

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
7/15/2019 4:33 PM  
BY SUSAN L. CARLSON  
CLERK

No. 96267-7

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SUPREME COURT OF THE STATE OF WASHINGTON

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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/Cross-Appellants*

and

WASHINGTON STATE DAIRY FEDERATION and  
WASHINGTON FARM BUREAU,  
*Intervenor-Respondents/Cross-Appellants.*

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**RESPONDENTS/CROSS-APPELLANTS REPLY BRIEF IN  
SUPPORT OF CROSS APPEAL**

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**TABLE OF CONTENTS**

	<i>Page</i>
I. INTRODUCTION .....	1
II. ARGUMENT .....	4
1. This Court reviews the trial court’s order de novo; RCW 49.46.130(2)(g) is presumed constitutional, and Plaintiffs must persuade the Court that it is unconstitutional beyond a reasonable doubt. ....	4
2. This case is about the statutory entitlement to overtime pay, and the statutory exclusion of agriculture from that entitlement should be held valid as such. ....	5
3. There is no fundamental right to legislative protection of workers in dangerous employments. ....	6
4. Washington case law consistently requires proof of a discriminatory “benefit and burden” effect when applying article I, § 12 to economic regulation; the statutory exemption of agriculture from entitlement to overtime pay does not satisfy that element. ....	12
5. The agricultural exclusion does not violate the equal protection provisions of article I, § 12. ....	16
6. The alleged “racist history” of the agricultural exemption from entitlement to overtime pay is irrelevant to the issues before the Court; otherwise, the record evidence either compels summary judgment against Plaintiffs’ Complaint, or requires reversal of the trial court’s partial summary judgment order. ....	17
7. The issue of prospective application is squarely before the Court, and the Court should exercise its inherent authority to order that any holding adverse to RCW 49.46.130(2)(g) shall have only prospective effect. ....	21
III. CONCLUSION .....	22

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Am. Legion Post No. 149 v. Dep’t of Health,</i> 164 Wn.2d 570, 192 P.3d 306 (2008).....	13
<i>Anderson v. King County,</i> 158 Wn.2d 1, 138 P.3d 963 (2006).....	14
<i>Ass’n of Washington Spirits &amp; Wine Distribs. v. Wash. State Liquor Control Bd.,</i> 182 Wn.2d 342, 340 P.3d 849 (2015).....	10, 12, 13
<i>C.f. Taskett v. King Broadcasting Co.,</i> 86Wn.2d 439, 546 P.2d 81 (1976).....	20
<i>Darrin v. Gould,</i> 85 Wn.2d 859, 540 P.2d 882 (1975).....	9
<i>Duranceau v. City of Tacoma,</i> 27 Wn. App. 777, 620 P.2d 533 (1980).....	14
<i>Ex parte Camp,</i> 38 Wash. 393, 80 Pac. 547 (1905).....	13
<i>Fields v. Dep’t of Early Learning,</i> 193 Wn.2d 36, 434 P.3d 999 (2019).....	4
<i>In re Detention of Herrick,</i> 190 Wn.2d 236, 412 P.3d 293 (2018).....	4
<i>In re Marriage of Anderson,</i> 134 Wn.App. 506, 141 P.3d 80 (2006).....	21
<i>In re Pers. Restraint of McNeil,</i> 181 Wn.2d 582, 334 P.3d 548 (2014).....	5
<i>In re Welfare of A.W.,</i> 182 Wn.2d 689, 344 P.3d 1186 (2015).....	5

<i>Jackowski v. Borchelt</i> , 174 Wn.2d 720, 278 P.3d 1100 (2012).....	20
<i>Lee v. State</i> , 185 Wn.2d 608, 374 P.3d 157 (2016).....	4
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 166 Wn.2d 264, 208 P.3d 1092 (2009).....	20
<i>Macias v. Dep't of Labor &amp; Indust.</i> , 100 Wn.2d 263, 668 P.2d 1278.....	15
<i>McCleary v. State</i> , 173 Wn.2d 477, 269 P.3d 227 (2012).....	9
<i>Ockletree v. Franciscan Health Sys.</i> , 179 Wn.2d 769, 317 P.3d 1009 (2014).....	13
<i>Ralph v. City of Wenatchee</i> , 34 Wn.2d 638, 209 P.2d 270 (1949).....	12, 13
<i>Sch. Dists.' Alliance for Adequate Funding of Special Educ. V. State</i> , 170 Wn.2d 599, 244 P.3d 1 (2010).....	4
<i>Schroeder v. Weighall</i> , 179 Wn.2d 566, 316 P.3d 482 (2014).....	14
<i>Seattle v. Dencker</i> , 58 Wash. 501, 108 Pac. 1086 (1910).....	13
<i>State ex rel. Humiston v. Meyers</i> , 61 Wn.2d 772, 380 P.2d 735 (1963).....	18
<i>State v. Bassett</i> , 192 Wn.2d 67, 428 P.3d 343 (2018).....	4
<i>State v. Clark</i> , 76 Wn. App. 150, 883 P.2d 333 (1994).....	15
<i>State v. Coria</i> , 120 Wn.2d 156, 839 P.2d 890 (1992).....	16

