

FILED
SUPREME COURT
STATE OF WASHINGTON
5/15/2019 1:53 PM
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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.

**INTERVENOR
RESPONDENTS AND CROSS-PETITIONERS'
OPENING BRIEF**

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I. INTRODUCTION

“Overtime” – a legal entitlement to time and a half for hours worked beyond forty in a work week – is entirely a legislative creation. Each component of that formula was enacted through legislative decision-making. Why is 39 hours of work in a work week acceptable, but 41 hours excessive? Why is a 25% premium for overtime inadequate, but double-time too much? In our system of government, only the legislature can answer those inherently discretionary questions. Because the right to overtime must be left to the discretion of the legislature, it cannot be considered a fundamental right of state citizenship.

No matter how the trial court or Plaintiffs Jose Martinez-Cuevas and Patricia Aguilar (“Plaintiffs”) describe their so-called fundamental right of state citizenship, whether as a “right to work and earn a wage” or a “right to be protected by health and safety laws,” they cannot overcome the plain and simple fact that RCW 49.46.130(2)(g) (the “farm worker exemption”) does not involve a privilege or immunity. Even if it does, the legislature had a reasonable ground for creating the farm worker exemption. It would cost Washington farmers tens if not hundreds of millions of dollars per year to extend an overtime premium to farm workers, a cost that competitor farmers in neighboring states would not bear.

Moreover, the farm worker exemption does not violate the equal protection clause under any level of scrutiny. For these reasons, Respondents and Cross-Petitioners¹ Washington State Dairy Federation (“WSDF”) and Washington Farm Bureau (“WFB,” together, “Intervenors”) urge the Court to again² declare the agricultural exemption, RCW 49.46.130(2)(g), constitutional and remand for entry of judgment in favor of the Intervenors.

II. ASSIGNMENTS OF ERROR

In their Motion for Discretionary Review, Intervenors (along with Defendants DeRuyter Bros. Dairy, Inc. and Geneva S. and Jacobus DeRuyter, “Defendants”) identified two controlling questions of law. Those questions generate the following assignments of error:

1. The trial court order erred in failing to grant Intervenors’ motion for summary judgment (and Defendants’ request for summary judgment during those motion proceedings) because the farm worker exemption does not involve a privilege or immunity.

2. The trial court order erred in failing to grant Intervenors’ motion for summary judgment (and Defendants’ request for summary

¹ As designated by the Supreme Court Clerk in the ruling on the Motion to Designate Defendants and Intervenors as Petitioners, March 21, 2019.

² *Peterson v. Hagan*, 56 Wn.2d 48, 351 P.2d 127 (1960) (upholding Laws of 1959, ch. 294, which first enacted the farm worker exemption from the Minimum Wage Act, as constitutional against a challenge under article I, section 12, with certain exceptions not relevant here). See the discussion at Part IV(A), *infra*, pp. 9-10.

judgment during those motion proceedings) because the legislature had a reasonable ground for passing the farm worker exemption.

3. The trial court order erred in failing to grant Intervenors' motion for summary judgment (and Defendants' request for summary judgment during those motion proceedings) because the farm worker exemption does not violate the equal protection clause of the Washington Constitution.

III. STATEMENT OF THE CASE

In 1959, the legislature adopted the Washington Minimum Wage and Hour Act ("MWA"), declaring that it was "[a]n Act relating to wages and other conditions of employment for employees." Laws of 1959, ch. 294. This act exempted from overtime eligibility several categories of employment, including farm workers. Laws of 1959, ch. 294, § 1(5)(a)-(i). It was undisputed before the trial court that at the time of enactment of the MWA, and for many years thereafter, the majority of farm workers in Washington were Caucasian.

From 1959 until today, the legislature has exempted vast swathes of the workforce from eligibility for overtime pay, including:

- Casual labor at a private home, RCW 49.46.010(3) and RCW 49.46.130(2)(a);

- Executive employees, *id.*;
- Administrative employees, *id.*;
- Professional employees, *id.*;
- Outside sales persons, *id.*;
- Newspaper delivery personnel or freelance correspondents, *id.*;
- Forest and fire protection personnel, *id.*;
- Employees who sleep at the place of employment, *id.*;
- Inmates, *id.*;
- Crews of Washington State ferries, *id.*;
- Other seamen, *id.*; RCW 49.46.130(2)(c);
- Minors playing junior hockey, RCW 49.46.010(3);
- Seasonal fair employees, RCW 49.46.130(2);
- Unionized motion picture projectionists; *id.*;
- Employees in industries where federal law prescribes work weeks other than forty hours, *id.*;
- Some air carrier employees, *id.*;
- Some real estate brokers, *id.*;
- Commission-paid retail employees, *id.*; and
- Commission-paid automobile salespersons, *id.*

As a consequence, substantial portions of the work force are not eligible for overtime pay. For example, more than one out of every six workers otherwise eligible for overtime are exempt under the “white collar” (executive, administrative and professional) exemptions alone,³ without regard for the numerous other exemptions.

In 1989, the people of Washington approved Initiative 518, amending Ch. 49.46 to extend minimum wage protections to farm workers; notably, the people chose to not place Washington farms at a competitive disadvantage by requiring overtime for farm workers. Laws of 1989, ch. 1. In 2016, Washington voters approved Initiative 1433, which again amended the MWA to contain new minimum wage and paid sick leave requirements.⁴ In this instance, the people of Washington did not make any changes to any of the types of employment statutorily exempt from overtime, including farm workers.

