

FILED
SUPREME COURT
STATE OF WASHINGTON
10/7/2019 3:58 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 96267-7

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

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.

**RESPONDENTS AND INTERVENOR-RESPONDENTS' JOINT
ANSWER TO AMICUS BRIEF OF FRED T. KOREMATSU
CENTER FOR LAW AND EQUALITY**

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I. INTRODUCTION

The Amicus Brief of the Fred T. Korematsu Center for Law and Equality (“**Korematsu**,” “**Korematsu Amici**” or “**Korematsu Brief**”) propounds legal arguments that were never made by the litigants and improperly seeks to change the course of the case and the issues involved. However, it is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae. Moreover, the Korematsu Amici are directly at odds with the amicus brief of the American Civil Liberties Union (“**ACLU Brief**”). The Court should decline to consider the Korematsu Brief for these reasons alone.

Even if the Court were to consider the Korematsu Brief (which it should not), it should decline to adopt any of its reasoning. The Korematsu Amici ask the Court to apply a “reasonable grounds test” to Petitioners’ equal protection claim. The Korematsu Amici offer no explanation for why the Court should jettison decades of equal protection analysis and adopt this new test. Further, this so-called “reasonable grounds test” would scrap the need to find a right implicated by the farmworker overtime exemption and the need to find evidence of discriminatory intent in cases of disparate impact.

Moreover, the Court should not alter its Article I, section 12 analysis because the federal Fourteenth Amendment already provides the

framework that the Korematsu Brief seeks. The Korematsu Brief's approach is affected by federal "strict scrutiny" standards when dealing with a protected class. If a state law intentionally discriminates against a protected class, it is subject to strict scrutiny under the Fourteenth Amendment. Petitioners could have brought this action in federal court under the Fourteenth Amendment and would have obtained the analysis that Korematsu seeks here.

For all of these reasons, the Court should decline to adopt any reasoning or argument from the Korematsu Brief.

II. ARGUMENT

A. The Korematsu Brief Solely Raises Entirely New Arguments, Making It Improper.

The Court has "many times held that arguments raised only by amici curiae need not be considered." *State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988). The Court has not wavered from this principle,¹ which is especially applicable where, as here, amici curiae

¹ It is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae. See, e.g., *Gallo v. Dep't of Labor & Indus.*, 155 Wn.2d 470, 495 n.12, 120 P.3d 564 (2005) (citing *Harmon v. Dep't of Soc. & Health Servs., State of Wash.*, 134 Wn.2d 523, 544, 951 P.2d 770 (1998)); *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 303 n.4, 103 P.3d 753 (2004) ("This court, however, need not consider issues raised only by amicus, and we decline to do so in this case."); *Harmon*, 134 Wn.2d at 544 ("[I]t is appropriate to adhere to the well established rule that new issues may not be raised for the first time on appeal by amici curiae." (citing *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962); *State v. Clark*, 124 Wn.2d 90, 101, 875 P.2d 613 (1994), *overruled on other grounds by State v. Catlett*, 133 Wn.2d 355, 361, 945 P.2d 700

assert that the Court should engage in a constitutional analysis, without the issue having been briefed by the parties. *Id.*; *see also United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970) (“[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.”).

The Korematsu Amici’s entire argument is that, in lieu of applying the well-established rational basis review, the Court should apply reasonable grounds scrutiny to “government action that disproportionately affects a protected class.” Korematsu Br. 7. None of the parties raised this issue or briefed it at all.

Moreover, the Korematsu Brief is at odds with the ACLU Brief. The ACLU Brief seeks for this Court to hold that the Washington Constitution is more protective than the U.S. Constitution, warranting a form of heightened scrutiny. *See generally* ACLU Br. However, the Korematsu Amici seek for the Court to apply an approach affected by *federal* “strict scrutiny” standards when dealing with a protected class. *See* Korematsu Br. at 4.