<i>State v. Evergreen Freedom Found.</i> , 192 Wn.2d 782, 432 P.3d 805 (2019).....	4
<i>State v. Grayson</i> , 154 Wn.2d 333, 111 P.3d 1183 (2005).....	18
<i>Wash. Educ. Ass’n v. Dep’t of Ret. Sys.</i> , 181 Wn.2d 233, 332 P.3d 439 (2014).....	5
<i>Wyman v. Wallace</i> , 94 Wn.2d 99, 615 P.2d 452 (1980).....	18

**STATUTES**

Fair Labor Standards Act (FLSA).....	passim
Industrial Safety and Health Act.....	6
RCW 49.17.041(2).....	6
RCW 49.46.130 .....	16, 17
RCW 49.46.130(1).....	5, 6
RCW 49.46.130(2)(g) .....	passim
RCW 82.04.2902(1) and (2) .....	21

**OTHER AUTHORITIES**

Const. art. I, § 12.....	passim
Const. art. II, §1(e).....	10
Const. art. II, § 26 .....	10
Const. art. II, § 29 .....	10
Const. art. II, § 35 .....	passim
Const. art. II, § 39 .....	10
Const. art. II, § 43(4).....	10

Const. art. IV, § 21 .....	10
Juan F. Perea, <i>The Echoes of Slavery: Recognizing the Racist Origin of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act</i> , 72 Ohio State L.J. 95, 114-17 (2011).....	16
Marc Linder, <i>Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States</i> 128-32 (1992) .....	16
Michael H. LeRoy & Wallace Hendricks, Should “Agricultural Laborers” Continue to Be Excluded from the National Labor Relations Act?, 48 EMORY L.J. 489, 490-91 (1999).....	19
WAC 314-23-025.....	13

## I. INTRODUCTION

Plaintiffs' Response and Reply Brief plainly reveals Plaintiffs' actual argument in this case to be as follows: Farming is hard, dirty work. As has been the case for many decades, farming can also be dangerous work. As from time immemorial, those who farm may be poor. Since the Washington legislature passed the Minimum Wage Act 62 years ago, the demographics of farm labor have changed—much of the farm work performed by white workers in 1957 is now performed by Latinx. Because of those changed demographics, the statute's agricultural overtime exclusion now impacts a work force that is 73% Latinx.<sup>1</sup> The people of Washington have not acted to change the statute's agricultural exclusion in the past 20 years, legislatively or by initiative. Consequently, the Court should make that economic policy change, and grant farmworkers overtime pay.

Because constitutional separation of powers and this Court's precedent clearly prohibit judicial legislation, Plaintiffs attempt to disguise their case with two other arguments. First, to make a privileges or immunities claim, they argue that the "right" at issue is "safety protection" for workers in "dangerous industries," rather than the overtime pay actually at issue. Second, to prop-up their equal protection argument, they

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<sup>1</sup> Strom Dec., ¶ 48, CP 821 (citing 2016 Census Bureau data).

attempt to prejudice the Court’s legal analysis with a claim of legislative racial discrimination. Neither argument has merit. This case is plainly about overtime pay, not worker safety, and in any event article II, § 35 does not create any judicially-enforceable positive constitutional right. Nor is there any dispute that Washington’s legislature was not racially motivated to exclude agriculture from overtime pay. But Plaintiffs’ argument regarding the origin or purpose of the FLSA’s exemption is certainly not undisputed (or subject to judicial notice), but that disputed fact is immaterial to the issues before the Court. This case is about Washington’s statute, not the FLSA.<sup>2</sup>