Plaintiffs are former employees of Defendant DeRuyter, each of whom spent a little more than one year working as milkers. Plaintiffs filed this action on December 8, 2016, alleging that they worked more than 40 hours a week at the farm, but were not paid “time and a half” for overtime.

³ 84 Fed. Reg. 10,900, 10,930, Table 10, Mar. 22, 2019.

⁴ Laws of 2017, ch. 2; *see* Wash. Dep’t of Labor & Indus., Initiative 1433 Overview, <https://www.lni.wa.gov/WorkplaceRights/Wages/Minimum/1443.asp> (last visited May 14, 2019).

Plaintiffs admit that they were agricultural employees, exempt from entitlement to overtime pay by RCW 49.46.130(2)(g). Plaintiffs sought from the trial court a declaratory judgment invalidating the farm worker exemption as a violation of Washington State's Constitution.

On February 2, 2018, the court granted the Washington State Dairy Federation and the Washington Farm Bureau's motion to intervene as Defendants in the action.

The parties filed cross motions for summary judgment on the issues. CP 91-148 & 740-785. Specifically, Plaintiffs asserted the farm worker exemption violates article I, section 12 by violating their right as workers in dangerous industries to receive the protections of workplace health and safety laws. Plaintiffs also asserted that the exemption discriminates against Latina/o agricultural workers on the basis of race and/or national origin. Plaintiffs did not argue that the farm worker exemption violated a fundamental right "to work and earn a wage."

On May 31, 2018, the trial court issued a letter ruling granting in part and denying in part Plaintiffs' motion while denying Intervenors' motion. CP 1212-1214. The letter decision did not address Plaintiffs' argument that RCW 49.46.130(2)(g) implicates a purported "fundamental right to worker health and safety in dangerous occupations." First, the trial

court ruled that RCW 49.46.130(2) grants a privilege or immunity in contravention of article I, section 12, burdening Plaintiffs' "right to work and earn a wage" because it "treats a class of workers in a significantly different fashion than other wage earners engaged in the business of selling their labor." Second, the trial court ruled that it could not determine on a CR 56 motion whether there is a "reasonable basis" for granting the identified privilege or immunity. In the order that the trial court entered on July 27, 2018 based on its previous letter ruling, it also certified its summary judgment order for discretionary review.

Intervenors moved for discretionary review, CP 1215-1232, and Plaintiffs moved for direct review by this Court, CP 1233-1250, which was granted on February 6, 2019.

IV. ARGUMENT

Article I, section 12 of the Washington Constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens or corporations." This Court has previously rejected claims that the portion of the MWA under review here violates article I, section 12. *Peterson v. Hagan*, 56 Wn.2d 48, 67, 351 P.2d 127 (1960). Under this Court's more current article I, section 12 analysis, the same result applies. The Court applies a two-step analysis.

Ockletree v. Franciscan Health Sys., 179 Wn.2d 769, 776, 317 P.3d 1009 (2014). The first step is to determine whether the law in question involves a privilege or immunity; if not, article I, section 12 is not implicated. *Id.* (citing *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004) (hereinafter “*Grant County I*”). If there is a privilege or immunity, the second step is to determine whether there was a “reasonable ground” for granting the privilege or immunity. *Id.* (citing *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731, 42 P.3d 394 (2002) (hereinafter “*Grant County I*”).

A. This Court Has Previously Held the Farm Worker Exemption Constitutional.

In *Peterson*, this Court addressed constitutional challenges to Laws of 1959, ch. 294, Washington’s initial enactment of its MWA. The 1959 act was based on the federal Fair Labor Standards Act (“FLSA”). 56 Wn.2d at 56. The Court expressly noted that section 1(5) of that act “defines ‘Employee’ but excludes agricultural labor and labor employed incidental to agriculture.” *Id.* The Court faced the claim “that the entire act contravened the equal protection clause of the fourteenth amendment to the federal constitution and Art. I, § 12 of the state constitution.” *Id.* at 51. The parties challenging the statute specifically objected that “the exemptions contained in § 1(5) excluding a number of employments from

the operation of” the portion of the act creating overtime requirements “constitute a further unconstitutional discrimination against them which renders” that provision void. *Id.* at 52.

The Court rejected those claims. The Court specifically noted that “the right of the legislature to regulate hours and wages is not open to serious question.” *Id.* at 54. While the Court did strike down two provisions of the 1959 act not at issue here⁵, it rejected the other challenges. *Id.* As the Court would later explain, after *Peterson* the “remainder of the 1959 act continued to be in full force and effect.” *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 577, 399 P.2d 8 (1965). Thus, farmworkers were constitutionally excluded from Washington’s minimum wage obligations.

Intervenors acknowledge that the framework for this Court’s analysis of article I, section 12 has evolved since 1960. Nonetheless, this Court’s conclusion almost 70 years ago remains correct. The Court should again uphold the legislature’s judgment “excluding a number of employments from the operation of” the MWA’s overtime requirements. *Peterson*, 56 Wn.2d at 52.

