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Supreme Court No. 96267-7

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**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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JOSE MARTINEZ-CUEVAS, et al.,

Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC., et al.,

Respondents,

and

WASHINGTON STATE DAIRY FEDERATION  
and WASHINGTON FARM BUREAU,

Intervenor-Respondents.

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**RESPONDENTS AND INTERVENOR-RESPONDENTS'  
JOINT ANSWER TO AMICUS BRIEFS OF THE  
FARMWORKERS JUSTICE PROJECT & PROFESSOR MARC  
LINDER AND NATIONAL EMPLOYMENT LAW PROJECT,  
FAMILIAS UNIDAS POR LA JUSTICIA, UNITED FARM  
WORKERS OF AMERICA**

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## I. INTRODUCTION

The Amicus Briefs of The Farmworkers Justice Project and Professor Marc Linder (“FJP” or “FJP Brief”) and the National Employment Law Project, Familias Unidas Por La Justicia, United Farm Workers of America (“NELP” or “NELP” Brief”) fail to assist the Court because they improperly introduce extensive evidence that directly conflicts with evidence properly placed in the record, mere weeks before oral argument. Because such “evidence” fails to meet the standards required for Court consideration, the Court should decline to consider these amici briefs.

Moreover, on the merits, neither amicus brief provides any basis to uphold the trial court’s erroneous conclusions.

## II. ARGUMENT

### A. **NELP and FJP Solely Seek to Introduce Evidence from Outside the Record, Making Their Amicus Briefs Improper.**

The FJP’s brief is essentially an expert report from Professor Marc Linder, whom FJP refers to (without citation) as “the nation’s foremost expert on the legislative history of the Fair Labor Standards Act.” FJP Br. 1. The FJP brief seeks to inappropriately introduce extensive “facts” into the record purporting to “shed light on the historical underpinnings of the Fair Labor Standards Act” (“FLSA”). FJP Br. 1. Similarly, the NELP brief is in

actuality an expert report seeking to improperly introduce extensive evidence into the record, professing to demonstrate that agricultural labor is “extremely dangerous.” NELP Br. 5-11, 13.

The Court may take judicial notice of facts outside the record only if they are considered “adjudicative facts” under ER 201 or if they are considered “legislative facts.” *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980). “Adjudicative facts” are facts not subject to reasonable dispute and either “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 201(b). “Legislative facts” consist of “established truths, facts or pronouncements that do not change from case to case but [are applied] universally.” *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005) (alteration in original; internal quotation marks and citation omitted). “Under this doctrine, a court can take notice of scholarly works, scientific studies, and social facts.” *Wyman*, 94 Wn.2d at 102.

FJP and NELP assert supposed “facts” that the Court cannot consider because they are neither adjudicative nor legislative facts. The facts are not adjudicative facts because they are very much in conflict with evidence properly placed *in the record* by Respondents

and Respondent-Intervenors. Indeed, the FJP *admits* that the facts it asserts are disputed; it attacks the expert declaration of Claire Strom, which refutes Petitioners' claims as to the allegedly racist intent behind the agricultural exclusion in the FLSA. FJP Br. 16.

Similarly, the NELP raises contentious claims<sup>1</sup> that contradict record evidence. Respondents and Respondent-Intervenors properly placed in the trial court record actual evidence that farming is not unduly hazardous, and that Petitioners had established no causation between the hazards they identified and the overtime exemption. *See* CP 916 n.4 (Respondent-Intervenors' criticism of Petitioners' failure to offer expert testimony on the issue of farming safety); CP 1117-18 (Respondent-Intervenors' citation to Washington State Department of Labor and Industries data showing no workplace fatalities in agriculture as of that date, and criticism of Petitioners' failure to address other facially dangerous occupations that are exempt from overtime); CP 757 (Respondents point out that Petitioners failed to submit any evidence as to causal connection between alleged hazards of farming and the overtime exemption).

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<sup>1</sup> *E.g.*, NELP supports its workplace safety claims by citing to its own previous advocacy writings, NELP Br. 7 n.10, or disputes the effectiveness of Washington safety programs by citing to California-specific data, NELP Br. 7-8 n.13, or rests critical components of their analysis on a single newspaper article reporting on dairy farms in Michigan. NELP Br. 14 nn.26, 28.

