutory structure emulated by the Washington Legislature was aimed at continued racial subjugation through maintenance of the existing racist socioeconomic system.

This Court's analysis should take into account the FLSA history when examining the overtime exclusion under the equal protection doctrine.²⁵ It is undisputed that the FLSA overtime exclusion of agricultural workers formed the basis for the Washington Legislature's exclusion of the same workers from the MWA.²⁶ *See Workers' Opening*

²⁵ An examination of the racist origins of the agricultural exemption is not necessary to the Workers' "privileges" analysis, however, the history and context are important. *See Workers' Opening Brief* at 26-31.

²⁶ While the Workers' argument does not depend on the racial makeup of the Washington agricultural workforce when the MWA was adopted in 1959, it bears noting that the DeRuyters' contention that 97 percent of the agricultural workforce in 1960 was white obscures the true story about demographic shifts in rural Washington at the time. *See DeRuyters' Opening Brief* at 10. First, the 1960 census data classified "Hispanic" people as white. G. Cristina Mora, *Making Hispanics: How Activists, Bureaucrats, and Media Constructed a New American* 83, 85 (2014). The first attempt to identify the total "Hispanic" population was not until 1970. U.S. Census Bureau, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States* (2002), <https://web.archive.org/web/20141224151538/http://www.census.gov/population/www/documentation/twps0056/twps0056.html>. Even then, the results were controversial because the census form had not been translated to Spanish and census methods overlooked those without formal addresses, such as migrant camp residents. Mora, *supra* at 88. Also, workers of color in Washington were consistently undercounted because tallies were done in the spring and not the peak summer season, thereby missing large numbers of migrant farmworkers. James Gregory, *Toward a*

Br. at 27; Industry Groups’ Opening Brief at 8. The Workers do not claim that the legislative record shows the Washington Legislature itself was conscious of the racist underpinnings of the exclusion, but rather that the legislature adopted the provision without examination, with indifference to or ignorance of that racist history. *See Andersen v. King Cnty.*, 158 Wn.2d 1, 128, 138 P.3d 963 (2006) (Fairhurst, J., concurring in dissent) (historical ignorance and discrimination should not be basis for continued discrimination). Allowing explicitly racist decisions of the past to embed themselves in the structure of our laws without examination ignores the fact that most racism operating today is institutional and “unintentional.” *See State v. Jefferson*, 192 Wn.2d 226, 243, 429 P.3d 467 (2018) (examining procedure for peremptory jury challenges) (quoting *State v. Saintcalle*, 178 Wn.2d 34, 35-36, 309 P.3d 326 (2013)).

History of Farm Workers in Washington State, https://depts.washington.edu/civilr/farmwk_ch1.htm (last visited June 11, 2019) (CP 905). Finally, the Latinx population in Washington dramatically increased in the 1940s, particularly in rural communities. *See* Erasmo Gamboa, *Mexican Migration into Washington State: A History, 1940-1950*, 72 *Pacific Northwest Quarterly* 121, 128-29 & Table 4 (July 1981) (documenting unprecedented numbers of Latinx workers were recruited to Washington as Braceros and from southwestern states and observing those trends in the Yakima Valley from church records; by 1950 over fifty percent of the baptisms in Toppenish and Wapato were to families with Spanish surnames). This midcentury influx of Latinx people is, accordingly, difficult for historians to quantify. *Id.* (noting in addition that “census takers were little concerned with the growing Mexican-American communities”). Even the DeRuyters’ declarant notes that a significant undercount, perhaps obscuring Latinx people as 36% of the agricultural labor force, was possible. CP 820 ¶ 47.

The history of the farmworker exclusion is a key consideration under any level of equal protection scrutiny, as it shows “racial purpose” under strict scrutiny, *see Hunt v. Cromartie*, 526 U.S. 541, 546, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999), obviates any “substantial state interest” under intermediate scrutiny, *see State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987), and exposes the provision as “not rational as a matter of law” under rational basis review, *see Miguel v. Guess*, 112 Wn. App. 536, 553, 51 P.3d 89 (2002); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446-50, 105 S. Ct. 3249, 3271, 87 L. Ed. 2d 313 (1985).