⁵ The Court invalidated Section 3, because it only covered employers not covered by the FLSA. 56 Wn.2d at 58. The Court invalidated Section 5 as an invalid legislative delegation. *Id.* at 65-66. The Court did not, however, invalidate the statute’s definitions, Section 1, or its minimum wage requirements, Section 2. *Id.* at 67.

B. RCW 49.46.130(2) Does Not Grant a Privilege or Immunity.

Not every benefit constitutes a “privilege” or “immunity” for purposes of the independent article I, section 12 analysis. *Ockletree*, 179 Wn.2d at 778 (Johnson, J., lead opinion). *Ockletree* was a fractured decision, but on this question all members of the Court agreed. *Id.* at 794 (Stephens, J., dissenting); *id.* at 806 (Wiggins, J., concurring and dissenting). Rather, the benefits triggering that analysis are only those implicating “‘fundamental rights . . . of . . . state . . . citizenship.’” *Schroeder v. Weighall*, 179 Wn.2d 566, 573, 316 P.3d 482 (2014) (ellipses in original) (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). These rights are more prosaic than the “fundamental rights” guaranteed by due process, and include “‘the right to . . . carry on business’” in the state, “‘to acquire and hold property, and to protect and defend the same in the law,’” and “‘to enforce other personal rights.’” *Ockletree*, 179 Wn.2d at 793 (Johnson, J., lead opinion) (ellipsis in original) (quoting *Vance*, 29 Wash. at 458). As this Court said in *Vance*,

[a] statute can be declared unconstitutional only where specific restrictions upon the power of the legislature can be pointed out, and the case shown to come within them, and not upon any general theory that the statute conflicts with a spirit supposed to pervade the constitution, but not expressed in words.

Vance, 29 Wash. at 459 (citing *Smith v. City of Seattle*, 25 Wash. 300, 65 P. 612 (1901)). Moreover, rights left to the discretion of the legislature are not fundamental. *Ockletree*, 179 Wn.2d at 778 (citing *Grant County II*, 150 Wn.2d at 814). Indeed, the dissenting judges in *Ockletree* were even more explicit, concluding that “the legislature has authority to create or repeal causes of action unrelated to common law claims, and it does not grant or withhold a privilege when it does so.” *Id.* at 795 (Stephens, J., dissenting).

In the instant case, minimum wage and overtime requirements are creatures of statutory enactment, not the common law, and could not be further from the type of legislation at issue in *Ockletree*. There, this Court held that an exemption under the Washington Law Against Discrimination (“WLAD”) unconstitutionally burdened a fundamental “personal right.” *Id.* The Court noted that WLAD was enacted ““in fulfillment of the provisions of the Constitution of this state concerning civil rights,”” to protect ““the rights and proper privileges”” of state citizens. *Id.* (quoting RCW 49.60.010). Importantly, WLAD recognized that freedom from discrimination is a *civil right*, not merely a statutory promise. *Id.* (citing RCW 49.60.030(1)).

In the present case, absolutely nowhere in the MWA does the legislature mention any civil right or privilege – because in the context of wage-and-hour laws, such right or privilege does not exist. Plaintiffs and the trial court claim that Plaintiffs have a fundamental right to the payment of an overtime premium. However, Plaintiffs admit that it was not until 1959 – fully 70 years after statehood – that Washington enacted statutory law⁶ that granted *anyone* the right to overtime. Petitioners’ Opening Brief (“Pet. Brief”) at 17. A right cannot be “fundamental” when it did not exist, for anyone, for more than half of Washington’s history. Wage and overtime laws are solely creatures of legislative discretion and do not burden any fundamental “personal right.”

Further proof that the MWA’s farm worker exemption does not burden a fundamental right of state citizenship is that in 1989, the people of Washington enacted Initiative 518, which allowed the minimum wage, but not overtime, for farm workers.⁷ Then again, in 2016 Washington voters approved Initiative 1433, extensively amending the MWA without

⁶ Again, the contrast to *Ockletree* is instructive. The dissenting judges noted that it was “simply incredible for the lead opinion to suggest that Washington citizens enjoyed no state common-law remedy for discrimination until 1973,” when the statutory right of action for violation of the WLAD was created. 179 Wn.2d at 796 (Stephens, J., dissenting). In contrast, it would have been incredible for a plaintiff, in 1958, to have asserted a Washington State law entitlement to time and one-half pay for working more than forty hours in a week.

⁷ Laws of 1989, ch. 1

changing any of the exemptions from overtime.⁸ When the people exercise their initiative power, they “exercise the same power of sovereignty as the Legislature does when enacting a statute.” *Wash. State Farm Bureau Fed’n v. Gregoire*, 162 Wn.2d 284, 302, 174 P.3d 1142 (2007) (quoting *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762, 27 P.3d 608 (2000)). The people of the State of Washington are presumed to know the law, and notably they have chosen – *twice* – to not make any change to the types of employment statutorily exempt from overtime, including farm workers.

Moreover, no Washington appellate court has ever identified a “fundamental right” to “work and earn a wage” or “be protected by health and safety laws” in dangerous occupations. Washington courts have regularly reviewed the exemptions set forth in RCW 49.46.130, and never once suggested that any exemption violates a fundamental right. *Cerrillo v. Esparza*, 158 Wn.2d 194, 142 P.3d 155 (2006).⁹ As is relevant to the instant matter, *Cerrillo* is particularly noteworthy. This Court construed the plain language of RCW 49.46.130(2)(g) – the farm worker exception

⁸ Laws of 2017, ch. 2; see Initiative 1433 Overview, *supra*, note 4.