FJP's and NELP's briefs also do not contain legislative facts. The books and articles, studies, and social facts they cite to do not contain universal or established truths, facts, or pronouncements. Instead, they cite works and studies about the FLSA and agricultural labor that are not only hotly disputed by Respondents and Respondent-Intervenors, but also by other works and studies. *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) ("The 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.").

Because the FJP and NELP briefs contain no adjudicative or legislative facts properly noticeable by the Court, the Court should decline to consider them.

**B. The FJP Brief Is Irrelevant.**

Aside from its attempt to introduce disputed evidence into the proceeding at this late date, the FJP Brief suffers from an additional disqualifying weakness. With its misplaced focus on Congressional activity in the 1930s, the FJP brief does not even attempt to correlate those actions with the steps undertaken by the Washington Legislature in

enacting our Minimum Wage Act. Simply put, the FJP brief offers not one word of analysis suggesting that the Washington Legislature was motivated by any discriminatory purpose when it originally enacted the MWA in 1959, or when it responded in 1961 to this Court's action in *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960), invalidating portions of the MWA. The FWJ makes no attempt to suggest the people of Washington were infected with bias when they enacted I-588, extending minimum wage coverage (but not the overtime premium) to farm workers. Most critically, the FJP makes no effort to explain how the Legislature could be supposedly motivated by bias in excluding (largely Caucasian) farmworkers from overtime when it had, fully ten years earlier, enacted the first version of our Law Against Discrimination, Laws 1949, ch. 183, making clear its conviction that discrimination on the basis of race was unlawful.

Simply put, the FJP Brief is a morality play in search of a villain. With no connection to the statute that is actually before the Court, it should be entirely disregarded.

**C. On the Merits, the NELP Brief Is in Error.**

Aside from the untimely effort to add contested evidence to the record, the NELP Brief advances three arguments disputing the “reasonable ground”<sup>2</sup> for the farming overtime exemption. Each is wrong.

**1. The NELP Brief Unfairly Minimizes the Goals of the MWA, and Rests on an Unproven Assertion.**

The NELP Brief references the goal of the Washington’s Minimum Wage Act to protect the “immediate and future health, safety and welfare” of Washington residents. RCW 49.46.005(1). However, the NELP brief focuses on only two components of the legislature’s articulated goal: safety and health, to the exclusion of the other goal, the “general welfare” of citizens of the state. The legislature, in the same section, articulated other considerations at issue and worthy of the MWA’s protections. The “general welfare” of the state’s citizens is a broader concept than solely safety and health. It readily includes the goal to “encourage employment opportunities within the state.” The legislature is certainly entitled when enacting the specific requirements of the MWA to consider other aspects of the general welfare, including the economic

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<sup>2</sup> The NELP Brief appears to contradict the ACLU and Korematsu amicus briefs by accepting the Court’s existing analysis for cases arising under Article I, § 12. This confusion among the numerous parties assisting Petitioners is all the more reason to reject the new arguments being made by those parties.

dislocation suffered by Washington farms through imposition of an overtime obligation not applicable to competitor farms in sister states.

Moreover, the NELP Brief rests on the logical fallacy of an assertion that is wholly unsubstantiated by any of the new contested evidence it seeks to introduce into this record: that there is any kind of causal connection between the harms it claims, and the solution it demands be imposed. The NELP Brief assumes but does not cite a single authority in support of the proposition that imposing an overtime premium will decrease the dangers it claims exist in farming. Indeed, all evidence cited by NELP only indicates that an increase in the hours of work may generate an increase in the number of injuries occurring at work. Nothing in NELP's Brief demonstrates that the particular economic remedy they seek, imposing an overtime premium of an additional 50% of the regular wage for every hour past 40 in a work week, will, by itself, reduce injuries. All NELP's desired remedy will do is increase the amount of wages paid by Washington farms. Anything more than that is mere speculation.

**2. Treating Washington Farms as 'Just Another Business' Is Contrary to Legislative Findings, Logic, and This Court's Holdings.**

The NELP Brief attempts to characterize Washington's farms as some sort of faceless "agribusiness." NELP Br. 13-17. NELP is wrong to characterize farming as just another commercial activity.