C. The exclusion of farmworkers from overtime protection violates the equal protection guarantee of article I, section 12 of the Washington Constitution under any level of scrutiny.

1. The farmworker exclusion fails strict scrutiny.

The Workers have demonstrated above that racial animus was a “motivating factor” in the decision to exclude farmworkers from the federal overtime protections that were imported into Washington law, as required by *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265, 97 S. Ct. 555, 563, 50 L. Ed. 2d 450 (1977). As to the nexus between the racial animus and the Washington Legislature, this Court can and should determine the influence of race as a factor through an objective inquiry that includes awareness “of the history of explicit race discrimination in America” and

how that impacts “decision making in nonexplicit, or implicit, unstated ways.” *See State v. Jefferson*, 192 Wn.2d 226, 249-50, 429 P.3d 467 (2018) (examining procedure for peremptory jury challenges). Here, the explicit racist history of the FLSA exemption, the Washington Legislature’s failure to examine that motivation, and the current racial makeup of the excluded agricultural workforce at nearly 100% people of color are grounds to declare the exclusion unconstitutional. *See Arlington Heights*, 429 U.S. at 265-66.²⁷ The farmworker exclusion fails strict scrutiny because race was a motivating factor in its adoption.

2. *The farmworker exclusion fails intermediate scrutiny.*

Even if strict scrutiny were not implicated, intermediate scrutiny would be, because the farmworker overtime exclusion burdens both an important right and a semi-suspect class. *See Schroeder*, 179 Wn.2d at 578. While no case has previously examined the article II, section 35 right to workplace protections for workers in dangerous industries for purposes of intermediate scrutiny, that right is manifestly “important,” as it is explicitly enumerated in our state constitution. Further, this Court has

²⁷ The DeRuyters’ reliance on *Harris v. Department of Labor & Industries*, 120 Wn.2d 461, 477, 843 P.2d 1056 (1993), is misplaced. *See* DeRuyters’ Opening Brief at 37. In *Harris*, the court merely noted that the fundamental right to travel, implicated in *Macias*, was not implicated there. *Id.* at 477. Moreover, *Harris* did not expressly consider or reject the right to worker health and safety as fundamental. *See id.*

explicitly recognized the connection between overtime protections and worker health. *Anfinson*, 174 Wn.2d at 870; *supra* Section II.A.1.a. The rights implicated in this case are important rights.²⁸

The Workers have also established that farmworkers constitute a “semi-suspect class not accountable for its status,” *see Schroeder*, 179 Wn.2d at 578, based not on a single status but rather on the intersection of characteristics. In *Schroeder*, this Court’s most recent articulation of how a semi-suspect class may be established, the Court found that minor victims of medical malpractice could be a semi-suspect class based on a combination of factors, including minority, status as foster children, being the children of minors themselves, or even having parents who were “unconcerned.” *Id.* at 489. Contrary to the DeRuyters’ suggestion, the Workers do not allege that farmworkers are a semi-suspect class because of their employment status. *See* DeRuyters’ Opening Brief at 40. Instead, the Workers show that as a group, farmworkers have a combination of characteristics that are of concern in equal protection cases: race, poverty,

²⁸ The DeRuyters again rely on a case, *Campos v. Department of Labor and Industries*, 75 Wn. App. 379, 386-87, 880 P.2d 543 (1994), that did not examine the same rights set forth by the Workers in this case, but instead considered and rejected the proffered “right to seek an adjustment in workers’ compensation when a condition has worsened.” *See* DeRuyters’ Opening Brief at 39.

educational and linguistic barriers, and demonstrable lack of political power.²⁹ See Workers' Opening Brief at 36-37.