⁹ *E.g.*, *Stahl v. Delicor of Puget Sound, Inc.*, 148 Wn.2d 876, 64 P.3d 10 (2003) (retail sales employees exempt); *Berrocal v. Fernandez*, 155 Wn.2d 585, 121 P.2d 82 (2005) (upholding exemption of employees – shepherders – who slept at their place of employment); *Webster v. Pub. Sch. Emps. of Wash., Inc.*, 148 Wn.2d 383, 60 P.3d 1183 (2003) (administrative employees); *Clawson v. Grays Harbor Coll. Dist. No. 2*, 148 Wn.2d 528, 61 P.3d 1130 (2003) (professional employees).

itself – to reverse the Court of Appeals and conclude that a group of agricultural workers were not entitled to overtime. Not one word in *Cerrillo* intimates the slightest constitutional infirmity in the farm worker exception.

Federal and state courts nationwide have reached the same conclusion; none has deemed wage-and-hour protections fundamental under the Constitution. The Sixth Circuit Court of Appeals' decision in *Michigan Corrections Organization v. Michigan Department of Corrections* is instructive. 774 F.3d 895 (6th Cir. 2014). In that case, the Sixth Circuit held that the FLSA did not violate the Privileges or Immunities Clause of the U.S. Constitution. *Id.* at 902. It reasoned:

Federal wage-and-hour protections first became law in 1938 through congressional legislation.^[10] Neither the vintage of the law nor its subject bespeaks a fundamental right in the constitutional sense. *No court to our knowledge has deemed wage-and-hour protections fundamental under the Constitution, and we see no reason to be the first. A State does not violate the Privileges or Immunities Clause by denying the minimum-wage or overtime-pay requirement established by Congress in the FLSA.*

Id. (emphasis added); *see also De Leon v. Tex. Emp't Comm'n*, 529 S.W.2d 268, 269-70 (Tex. Civ. App. 1975) (Texas Unemployment

¹⁰ Prior to the 1930s, the only protective legislation approved by Congress, a law regulating the use of child labor, was seen by the courts as an intrusion on the right to free contracting. *See* Andrew J. Seltzer, *The Political Economy of the Fair Labor Standards Act of 1938*, J. of Pol. Econ., Vol. 103, No. 6, at 1302 (1995).

Compensation Act provision stating that persons may receive unemployment benefits only if they are available for work does not violate the privileges or immunities clause, because “[t]he eligibility requirement of the statute is a statutory condition which a claimant must meet before he is entitled to unemployment benefits.”), *writ refused NRE* (Jan. 28, 1976); *Young v. Ferrellgas, L.P.*, 106 Wn. App. 524, 531, 21 P.3d 334 (2001) (calling overtime pay under RCW 49.46.130(1) a statutory right). Overtime pay is decidedly left in the legislature’s hands and thus cannot be considered a fundamental right subject to judicial action as Plaintiffs argue here.

Plaintiffs’ efforts to derive a right to overtime from an “employee right” to a safe workplace under article II, section 35 (“Art. II, § 35”) are thus fatally defective. Our constitution mandates that:

The legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.

Art. II, § 35 is not contained in the Declaration of Rights contained in article I of the Washington Constitution. Rather, it is a portion of article II, fixing the powers and authority of the legislature. Thus, Art. II, § 35 does not “pertain alone . . . to the citizens of the state.” *Vance*, 29 Wash. at 458. Rather, it authorizes legislative action, and rights left to the discretion of

the legislature are not fundamental. *Ockletree*, 179 Wn.2d at 778

(Johnson, J., lead opinion) (citing *Grant County II*, 150 Wn.2d at 814).

Moreover, Art. II, § 35 directs *the legislature* to “fix pains and penalties” for enforcement of its legislation pertaining to workplace safety.

“It is a fundamental principle . . . especially in construing a document of the gravity of the Constitution, that, if possible, an effect must be given and a meaning accorded to *all* of the words used therein.” *Chlopeck Fish*

Co. v. City of Seattle, 64 Wash. 315, 322-23, 117 P. 232 (1911) (emphasis added); *State v. Pannell*, 173 Wn.2d 222, 230, 267 P.3d 349 (2011) (“[A]

statute or constitutional provision should, if possible, be so construed that no clause, sentence or word shall be superfluous, void, or insignificant.”

(citation and internal quotation marks omitted)). Protecting workplace

safety is thus directly charged to the legislature – a task which the

legislature has, as will be seen below, taken up directly and extensively.

The fact that the legislature has chosen to not apply the “pain or penalty”

of an overtime premium as an indirect method of enforcing workplace

safety on the farm is a decision specifically charged to the legislature. Art.

II, § 35 does not support a claim that overtime is a fundamental right; to

the contrary, it undercuts Plaintiffs’ claims.

Recognizing, perhaps, that a fundamental right to earn an overtime premium cannot be indirectly derived from an entitlement to a safe workplace, the superior court found that the right to overtime was a privilege or immunity because it implicates a “right to work and earn a wage.” The court did not cite a single authority for the existence of such a fundamental right in those terms. *Cf.* CP 1213-1214 (superior court’s analysis). Even if it had, the superior court’s ascertained right is, in the context of this case, a non sequitur. The question presented in this case is not whether Plaintiffs had the right to work and earn a wage¹¹ – the issue is whether Plaintiffs had the fundamental right to earn an overtime premium for more than forty hours of work in a week. The right to engage in a transaction and the question whether the legislature may prescribe terms and conditions regulating that transaction are two entirely different issues.