**a. The Legislature Has Repeatedly Noted the Unique Nature of Washington’s Family Farms.**

As this court has noted, the legislature – unlike the appellate courts – is uniquely capable of holding hearings and finding on the facts as they may actually exist throughout the state. In doing so, the legislature sometimes makes formal findings. As it pertains to this issue, the legislature’s findings have been consistent: Washington’s farms are primarily family owned businesses. The legislature so declared in 1995:

The state’s highly productive and efficient agricultural sector is composed predominately of family-owned and managed farms and an industrious and efficient workforce.

Laws 1995, ch. 371, 1(1). In making that finding, the legislature also noted that “a reasonable level of safety regulation is needed to protect workers.” *Id.*, § 1(2).

The legislature’s express findings have been repeated:

The legislature finds that the state's highly productive and efficient agriculture sector is composed predominately of family owned and managed farms and an industrious and efficient workforce.

Laws 1996, ch. 260. This Court should reject the NELP’s invitation to set aside express legislative findings, based solely on the rhetoric of a single amicus.

**b. The NELP Analysis Is Fatally Flawed by Logical Error.**

NELP's analysis of "agribusiness" is based on a logical error: it focuses exclusively on *trends*. NELP Br. at 15-17. By noting the growth of dairies with more cows, or orchards with more trees or acreage, or farms operating as corporations, NELP attempts to misrepresent the actual population impacted by these trends. In that regard, the only evidence in the record – indeed, evidence not actually rebutted by NELP's focus on trends – is that more than 95% of Washington's farms are family farms, and 94% of Washington's farms are small operations, grossing less than a quarter million dollars a year in revenue. CP 896-906. Moreover, NELP's analysis does not prove what it sets out to establish. For example, NELP notes that over a seven-year period, the number of corporate-owned farms increased, and the number of family-owned farms decreased – but by different percentages. NELP Br. at 16. However, there is no reason to be surprised that one measure may increase by a different amount than the other decreases, because there is no conflict between the two measures. There simply is no reason why a family farm may not operate through a corporate legal entity. The supposed contrast proves nothing.

Indeed, NELP's references reinforce Intervenor's concerns. NELP points out that California "recently adopted" overtime pay for farm work.

NELP Br. at 17. In doing so, however, NELP misrepresents the facts, and proves only that this is an issue for the legislature to determine.

Preliminarily, NELP is wrong to suggest that California only recently enacted *any* overtime premium requirement for farm workers – before January 1, 2019, the requirement for overtime occurred only after working **60 hours** in a week, whereas other California employees were entitled to overtime after 40 hours in a week.<sup>3</sup> *Compare* Assembly Bill 1066, ch. 313 Cal. Statutes 2016 (hereinafter, “AB 1066”) *with* Cal. Labor Code § 510. Neither NELP, nor Petitioners, nor any other Amici, offer any explanation as to how this express distinction is acceptable under the equal protection analysis they promote. For all the reasons identified by Intervenor and Respondents, however, the distinction is apparent: entitlement to an overtime premium after *any* number of hours of work is entirely a legislative creation, subject to rationale basis review, and entirely justifiable under that standard.

Moreover, consideration of AB 1066 underscores the point that this is an issue for the legislature and not this Court. AB 1066, enacted in

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<sup>3</sup> California’s regulation of the hours of work varies from Washington’s in many ways, including a requirement for an overtime premium for more than a certain number of hours of work in a day. NELP does not appear to advocate for the importation of that standard and Respondents therefore not address it herein. NELP also cites to Oregon law with no discussion in its brief. NELP Br., n.40. NELP is wrong to do so; the cited section applies to *manufacturing*, not agriculture. Or. Rev. Stat. § 652.020.

2016, did not begin altering the number of hours in a work week that would trigger an overtime premium until **2019**. *Id.* Even for the largest farms (employing more than 25 employees) overtime after 40 hours of work in a week will not be required until 2022; for smaller farms, that level will not be reached until 2025. *Id.* The recognition that the dramatic change Petitioners demand will require years of planning proves that Petitioners and Amici should present their request for policy change to the legislature, not this Court.