In re: Personal Restraint of Runyan, 121 Wn.2d 432, 853 P.2d 424 (1993), cited by both DeRuyters and Industry Groups, does not stand for the proposition that a semi-suspect class composed of several suspect characteristics cannot include the characteristic of poverty—and no case has ever made such a ruling. Instead, in *Runyan*, indigence was the only characteristic proffered to allege a semi-suspect class existed, and the Court noted that the statute at issue did not classify persons according to financial resources. 121 Wn.2d at 448-49.

Because farmworkers are a semi-suspect class, and the overtime exclusion facially discriminates against them, no further showing of animus against farmworkers is necessary. It is plain that the provision at issue in this case, RCW 49.46.130(2)(g), acts to exclude farmworkers. Once the semi-suspect class is established, the underlying reason for facial discrimination is not considered when determining the level of scrutiny.

²⁹ The Industry Groups take issue with the fact that *Macias v. Department of Labor & Industries*, 100 Wn.2d 263, 668 P.2d 1278 (1983), does not decide whether farmworkers are a semi-suspect class for purposes of intermediate scrutiny. Industry Groups' Opening Brief at 30. The Court specifically declined to engage in intermediate scrutiny analysis because it had an independent basis for strict scrutiny. *Macias*, 100 Wn.2d at 271. Furthermore, *Macias* was decided in 1983, when the contours of intermediate scrutiny were much less developed than they are today.

See Latta v. Otter, 771 F.3d 456, 468 (9th Cir. 2014) (law discriminating on face based on sexual orientation examined under intermediate scrutiny without showing of intent); *Serv. Women’s Action Network v. Mattis*, 352 F. Supp. 3d 977, 988 (N.D. Cal. 2018) (facially discriminatory policy based on gender did not require showing of intent by policymaker).

Indeed, once facial discrimination against the semi-suspect class is established, the burden shifts to the proponent of the provision to show the connection between the distinction made and an important governmental objective. *See Craig v. Boren*, 429 U.S. 190, 197-204, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (inferring “invidious discrimination” behind a statute that facially discriminated against men after finding the government had failed to convincingly demonstrate connection between gender and governmental objective, entitling the plaintiff to a remedy for the discrimination).

Because the Workers have established that both an important right and a semi-suspect class are implicated in this case, and Respondents have not proffered any substantial state interest sufficient to justify farmworkers’ exclusion from overtime, the exclusion fails intermediate scrutiny.

3. *There is no rational basis for the exclusion of farmworkers from overtime protection.*

As compared with other workers protected by the overtime system, the exclusion of agricultural workers from overtime protection is arbitrary and irrational. Bearing in mind that in order to survive rational basis review, the legislative distinction must be rationally related to the purpose of the statute, *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998), it makes no sense that one of the most dangerous industries in the state is excluded from health and safety protections intended to limit hours of work, *see supra* Section II.A.1.a; Workers' Opening Brief at 16-21.³⁰ Whether the Court compares farmworkers with workers in other dangerous industries or with the workforce as a whole, it is clear that farmworkers—who work in one of the most dangerous industries in the state—are treated differently without a rational health and safety justification.

³⁰ *Peterson v. Hagan*, far from establishing that the overtime exclusion is constitutional as argued by Industry Groups, *see* Industry Groups' Opening Brief at 8-9, is a powerful example of this Court invalidating part of the MWA on rational basis grounds. There, when small employers brought a claim that larger employers were unfairly advantaged by an exemption in the MWA for those covered by FLSA, the Court readily agreed, making essentially no attempt to find a justification for the statutory distinction before declaring it invalid. *Peterson*, 56 Wn.2d at 58-61.