This is patently demonstrated by considering each and every one of the rights derived from *Vance*, 29 Wash. at 458, identified by the trial court in this case:

¹¹ Indeed, the superior court’s newly identified fundamental right opens a true Pandora’s box. If there is a fundamental right to work and earn a wage, the person most directly impaired in the exercise of that right is the unskilled or disabled worker who cannot offer labor adding sufficient economic value to offset Washington’s steadily rising minimum wage. The Court should hesitate to endorse an entirely new fundamental right that will generate litigation challenging long-standing economic and social policy.

- As to the right to “carry on business,” CP 1213, the legislature regulates most aspects of business, from when citizens may do so at all, e.g., Title 18, RCW, to what a business must do to wind up its affairs. Ch. 23B.14, RCW.
- The right to hold, acquire, and sell property is likewise routinely regulated. *E.g.*, ch. 19.36 RCW (certain contracts must be in writing); ch. 19.52 RCW (usury).
- The right to access courts has been regulated by the legislature since before statehood. Laws of 1854, p. 362, § 2, (creating statutes of limitations); ch. 4.16 RCW (same).
- The right to collect debts has long been subject to state regulation as to when and how collection may be attempted. Ch. 19.16, RCW. (debt collection practices).

Indeed, one of the rights identified in *Vance* but not specifically relied upon by the trial court (“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,” CP 1213 (citing 29 Wash. at 458), is, in this context, ironic. In determining what was or was not a privilege or immunity, this Court specifically identified various property tax

exemptions as the kind of routine legislative judgment not subject to a privilege and immunities challenge. *Ockletree*, 179 Wn.2d at 779.

For all of these reasons, the Court should hold that the farm worker exemption does not create a privilege or immunity in violation of article I, section 12 of the Washington Constitution.

C. There Are Reasonable Grounds for the Farm Worker Exemption.

The Court need not reach this issue for the reasons identified above, but nonetheless it is Plaintiffs' burden to prove that the farm worker exemption is based on unreasonable grounds.

A law that grants a privilege or immunity to any citizen, group of citizens, or corporation not available to all on the same terms violates article I, section 12 unless there is "reasonable ground for distinguishing between those who fall within the class and those who do not." *Grant County I*, 145 Wn.2d at 731. A distinction is reasonable if it has "a natural, reasonable, and just relation to the subject matter of the act." *Ockletree*, 179 Wn.2d at 797 (Stephens, J., dissenting) (citation omitted).

Plaintiffs' primary argument appears to be that farm work is dangerous, and granting overtime to farm workers would somehow¹²

¹² Intervenors do not minimize concerns with workplace safety – to the contrary, offering a safe workplace is something to which each and every one of their members is deeply committed. But, Plaintiffs fell far short of proving their allegations in this regard

indirectly improve safety. Pet. Brief at 9. However, Plaintiffs' arguments fail as a matter of law for several independent reasons. First, the legislature has directly addressed workplace safety on Washington's farms. The legislature mandated that Washington farms, like other workplaces, be safe places to work, enacting the Washington Industrial Safety and Health Act, Ch. 49.17 RCW ("WISHA"). This legislation is directly authorized by Art. II, § 35. *Rios v. Wash. Dep't of Labor & Indus.*, 145 Wn.2d. 483, 493-94, 39 P.3d 961 (2002). Pursuant to WISHA, the Department of Labor and Industries has been delegated the authority to prescribe safety regulations for farm workers. It has done so, extensively. Ch. 296-307 WAC regulates, in extraordinary detail, safety practices on farms. Indeed, in the bound version of the Washington Administrative Code, Ch. 296-307 *exceeds 300 pages* of regulations addressing every aspect of safety on the farm. In light of Art. II, § 35's express delegation to

in these summary judgment proceedings. Plaintiffs offered the trial court a number of otherwise uncorroborated academic articles drawing a *correlation* between increased hours of work and a risk of accident. Plaintiffs offered *no* expert testimony drawing a causal connection between these two factors, in the agricultural sector or otherwise. This failing undercuts Plaintiffs' claims because a moment's reflection suggests that as a matter of logic, the longer one is exposed to a risk, the greater the number of resulting incidents there will be. For example, Plaintiffs allege that some dairy workers work 62 hours per week, approximately 150% of a standard work week. Pet. Brief at 3. But, Plaintiffs also allege that dairy workers have an injury rate that is only 121% higher than the state average. Pet. Brief at 5. That result does not demonstrate the disproportionate danger of the field.

the legislature¹³ to “fix pains and penalties for enforcement” of the workplace safety laws it has prescribed, the legislature cannot be said to be acting on unreasonable grounds to decline to do indirectly what it has already done directly.