**c. This Court has Noted That Farming is Different than Other Commercial Activities.**

Just last month, this Court noted that it was a “reasonable decision” for the Department of Labor & Industries to treat agricultural workers differently than workers in other industries. *Sampson v. Knight Transp., Inc.*, Docket No. 96264-2), slip op. at 15 (Sept. 5, 2019). The Court observed that the “agricultural and trucking industries are different.” *Id.* Indeed they are, and agriculture is different from virtually all non-agricultural industries. The respect shown to the Department in that case should be heightened in this case, in which the farm worker overtime exemption has been enacted by the legislature and ratified by the legislature and the People repeatedly.

### **3. The Farmworker Overtime Exemption Does Not Burden the Right to Sell One's Labor.**

NELP attempts to justify the trial court's ruling by contending that the farmworker overtime exemption unduly burdens a right to sell one's labor. NELP Br. at 17-19. It is noteworthy that the foundational authority for this proposition reflects cases in which governmental entities had actually barred persons from engaging in certain kinds of work. NELP Br. at 18 n.41 (citing *Ralph v City of Wenatchee*, 34 Wn.2d 638, 643, 209 P.2d 270 (1949) (barring itinerant photographers from operating within city), and *Ex parte Camp*, 38 Wash. 393, 396, 80 P. 547 (1905) (barring non-farmer peddlers from selling produce)). NELP acknowledges that mere infringement on the manner of conducting a business is not violative of any constitutional prohibition. NELP Br. at 18-19. On its face, if there is any right to sell one's labor, plainly the farm worker overtime exemption is merely some minor infringement<sup>4</sup> on that right. Simply put, farm workers are free sell their labor. The Legislature has merely determined that it shall not impose on that right a requirement that more than 40 hours of work be paid at some premium.

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<sup>4</sup> If anything, the right to sell one's labor invites countervailing claims. If a non-agricultural employer is willing to employ a worker covered by the MWA for more than 40 hours in a week at the regular rate of pay, and the worker is willing to sell his labor for that rate, he may not lawfully do so. The "right to sell one's labor," introduced into this case by the trial court without any presentation by Petitioners or Respondents or Intervenors, presents a true slippery slope.

NELP therefore hypothesizes that the alleged right to sell one's labor carries with it the right to do so in the manner that NELP and Petitioners contend will (indirectly) promote safety. To the contrary, the Constitution assigns to the legislature the authority to prescribe the methods in which work is to be performed safely in the state. Wash. Const., Art. II, § 35. The legislature, and/or its delegated agency, the Department of Labor and Industries, has done so repeatedly. If anything, history over just the last two decades illustrates that the state of Washington has been very attentive to the dangers faced by farm workers and has repeatedly appropriately responded.

In 1995, the legislature articulated specific standards for safety rules in agriculture. Laws 1995, ch. 371, § 2 (codified at RCW 49.17.041). The legislature further assisted in agricultural safety, issuing specific definitions related to agricultural safety rules in 1997. Laws 1997, ch. 362 (codified at RCW 49.17.020 and RCW 49.17.022).

Under this specifically delegated authority, the Department has been continually active responding to safety considerations in farming. In 1996, the Department adopted extensive regulations pertaining to field sanitation. WAC 296-307-095 through -09518. Also in 1996, the Department issued initial regulations regarding the application of

pesticides. WAC 296-307-107 through -13055. In 2000, the Department adapted specific safety regulations for temporary housing for workers, an issue that particularly impacts farmworkers. WAC 296-307-161 through -16190. In 2004, the Department enacted additional health and safety monitoring for pesticide application. WAC 296-307-148 through -14845. In 2009, the Department enacted requirements for outdoor heat exposure, again an issue of substantial concern to farm workers. WAC 296-307-097 through -09760.

The legislature and its delegated agency have been active and responsive to promote farm worker safety. This Court should not override the decision of the legislature and the People as to how best to do so.

### **III. CONCLUSION**

Amicus briefs that seek to introduce extensive and improper evidence into the record provide no help and are forbidden under the rules. The briefs of NELP and FJP fall into this forbidden category and fail to assist the Court. They are also fatally flawed by logical fallacy. For these reasons, the Court should decline to adopt any portion of these briefs.

DATED: October 7, 2019.

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