The Court cannot simultaneously apply the analyses of the ACLU Brief and the Korematsu Brief; they seek for the Court to apply conflicting

(1997); *Gonzalez*, 110 Wn.2d at 752 n.2; *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); *Schuster v. Schuster*, 90 Wn.2d 626, 629, 585 P.2d 130 (1978)).

constitutional standards. This demonstrates not only the confused and blurred state of Amici’s arguments, but that it would be improper for the Court to consider these contradictory arguments where the parties have not raised and briefed these novel arguments and issues themselves.

B. Korematsu Amici Seek for the Court to Adopt a Completely New “Reasonable Basis Test” to the Equal Protection Claim.

The Korematsu Amici claim that the Court should “at a minimum” engage in what it calls “reasonable grounds scrutiny.” Korematsu Br. at 5. The Korematsu Amici’s test appears to be some sort of heightened scrutiny, as it requires a “disparate impact” on a protected class or vulnerable group. *Id.* at 6-7. For the Court to adopt such an intermediate “test,” it would need to upend decades of equal protection law. The Korematsu Amici were unable to point to a *single* other court that has adopted its proposed test—the Court should not accept their unsupported invitation to re-write established constitutional law.

Moreover, none of the Washington cases relied upon by the Korematsu Amici actually support their argument. Instead, these cases make plain that the Court must *first find a right* before it will even look for “reasonable grounds” or apply intermediate scrutiny.

The Court has established that its Article I, section 12 privileges and immunities analysis is *a two-step analysis*, of which a determination

of a “reasonable ground” for the challenged law must come *second*. *Schroeder v. Weighall*, 179 Wn.2d 566, 572-73, 316 P.3d 482 (2014). The first step is to determine whether the law in question involves a privilege or immunity.² *Id.* (citing *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004)). Similarly, under a heightened equal protection analysis, “[i]ntermediate scrutiny applies *only* if the statute implicates both an important right³ *and* a semisuspect class not accountable for its status.” *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010) (emphasis added) (quoting *Am. Legion Post #149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 609, 192 P.3d 306 (2008)).

In Justice Fairhurst’s dissent in *Andersen v. King Cty.*, 158 Wn.2d 1, 138 P.3d 963(2006), she determined that DOMA’s denial of same-sex

² The Court previously determined that, as became “quite clear early in this State’s history,” the fundamental rights of state citizenship are:

[T]he right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. *Cooley, Constitutional Limitations* (6th ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004) (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

³ An “important right” implicated by intermediate equal protection scrutiny implicates “[p]hysical liberty.” *Petition of Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993); *State v. Schaaf*, 109 Wn.2d 1, 21, 743 P.2d 240 (1987) (denying juveniles jury trials did not implicate a physical liberty).

marriage violated Article I, section 12 of the Washington Constitution. *Id.* ¶ 328 (Fairhurst J., dissenting). However, she first determined that the challenged statute implicated the “right to marry,” which she characterized as “a right ‘older than the Bill of Rights—older than our political parties, older than our school system.’” *Id.* ¶ 307 (citation omitted).

In *Schroeder*, the Court determined that there was no reasonable ground for limiting medical malpractice defendants’ liability to patients injured during minority. *Schroeder*, 179 Wn.2d at 573. But it made such determination *only after* determining that the challenged statute implicated “the right to pursue common law causes of action in court,” which the Court had “long recognized” as a right included in the privileges and immunities contemplated in Article I, section 12. *Id.*

In *Macias*, the Court struck a restriction on workers’ compensation for certain workers because it “conclude[d] that the statute in question constitutes a penalty on appellants’ fundamental right to travel by denying them basic necessities of life.” *Macias v. Dep’t of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 274, 668 P.2d 1278 (1983).⁴

⁴ Because the classification failed strict scrutiny, the Court declined to resolve the issue of whether the statute would have survived an intermediate scrutiny analysis. *Id.* at 271.