Moreover, Plaintiffs’ arguments are in error for another independent reason. It is simply wrong to suggest that the MWA is addressed solely to health and safety considerations. The MWA was designed to also promote the “general welfare” of the state’s citizens, including “to encourage employment opportunities within the state.” RCW 49.46.005. This express recognition that the MWA affects the general welfare by its regulation of the employment relationship demonstrates that the legislature and the people had and have reasonable grounds¹⁴ for declining to extend overtime coverage to farm workers: the massive

¹³ Moreover, the Court must give effect to every word of the Constitution. Art. II, § 35 is explicit: it is *the legislature* that is assigned the authority to prescribe enforcement of workplace safety laws. This Court should not substitute its judgment for the body expressly charged by the Constitution to exercise that discretion.

¹⁴ Plaintiffs appear to suggest that in performing a privileges and immunities analysis of the reasonable grounds for the legislature’s action, the Court must confine its analysis to the text of the legislation or its history. Pl. Brief at 24-25 (citing *Schroeder*, 179 Wn.2d at 574). *Schroeder* does not so hold. *Schroeder* merely rejected the notion that a reasonable ground may rest on mere speculation, noting that “[n]either *the respondents* nor the legislative record” provided the factual basis for a reasonable ground for the action at issue there. 179 Wn.2d at 575 (emphasis added). Moreover, Plaintiffs’ suggested analysis was not what this Court did in *Ockletree*, as both the lead opinion, 179 Wn.2d at 783-84 (Johnson, J., lead opinion), and the dissent, *id.* at 798 (Stephens, J., dissenting), considered matters outside the legislative record in analyzing whether the legislative action there was supported by reasonable grounds. In contrast with *Schroeder*, Intervenor here provide actual – indeed, undeniable – facts about the nature of farming to provide a reasonable ground for exempting farm workers from overtime.

economic dislocation that would result. Farming has always¹⁵ been inherently a seasonal business, and overtime at busy times is a natural consequence. CP 889-890. The farm worker exemption recognizes the various time restraints and the seasonality of the agriculture industry, because farming relies upon workers to work long hours in a short period of time in order to meet demand in the harvest season. *Id.* This is the norm and standard operating procedure for farms across the nation. *Id.*

Farmers estimate that extending an overtime premium to farm workers would cost Washington farmers tens if not hundreds of millions of dollars a year in new costs. *Id.* at ¶ 7. Washington farms are not some impersonal economic monolith; 95% of Washington farms are family farms. *Id.* at ¶ 8; CP 900. Moreover, fully 94% of Washington farms are small operations with total sales of less than \$250,000 a year. CP 891; CP 901-902. Because Washington farmers compete in national and international markets, the price they can charge for their products is set by the market, not driven by their costs. CP 890. Indeed, for dairies such as DeRuyter, the price they can charge for their milk is established by a

¹⁵ Dealing with the natural cycles of growing crops and tending to animals, as well as the vagaries of weather, have been a part of agriculture since the dawn of farming – and Washington has thus excluded farm workers from overtime requirements since the statute was enacted. As discussed at more length below, *see infra*, Part IV(D)(1), pp. 27-28, Plaintiffs' fixation on the current racial make-up of Washington's farm worker population simply has no relevance to whether the legislature had reasonable grounds to exempt farm workers from overtime: it is *undisputed* that at the time of the enactment of the statute, the farm worker population in Washington was 85% Caucasian. CP 903-906.

federally administered regulatory regime and does not reflect Washington state-specific costs. *Id.* at ¶ 9. Not only was the legislature right to be concerned about the economic impact itself, but that impact is all the more dangerous when compared to the costs borne by the competitors to Washington farmers: farmers in neighboring states do not face such a cost, and the competitive disadvantage would be harmful to the entire agricultural community. *Id.*

Avoiding inflicting such a cost on a vital portion of Washington's economy is entirely reasonable. This Court should hold that the legislature had a reasonable ground for exempting farm workers from eligibility for overtime pay.

D. The Farm Worker Exemption Does Not Violate the Equal Protection Clause of the Washington Constitution.

Where a statute is alleged to affect a particular group or minority, a court may engage in an equal protection analysis under article I, section 12. *Schroeder*, 179 Wn.2d at 577. "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).

The appropriate level of scrutiny in equal protection claims depends upon the nature of the classification or rights involved. *Am.*

Legion Post No. 149 v. Wash. State Dep't of Health, 164 Wn.2d 570, 608, 192 P.3d 306 (2008). Suspect classifications, such as race, alienage, and national origin, are subject to strict scrutiny. *Id.* at 608-09. "Strict scrutiny also applies to laws burdening fundamental rights or liberties." *Id.* at 609. "Intermediate scrutiny applies only 'if the statute implicates both an important right and a semi-suspect class not accountable for its status.'" *Id.* (quoting *Madison v. State*, 161 Wn.2d 85, 103, 163 P.3d 757 (2007)). Absent a fundamental right or suspect class, or an important right or semi-suspect class, a law will receive rational basis review. *Id.* Under rational basis review, the legislative classification is upheld unless the classification rests on grounds wholly irrelevant to the achievement of legitimate state objectives. *State v. Harner*, 153 Wn.2d 228, 235-36, 103 P.3d 738 (2004).

The farm worker exemption survives Plaintiffs' equal protection challenge under any level of scrutiny.

- 1. Strict scrutiny does not apply because overtime pay is not a fundamental right and agricultural workers are not a suspect class.**

Strict scrutiny review under equal protection applies if the "allegedly discriminatory statutory classification affects a suspect class or a fundamental right." *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240

(1987). Here, however, agricultural workers are not a suspect class and overtime pay is not a fundamental right.