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<sup>2</sup> Plaintiffs’ Introduction warrants two other comments. First, in the Introduction (and throughout their briefing), Plaintiffs inconsistently invoke the status of whatever different class might serve their argument at the moment: “farmworkers” generally, “dairy employees” specifically, “workers in dangerous employments,” or even “Latinx.” To be clear, the plaintiff class in this case is limited to “individuals who worked as milkers for DeRuyter Brothers Dairy, Inc., between December 8, 2013 and May 25, 2017.” CP 70, ¶ 2. Those class members were paid “a flat day rate,” between \$95 and \$115 per day, “well above the [minimum wage] of \$9.47.” CP 848. No class member class was compelled to enter into a contractual relationship with DeRuyter. Membership in the class of “milkers”--or even “farmworkers” or persons in “dangerous jobs” more generally--is not compelled, and employment is not an immutable trait, or a status into which class members are locked by accident of birth. Indeed, in 2016, only 12% of the State’s Latintx population was engaged in “Farming, Fishing and Forestry Occupations.” Strom Dec., ¶ 48, CP 821 (citing 2016 Census Bureau data).

Second, Plaintiffs’ Introduction attempts to prejudice the Court’s view of the case by referencing a settlement of other unrelated claims in the case and falsely suggesting that the DeRuyters were not “innocent” in

RCW 49.46.130(2)(g) does not implicate a fundamental right of state citizenship, or benefit one class of workers at the expense of another. Consequently, it does not implicate a privilege or immunity under article I, § 12. Nor does the exclusion target a suspect or semi-suspect class, or implicate a constitutionally important right. Therefore, it is subject to deferential, rational basis review, like any other exercise of legislative discretion regulating economic matters. Because the Washington legislature clearly had a rational basis for treating agriculture differently from other employment with respect to overtime pay, Plaintiffs' equal protection claim must also be denied. While it may be that the people of Washington should reconsider its overtime statute, any such economic policy change should be made legislatively,<sup>3</sup> not judicially. The Court should reverse the trial court's order granting partial summary judgment, and direct summary judgment against Plaintiffs' Amended Complaint.

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following RCW 49.46.130(2)(g) according to its terms, its 60 years of history, and published guidance from the Washington Department of Labor. Plaintiffs offer no evidence to support their misleading insinuation that DeRuyter's settlement of those disputed claims was made with any admission of fault or liability, and those claims have nothing to do with DeRuyter's indisputably innocent reliance on the agricultural exclusion in any event.

<sup>3</sup> As Plaintiffs note, California has addressed the agricultural exemption legislatively, and federal legislation is also pending. Response and Reply, p. 19, n. 11. Thus, legislative change is clearly possible.

## II. ARGUMENT

1. This Court reviews the trial court’s order de novo; RCW 49.46.130(2)(g) is presumed constitutional, and Plaintiffs must persuade the Court that it is unconstitutional beyond a reasonable doubt.

“Statutes are presumed to be constitutional, and the burden to show unconstitutionality is on the challenger.” *Fields v. Dep’t of Early Learning*, 193 Wn.2d 36, 41, 434 P.3d 999 (2019). “The challenger can meet this burden only ‘if argument and research show that there is no reasonable doubt that the statute violates the constitution.’ “ *Id.* “The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. ... Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution.” *Sch. Dists.’ Alliance for Adequate Funding of Special Educ. V. State*, 170 Wn.2d 599, 605-06, 244 P.3d 1 (2010).<sup>4</sup>

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<sup>4</sup> Plaintiffs’ Response and Reply wrongly insinuates a recent relaxation or disregard of this standard, citing Justice Stephens’ concurrence in *Sch. Dists.’ Alliance*. *Id.* at n. 2, p. 3. The majority opinion in that case expressly confirmed continued application of the standard, 170 Wn.2d at 605-06, and the continued viability of the standard has been repeatedly confirmed in this Court’s decisions since *Sch. Dists.’ Alliance*--including seven different cases in just the last five years. *See State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 796, 432 P.3d 805 (2019); *State v. Bassett*, 192 Wn.2d 67, 77, 428 P.3d 343 (2018); *In re Detention of Herrick*, 190 Wn.2d 236, 241, 412 P.3d 293 (2018); *Lee v. State*, 185 Wn.2d 608, 619, 374 P.3d 157 (2016)(rule applies to statutes enacted

2. This case is about the statutory entitlement to overtime pay, and the statutory exclusion of agriculture from that entitlement should be held valid as such.

This case is not about “protection of workers in dangerous jobs.” A person who works 50 hours in a week and receives overtime pay is no safer or healthier than a person who works 50 hours in a week and does not receive overtime pay. The Court’s decision in this case, either way, will not make a 50 hour work week any more or less safe. This case is about entitlement to overtime pay. Plaintiffs’ attempt to tie RCW 49.46.130(1) to “protection for workers in dangerous jobs” is similarly spurious. Plaintiffs argue that “when [the legislature] chose to provide protection for some workers in dangerous jobs, it was required to do so equally for all.” Response and Reply, p. 21. But the overtime requirement of RCW 49.46.130(1) applies without regard to whether a job is dangerous, and the exemptions from the requirement are equally unrelated to “danger” in a particular job. The legislature did not enact RCW 49.46.130(1) to provide protection for some workers in dangerous jobs.