Korematsu utterly fails to discuss what *right*⁵ is implicated by the farmworker overtime exemption. Because the Korematsu Amici move the Court to dispense with its previously enumerated equal protection scrutiny, but utterly fail to identify a right burdened by the farmworker overtime exemption, the Court should decline to adopt any portion of the Korematsu Brief.

C. Disparate Impact, Without Discriminatory Intent, Is Not Unconstitutional.

The Korematsu Amici’s proposed “reasonable grounds scrutiny” would also have the Court determine that, if the farmworker overtime exemption has a disparate impact on a protected class, *without evidence of intentional discrimination*, the statute is unconstitutional. The Court should decline to adopt this reasoning, which would require that the Court overturn its clear prior constitutional jurisprudence requiring proof of discriminatory intent in “disparate impact” cases.

⁵ Although strict scrutiny’s “suspect class” and rational basis review under an equal protection claim do not require a finding of a “right” (*see, e.g., Macias*, 100 Wn.2d at 267-68 (strict scrutiny is applied “whenever a legislative classification involves a fundamental right *or* creates a suspect classification . . . the rational relation test, despite contrary dicta appearing from time to time in our cases, is used whenever legislation *does not* infringe upon fundamental rights or create a suspect classification” (citation omitted; emphasis added))), Korematsu does not argue that the Court should apply these standards. *See generally* Korematsu Br. Nor should it, as the farmworker overtime exemption certainly does not implicate them. *See, e.g.,* Intervenor-Respondents’ Reply and Response to Cross-Appeal at 14-15, 17-19.

As an initial matter, *Korematsu* blurs the line between the two types of disparate impact claims: disparate impact under state or federal anti-discrimination laws, and disparate impact under the equal protection clauses of the Fourteenth Amendment to the U.S. Constitution and Article I, section 12 of the Washington Constitution. However, these are very different claims, with very different lines of caselaw. *See, e.g., Rocha v. King Cty.*, 7 Wn. App. 3d 647, 650-51, 435 P.3d 325 (citing *State v. Johnson*, 194 Wn. App. 304, 307-08, 374 P.3d 1206 (2016)), *review granted sub nom. Bednarczyk v. King Cty.*, 193 Wn.2d 1017, 448 P.3d 64 (2019). Court interpretation of anti-discrimination laws in the employment context is entirely irrelevant to the present case, which involves *constitutional* questions.

In the constitutional context, the caselaw is clear: without proof of discriminatory intent, a generally applicable law with disparate impact *is not* unconstitutional. *Johnson*, 194 Wn. App. at 308. The *Korematsu* Amici, much like Petitioners, note the changing racial demographics of agricultural workers from the time that the farmworker overtime exemption was first adopted until the present. *Korematsu Br.* at 13. However, “[s]tatistics alone will not trigger strict scrutiny, unless there is some evidence of purposeful discrimination or intent.” *Macias*, 100

Wn.2d at 270; *see also State v. Clark*, 76 Wn. App. 150, 156, 883 P.2d 333 (1994) (no equal protection violation where statute excluding cocaine dealers from first-time offender waiver provision had disparate impact on African Americans), *aff'd and remanded*, 129 Wn.2d 211, 916 P.2d 384 (1996).

Korematsu counters that “[r]eview of statutes must account for changing facts.” Korematsu Br. at 13. However, the two cases relied upon by Korematsu are irrelevant. The case of *Northwest Austin Municipal Utility District Number One v. Holder* did not even involve the Fourteenth Amendment: it involved a Voting Rights Act provision challenged under *the Fifteenth Amendment*, which protects the right to vote. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) (citing U.S. Const., Amdt. 15, § 1). The case of *United States v. Carolene Products Co.* involved a statute prohibiting the shipment in interstate commerce of filled milk products challenged under rational basis review. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154, 58 S. Ct. 778, 82 L. Ed. 1234 (1938). The Court ultimately held that the law did not violate equal protection and upheld it as a constitutional exercise of Congress’ power to regulate interstate commerce. *Id.* Such limited and inapposite authority

supporting such a critical issue emphasizes that the Court should decline to hear new and novel theories advanced for the first time by amici curiae, for all the reasons identified above. *See* Part II(A), *supra*.