First, for all the reasons identified above in Part IV(A), *supra*, overtime pay is not a fundamental right. An entitlement to overtime is purely statutory, did not exist until 70 years after statehood, and is subject to numerous exemptions that are unchallenged as a routine part of American life. Any of those undeniable facts would be inconsistent with labeling the right to overtime as fundamental in any way. If there were any doubt on the matter, our courts have routinely held that the right to pursue a trade or profession is not a fundamental right for purposes of equal protection analysis. *Fields v. Dep't of Early Learning*, __ Wn.2d __, 434 P.3d 999, 1004 (2019). If the right to pursue a trade at all is not a fundamental right, *a priori* the right to some particular economic term of that employment cannot be fundamental.

Furthermore, agricultural workers are not a suspect class. Suspect classifications are limited and include classifications based on “race, alienage, and national origin” in the context of an equal protection challenge. *In re K.R.P.*, 160 Wn. App. 215, 229, 247 P.3d 491 (2011) (quoting *State v. Hirschfelder*, 170 Wn.2d 536, 550, 242 P.3d 876 (2010)). “[S]tatistics alone will not trigger strict scrutiny, unless there is some

evidence of purposeful discrimination or intent.” *Macias v. Dep’t of Labor & Indus. of State of Wash.*, 100 Wn.2d 263, 270, 668 P.2d 1278 (1983). In *Macias*, the Court decided that strict scrutiny would *not* apply to farm workers of largely Hispanic descent because the reliance on statistics was insufficient to show discriminatory purpose, much like Plaintiffs here. *Id.* Without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. *State v. Johnson*, 194 Wn. App. 304, 308, 374 P.3d 1206 (2016) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 207, 128 S. Ct. 1610, 170 L. Ed. 2d 574 (2008)); *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 blacks), *aff’d and remanded*, 129 Wn.2d 211, 916 P.2d 384 (1996).

Plaintiffs argue that strict scrutiny should apply to agricultural workers, because (today) most are Latina/o. Pet. Brief at 33-34. Moreover, Plaintiffs argue that because the Washington legislature based the MWA off the FLSA, the theoretical racial bias of the agricultural exemption is imputed onto RCW 49.46.130(2)(g). Pet. Brief at 33-34. However, Plaintiffs’ argument fails for a simple reason: at the time of the relevant actions by the legislature in 1959, when the farm worker exemption was

first enacted, white workers made up approximately 85% of all farm workers, and Latinos made approximately 10%. CP 903-906. 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 farm worker population, and Latinos comprised about 40%. *Id.* Plaintiffs have never offered any evidence whatsoever to dispute these facts. Plaintiffs 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).

2. Intermediate scrutiny is not appropriate because overtime is not an important right and agricultural workers do not qualify as a semi-suspect class.

Plaintiffs' challenge against the agricultural overtime exemption fails intermediate scrutiny as well. Intermediate scrutiny requires an important right *and* at least a semi-suspect class. *Schaaf*, 109 Wn.2d at 17-18. However, intermediate or heightened scrutiny has only been applied in "limited circumstances" where strict scrutiny is not mandated. *State v. Shawn P.*, 122 Wn.2d 553, 560, 859 P.2d 1220 (1993). Under intermediate scrutiny, the challenged law must further a substantial state interest. *State v. Clinkenbeard*, 130 Wn. App. 552, 564, 123 P.3d 872 (2005). It is critical to note that in order to successfully find a statute invalid under

intermediate scrutiny, it must involve **both** an important right and a semi-suspect class.

As demonstrated above, overtime pay is not a fundamental right, nor is it an important right as defined for purposes of equal protection analysis. Under Washington law, important rights are those that generally affect the liberties of Washington citizens, particularly physical liberties. *Schaaf*, 109 Wn.2d at 21 (denying juveniles jury trials did not implicate a physical liberty, nor were children a semi-suspect class to trigger heightened scrutiny); *In re Runyan*, 121 Wn.2d 432, 448, 853 P.2d 424 (1993). While an overtime premium for work beyond forty hours in a day may be a desirable term of employment, it is not an important right affecting the liberties of Plaintiffs – it simply cannot be, since the statute creating the supposed right exempts large portions of the work force. Indeed, consideration of the other exempt classifications belies Plaintiffs’ contention that overtime is an important right. Employees in an “executive” capacity are exempt. RCW 49.46.010(3)(c); RCW 49.46.130(2). An executive employee is one “[w]hose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof.” WAC 296-128-510(1). A right cannot be considered important if it is denied to

the very personnel running the business. But if overtime were considered an important right, all the categorically exempt employees under RCW 49.46.130(2) would have significant claims based upon nothing but their occupation. Courts would then be “called on to second-guess the distinctions drawn by the legislature for policy reasons nearly every time it enacts a statute.” *Ockletree*, 179 Wn.2d at 779 (Johnson, J., lead opinion).

Moreover, farm workers are not a semi-suspect class. Washington law has indicated that “a particular employment status does not create a semi-suspect class.” *Clinkenbeard*, 130 Wn. App. at 567 (citing *Griffin v. Eller*, 130 Wn.2d 58, 65, 922 P.2d 788 (1996)). If the classification applies equally to a group of individuals, “it does not create a suspect or a semi-suspect class.” *State v. Whitfield*, 132 Wn. App. 878, 891, 134 P.3d 1203 (2006) (statute did not create semi-suspect class where it applied to HIV-infected and non-HIV-infected persons); *see also Clark*, 76 Wn. App. at 156 (no equal protection violation where statute excluding cocaine dealers from first-time offender waiver provision had disparate impact on African Americans).