While other groups of workers are excluded from overtime protection, *see* Industry Groups’ Opening Brief at 2-4; 28, those exclusions do not render the agricultural exclusion constitutional. First, there is no evidence of racial animus at the root of the listed exclusions. Second, many of the exclusions, including the large “executive, administrative, professional” exclusion, do not involve dangerous occupations. Third, even where exempted jobs are arguably dangerous, those jobs are protected by other similar legal frameworks, for example: fire protection, 29 C.F.R. § 553.230, seamen, 46 U.S.C. § 8104(e); *see* 29 C.F.R. § 783.29 (detailing the history of FLSA exemption; seamen “already under special governmental regulation”), and truck and bus drivers, RCW 49.46.130 (exempting workers covered by the Federal Motor Carrier Act who have overtime pay “reasonably equivalent” to MWA requirements). And finally, some of these exclusions may be unconstitutional themselves, but simply remain untested in court.

The other “conceivable justifications” for the exclusion postulated by Respondents—seasonality and cost—are similarly irrational. *See* DeRuyters’ Opening Brief at 9-10; Industry Groups’ Opening Brief at 33. As noted in Section A.2 above, the New Mexico Supreme Court in *Rodriguez v. Brand West Dairy* found both of these justifications unavailing in the context of the farmworker exclusion from workers’

compensation. 378 P.3d at 28-30. As to seasonality, the court noted that, remarkably like this case, the exemption was both overinclusive, as it captured year-round dairy workers, and underinclusive, as it failed to exempt other seasonal workers, such as construction workers and those in service industries. *Id.* at 29-30. The court also noted that cost could be used to justify any legislative distinction and rejected that justification absent a showing that the distinction was not otherwise arbitrary. *Id.* at 28.

It is unsurprising that rational bases for the overtime exclusion are hard to come by, considering that the true motivation for exclusion of farmworkers was racism. *See supra* Section II.B.1. This is a fact that the Court cannot and should not ignore. As an initial matter, classifications “based on prejudice or bias” are “not rational as a matter of law.” *Miguel v. Guess*, 112 Wn. App. at 553. This rule overcomes other “conceivable rational bases” for the law that may be hypothesized by Respondents. *See id.* at 554.

More importantly, for equal protection review to mean anything at all, rational basis analysis must examine the underlying reasons for legislative distinctions. As noted by Justice Marshall in *City of Cleburne*, the equal protection clause prohibits racial discrimination in almost all circumstances, and “where history teaches us that [this discrimination has] systemically been ignored, a ‘more searching judicial inquiry’ is

required.” 473 U.S. at 432, 471 (Marshall, J., concurring in part and dissenting in part) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938)).³¹ This Court recently noted in *State v. Jefferson* that its analytical tools must confront the reality that most racism is “unintentional, institutional, or unconscious.” 192 Wn.2d at 243 (concerning procedure for peremptory strikes of jurors) (quoting *State v. Saintcalle*, 178 Wn.2d 34, 35-36, 309 P.3d 326 (2013)). This analysis is necessary because people, including legislators, “are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it.” *Jefferson*, 192 Wn.2d at 251 (quoting *Saintcalle*, 178 Wn.2d at 49). The fact that the discriminatory exclusion of black agricultural workers now manifests against a farmworker population in Washington composed of nearly 100% Latinx workers provides further support that the exclusion is not rational. *See Workers’ Opening Brief at Section II.A.3.*

Failure to subject a facial classification to the proper historical inquiry renders rational basis a meaningless review by allowing originally

³¹ Racist policies are insidious and persistent precisely because over time, they become structural rather than “intentionally racist,” and are therefore difficult to reach under traditional legal analyses. *See William M. Wiecek, Structural Racism and the Law in America Today: An Introduction*, 100 Ky. L.J. 1, 4-6 (2012).

intentional racism to endure, imbedded in the structure of our laws. For example, the U.S. Supreme Court’s decision in *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923), used racist federal policy against Asians as the basis to uphold Washington State’s Alien Land Law—a facially neutral classification that barred aliens ineligible for citizenship from owning or holding long-term leases of farmland. The court, in absolving Washington State of its responsibility for discriminating against Asian immigrants, said the citizenship-ineligible classification established by Congress “in and of itself, furnishe[d] a reasonable basis for classification in a state law.” *Id.* at 220.