If this case were really about “worker health and safety,” or even “protection of workers in dangerous jobs,” Plaintiffs might have

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through initiative process); *In re Welfare of A.W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015); *In re Pers. Restraint of McNeil*, 181 Wn.2d 582, 590, 334 P.3d 548 (2014); *Wash. Educ. Ass’n v. Dep’t of Ret. Sys.*, 181 Wn.2d 233, 241, 332 P.3d 439 (2014).

challenged the legislature's failure to prohibit more than 40 hours of work in a week altogether,<sup>5</sup> or its failure to pass a more protective Industrial Safety and Health Act, or its recent decision to prescribe different safety laws for agriculture than other industries. *See* RCW 49.17.041(2).

Plaintiffs did not, because this case is about overtime pay, not a safer workplace. Because Plaintiffs admit that there is no fundamental right to overtime pay,<sup>6</sup> the Court should reverse the trial court's partial summary judgment, and return the case with a mandate to enter judgment against Plaintiffs' Amended Complaint.

3. There is no fundamental right to legislative protection of workers in dangerous employments.

Plaintiffs argue that article II, § 35 “contains a fundamental right of state citizenship,” because its “express protection for all workers in dangerous jobs” “provides an affirmative protection to a particular group.” Response and Reply, p. 6. Thus, by this logically curious argument, the Court should recognize a fundamental positive right to protective health and safety legislation that is subject to the constitutional prohibition of privileges or immunities, but limit that “affirmative” fundamental right to certain, special occupations, *i.e.*, – take a desk job, you are on your own.

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<sup>5</sup> Indeed, Plaintiffs' Response and Reply even discusses statutory “restrictions on hours” as health and safety protections, ignoring the fact that RCW 49.46.130(1) simply does not restrict hours worked. *Id.* at 11.

<sup>6</sup> Response and Reply, p. 6.

At least two practical applications of the argument demonstrate its absurdity, as discussed below: First, it would require the courts (not the legislature) to determine what jobs are “dangerous” without any standards or guidance to do so; and second, it then requires application of that definition (whatever it might be) to legislation that merely “impacts” worker health and safety in such jobs, even indirectly. This result is not a reasonable interpretation of the constitution.

As noted, Plaintiffs’ argument would require the courts to determine, on an ad hoc basis, which occupations are (or are not) entitled to invoke this special, “affirmative” legislative duty. According to Plaintiffs, this new-found fundamental positive right may be invoked by any person who can “show that they work in a dangerous industry, and once that has been established, their right to be protected by health and safety laws, . . . is implicated.” Response and Reply, p. 12. But Plaintiffs’ argument begs a critical question: How will the courts determine whether a specific occupation is included or excluded from this new special class? What metrics will the courts apply? Police work and firefighting seem obvious candidates for inclusion as dangerous occupations, but what about the thousands of other jobs in Washington’s economy? DeRuyter respectfully submits that the questions ignored by Plaintiffs’ argument in

this regard are myriad and singularly inappropriate for judicial resolution, indicating the invalidity of the argument on its face.

As several examples, one must wonder whether the courts should look solely to L&I injury rates to determine what occupations are “dangerous,” or whether other measures also trigger the right. Does article II, § 35 only apply to traumatic injury rates, or would an increased risk of repetitive stress injury (such as carpal tunnel syndrome) also count? Does the constitutional direction for protective legislation of “dangerous employments” only address the rate of injury in a given occupation, or does it address only the severity of potential injuries? Does it apply to some mathematical combination of frequency and severity, such that occupations with a very low risk of a very bad injury (*e.g.*, skydiving) are on the same constitutional footing—in or out--as jobs with a high rate of mild injuries (like papercuts)? More broadly, is the constitution’s “special protection” limited to jobs with an increased rate of physical injury (traumatic or otherwise), or are jobs with an increased incidence of illness also subject to special constitutional protection? Will child day-care employees and grade-school teachers be included in the class of workers entitled to special legislative protection, because they have an increased exposure to colds and flus? Are jobs prone to a higher rate of mental illness “dangerous”? What about jobs with an increased susceptibility to

collateral health risks, such as chefs and obesity, lawyers and stress, or rock stars and drug addiction? Finally, will entitlement to this “fundamental right” of special legislative protection ebb and flow over time as the risk of a given job may wax or wane? Can people in jobs that were once thought “safe,” like teaching or attending school, now claim the benefit of this special constitutional right? Or is the constitutional “right” to legislative protection temporally static? Plaintiffs’ argument that people in dangerous jobs have a “special” constitutional right is wildly creative, but obviously ill-conceived in attempted application.