For purposes of determining the standard for an equal protection challenge, “inclusion of some exceptions” to the statute, “but not others, does not operate to create any semi-suspect class.” *Runyan*, 121 Wn.2d at

449 (citation omitted). “[T]he equal protection clause does not require a state to eliminate all inequalities between the rich and the poor.” *Id.* (quoting *Riggins v. Rhay*, 75 Wn.2d 271, 283, 450 P.2d 806 (1969)). “[C]lassifications bearing on nonconstitutional interests—even those involving the most basic economic needs of impoverished human beings, usually will not be subject to heightened treatment [under equal protection analysis] because they are not distinguishable in any relevant way from other regulations in the area of economics and social welfare.” *Sanchez v. Dep’t of Labor & Indus.*, 39 Wn. App. 80, 89, 692 P.2d 192 (1984) (internal quotation marks and citation omitted).

Without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. *Johnson*, 194 Wn. App. at 308 (citing *Crawford*, 553 U.S. at 207). In *Macias*, a case Plaintiffs rely heavily upon, the Court opted to not even address whether agricultural workers are a semi-suspect class after ruling they were not a suspect class based on the plaintiffs’ disparate impact evidence. *Macias*, 100 Wn.2d at 271. Plaintiffs note the changing racial demographics of agricultural workers from the decision in *Macias* to the present. Motion at 21:17-22. Once again, however, “‘impact alone is not determinative.’” *Macias*, 100 Wn.2d at 270 (citation omitted).

Accordingly, Plaintiffs' challenge to the validity of RCW 49.46.130(2)(g) fails on both requirements to trigger intermediate¹⁶ scrutiny.

3. Under the rational basis review, the exemption is reasonably related and constitutional.

If a suspect classification or fundamental right is not involved, rational basis review applies. *Am. Legion*, 164 Wn.2d at 609. "Social and economic legislation that does not implicate a suspect class or fundamental right is presumed to be rational [when challenged on equal protection grounds]; this presumption may be overcome by a clear showing that the law is arbitrary and irrational." *K.R.P.*, 160 Wn. App. at 230 (citation and internal quotation marks omitted). "A legislative distinction will survive the rational basis test if (1) all members of the class are treated alike; (2) there is a rational basis for treating differently those within and outside of the class; and (3) the classification is rationally related to the purpose of the legislation." *Clinkenbeard*, 130 Wn. App. at 567 (citing *O'Hartigan v. Dep't of Personnel*, 118 Wn.2d 111, 122, 821 P.2d 44 (1991)). With regard to the third prong, Plaintiffs must show the

¹⁶ If the Court were to determine that intermediate scrutiny applies, a substantial state interest applies for all the reasons explained above that the farm worker overtime exemption rests on sound grounds. Part IV(C), *supra*. The state has a significant interest in maintaining a healthy and productive farming sector, which is critical to the state's economy. *Id.*

classification is “purely arbitrary” to overcome the strong presumption of constitutionality. *Thurston Cty. Rental Owners Ass’n v. Thurston County*, 85 Wn. App. 171, 186, 931 P.2d 208 (1997) (citing *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991)).

Under the rational basis test, a “classification will be upheld against an equal protection challenge if there is any conceivable set of facts that could provide a rational basis for the classification.” *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997) (citation omitted). “The rationality of a classification does not require production of evidence to sustain the classification[] [and] it is not subject to courtroom fact-finding.” *Id.* Further, “[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.” *Id.* at 979-80 (citation and internal quotation marks omitted). Under rational basis review, it is “rare” for legislation to be found unconstitutional. *De Young v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998).

The overtime exemption readily meets the requirements of rational basis review. First, all members are treated identically. For all the reasons identified above, a rational basis exists for agricultural workers to be treated differently than other workers. Plaintiffs draw comparisons to

construction and factory workers as employees who receive overtime but also work in “dangerous occupations.” Pet. Brief at 40. It important to note that the class under review is not all employees “employed in dangerous occupations” but agricultural workers in Washington State who are exempt from overtime under RCW 49.46.130(2)(g). The underlying rationale for agricultural worker exemption is uniquely related to the nature of the agricultural industry and its dependence on the seasons for harvest. CP 889-895. The proper inquiry is whether a rational basis exists for agriculture workers to be exempt from overtime; plainly it does.

Finally, given the nature of farming, a rational relationship exists between the classification and its legislative purpose. Much like the other exemptions under RCW 49.46.130(2), a 40-hour work week is incompatible with the needs of farming. All the Court must do is determine any “conceivable . . . facts” for which this exemption may exist. *Gossett*, 133 Wn.2d at 979. Upon finding such a fact, the agricultural exemption survives rational basis review as it does here.

V. CONCLUSION

The Intervenors respectfully ask this Court to declare the

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agricultural exemption, RCW 49.46.130(2)(g), constitutional and remand
for entry of judgment in favor of the Intervenor and Defendants.

DATED: May 15, 2019.

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CERTIFICATE OF SERVICE

I certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of 18 years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, Washington 98101.

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May 15, 2019 - 1:53 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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