Discrimination by Washington State was found to be permissible because it “piggy-backed” on federal discrimination. This Court should not make the same mistake as the *Terrace* Court, and instead must remedy the structural discrimination within the MWA’s exclusion of farmworkers by acknowledging and renouncing the racist underpinnings of the FLSA’s agricultural exemption.

In light of the robust scholarship showing that the Washington overtime exclusion for farmworkers represents structural racism, rooted in the overt racist choices of the past, this Court should conclude that the exclusion fails rational basis review.

D. Whether a declaration of unconstitutionality will be applied retroactively is not before the Court.

The DeRuyters' request for prospective application of a determination that the agricultural exemption is unconstitutional is not properly before this Court.³² The trial court did not rule on the issue. CP 1203-14. The Respondents' joint notice of appeal and motion for discretionary review to the Court of Appeals do not request prospective application. *See* CP 1215-16; Motion for Discretionary Review (filed with Court of Appeals, Division III).

The scope of review of the appellate court is limited to the parts of the decision designated in the notice of appeal, the notice of discretionary review, and other decisions in the case. RAP 2.4(a). The DeRuyters' request for prospective application does not fall under any of these categories. Similarly, the DeRuyters do not identify any exception provided by RAP 2.5. *See* RAP 2.5(a) (errors which may be raised for the first time on appeal include lack of jurisdiction, failure to establish facts upon which relief can be granted, manifest error affecting a constitutional right); *see* DeRuyters' Opening Brief at 44-49.

Accordingly, the issue of whether the decision in this matter will be applied prospectively or retroactively is not properly before the Court

³² The Industry Groups do not include this issue in their assignments of error. Industry Groups Opening Brief at 3-4.

and the case should be remanded to the trial court for further proceedings. *See Peterson*, 56 Wn.2d at 50 & 66 (affirming judgment of declaration of unconstitutionality related to two sections of the MWA without determination of retroactive or prospective application where those issues were not assigned as errors).

III. CONCLUSION

The Workers respectfully ask this Court to declare the agricultural exemption, RCW 49.46.130(2)(g), unconstitutional, award the Workers reasonable attorney fees³³ and remand for entry of judgment in favor of the Workers.

DATED this 14th day of June, 2019.

COLUMBIA LEGAL SERVICES

FRANK FREED SUBIT &
THOMAS LLP

By: s/ Lori Jordan Isley
Lori Jordan Isley, WSBA # 21724
Joachim Morrison, WSBA # 23094
Andrea Schmitt, WSBA # 39759

By: s/ Marc Cote
Marc Cote, WSBA # 39824
Anne Silver, WSBA # 51695

Attorneys for Petitioners

³³ The DeRuyters and Industry Groups did not oppose the Workers' request for attorneys' fees pursuant to RAP 18.1(b). *See Workers' Opening Brief* at 42-43.

CERTIFICATE OF SERVICE

I certify under penalty of perjury and in accordance with the laws of the State of Washington that on June 14, 2019, I electronically filed the foregoing PETITIONERS' REPLY BRIEF with the Clerk of the Court using the Washington State Appellate Courts' Portal, which will send notification of such filing to the following:

John Ray Nelson
FOSTER PEPPER PLLC
618 W. Riverside Ave., Ste 300
Spokane, WA 99201
john.nelson@foster.com
Counsel for Respondents

Timothy J. O'Connell
Anne Dorshimer
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
tim.oconnell@stoel.com
anne.dorshimer@stoel.com
Counsel for Intervenor-Respondents

DATED this 14th day of June, 2019 at Yakima, Washington.


Elvia F. Bueno

COLUMBIA LEGAL SERVICES

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Filing on Behalf of: Lori Jordan Isley - Email: lori.isley@columbialegal.org (Alternate Email: cheli.bueno@columbialegal.org)

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