Intervenor-Respondents cannot find a single case that held that, under an equal protection analysis, disparate impact on a protected class *without* proof of discriminatory intent is enough to trigger heightened scrutiny. “Equal protection provides equal application of law but does not provide complete equality among individuals or classes of individuals.” *Harris v. Charles*, 171 Wn.2d 455, 462, 256 P.3d 328 (2011). If Korematsu cannot point to evidence of a discriminatory intent, then it simply cannot make a successful heightened equal protection challenge based on disparate impact.

Korematsu also puts forth unsubstantiated sociological speculation in an attempt to argue that the overtime exemption somehow led to the farmworker population becoming Latinx. Korematsu Br. at 12-13. This statement is unsupported by the record. Moreover, neither Korematsu, nor any other amici, nor Petitioners can deny the fact that at the time of the relevant actions by the legislature in 1959, when the farmworker exemption was first enacted, white workers made up approximately 85% of all farmworkers and Latinos made approximately 10%. CP 903-06. In

1989, when the people enacted Initiative 518 (which extended minimum wage protections to farm workers but maintained the overtime exemption) white people made up in excess of 50% of the farmworker population and Latinos comprised about 40%. *Id.*

Because Korematsu, like Petitioners, simply cannot make out any discriminatory intent on the part of Washington legislators or voters against Washington agricultural workers in enacting RCW 49.46.130(2)(g), even if the law has a disparate impact, the law “is not unconstitutional.” *Johnson*, 194 Wn. App. at 308 (citing *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 207, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008)).

D. The Fourteenth Amendment Already Provides the Strict Scrutiny Analysis That Korematsu Seeks.

Even if the Korematsu Amici could somehow establish a constitutional claim based on disparate impact (which they cannot), there is no reason for the Court to revise its Article I, section 12 analysis. Korematsu urges the Court to apply the “reasonable grounds” test when a legislative classification disproportionately affects a protected group. Korematsu Br. at 5. Their approach is affected by federal “strict scrutiny” standards when dealing with a protected class. *See id.* at 7 (contending that applying so-called “reasonable grounds scrutiny” to “government

action that disproportionately affects a protected class” would be “consistent with U.S. Supreme Court case law” on equal protection).

The Court has no need to overturn its Article I, section 12 jurisprudence in the manner suggested by Korematsu. The federal Fourteenth Amendment already subjects strict scrutiny to a state law that intentionally discriminates against a protected class. *Wisconsin v. City of New York*, 517 U.S. 1, 18 n.8, 116 S. Ct. 1091, 134 L. Ed. 2d 167 (1996) (“Strict scrutiny of a classification affecting a protected class is properly invoked only where a plaintiff can show intentional discrimination by the Government.” (citing *Washington v. Davis*, 426 U.S. 229, 239-45, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976))). If Petitioners desire such analysis, then they should have to bring an action in federal court, seeking the protections of the Fourteenth Amendment’s equal protection clause.

III. CONCLUSION

The Korematsu Brief is fraught with issues. It propounds legal arguments that were never made by the litigants and improperly seeks to change the course of the case and the issues involved. It directly conflicts with a brief that it contends to be aligned with. It also asks the Court to overturn decades of jurisprudence on equal protection in favor of the Korematsu Amici’s preferred yet wholly unsupported “test,” although the

federal Fourteenth Amendment already provides the framework that the Korematsu Amici seek.

For all of these reasons, the Court should decline to adopt any reasoning from the Amicus Brief of the Fred T. Korematsu Center for Law and Equality.

DATED: October 7, 2019.

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October 07, 2019 - 3:58 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96267-7
Appellate Court Case Title: Jose Martinez-Cuevas, et al. v. Deruyter Brothers Dairy, Inc., et al.
Superior Court Case Number: 16-2-03417-8

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Note: The Filing Id is 20191007155417SC160678