Second, according to Plaintiffs’ argument, the Court cannot limit its application of heightened constitutional scrutiny for people in “dangerous jobs” solely to legislation that directly addresses “health and safety” measures. Instead (as Plaintiffs must argue in this case because they admit there is no direct causal relationship between receipt of overtime pay and reduced injury rates), Plaintiffs’ proposed new fundamental right will exist, and a constitutional “privilege” may be alleged, even if a statutory classification merely “implicates” worker health or safety for people in “dangerous jobs.” The problems of identifying “dangerous jobs” discussed above will be multiplied many times over, because Plaintiffs’ special right to protective legislation can be asserted even in the absence of any direct causal connection between the

law and worker safety, and even if the alleged “implication” of the law on worker health or safety is purely and admittedly remote and indirect,<sup>7</sup> say, by the secondary impact of a financial disincentive to certain employment practices. Fair, consistent judicial administration of Plaintiffs’ newly proposed rule seems unlikely, to say the least.

Plaintiffs’ attempt to place the individual positive right purportedly guaranteed by article II, § 35, with the constitution’s educational guarantees is similarly absurd. Article IX, § 1 provides: “It is the paramount duty of the state to make ample provision for the education of all children . . . .” This is the language that reflects the status of education as a fundamental positive right. See *Darrin v. Gould*, 85 Wn.2d 859, 870, 540 P.2d 882 (1975); accord *McCleary v. State*, 173 Wn.2d 477, 269 P.3d 227 (2012) (citing *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 512, 585 P.2d 71 (1978) (“because the constitution describes the State’s duty as ‘paramount,’ the corresponding right is likewise elevated to a paramount status”).<sup>8</sup> Article II, § 35, by contrast, merely instructs the legislature to “pass necessary laws” for the protection of persons working in dangerous jobs, and to “fix pains and penalties for the enforcement of the same.” As

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<sup>7</sup> *Id.*, pp. 10, 12.

<sup>8</sup> The *McCleary* decision also notes that article IX, § 1 imposes the duty to amply fund education on the “State,” comprising all three branches of government, as well as state subdivisions. By contrast, article II, § 35, merely addresses the legislature.

previously noted, this language is not self-executing—it depends entirely on legislative discretion. Respondents’ Opening Brief, pp. 31-33. Rights granted at the discretion of the legislature are not “privileges.” *Ass’n of Washington Spirits*, 182 Wn.2d at 362. Plaintiffs’ Response and Reply simply misses the point of this fact, and deliberately ignores the controlling precedent that teaches it.

Finally, Plaintiffs have never addressed the fact that their “specific mandate/positive right” argument, if followed to its logical end, would compel the absurd conclusion that the constitution creates fundamental rights in voter information pamphlets,<sup>9</sup> the manner in which suits may be brought against the state,<sup>10</sup> convict labor,<sup>11</sup> laws prohibiting the free transportation of public officers,<sup>12</sup> legislative redistricting,<sup>13</sup> and the speedy publication of supreme court opinions<sup>14</sup>--because the Constitution

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<sup>9</sup> Const. art. II, § 1(e) (“the legislature shall provide methods of publicity of all laws”).

<sup>10</sup> Const. art. II, § 26 (“[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state”).

<sup>11</sup> Const. art. II, § 29 (“the legislature shall by law provide for the working of inmates”).

<sup>12</sup> Const. art. II, § 39 (“the legislature shall pass laws to enforce” the prohibition against free transportation of public officers).

<sup>13</sup> Const. art. II, § 43(4) (“the legislature shall enact laws providing for the implementation of this section”).

<sup>14</sup> Const. art. IV, § 21 (“[t]he legislature shall provide for the speedy publication of opinions of the supreme court”).

also “specifically mandates” the legislature to pass laws to ensure those objectives.

In short, the mere fact that the constitution directs the legislature to pass a law does not mean that the potential beneficiaries of such a law have a fundamental right in the purpose of the legislation. There is no legal or logical support for Plaintiffs’ argument that article II, § 35 “contains” a fundamental right of state citizenship simply because it directs the legislature to pass certain laws, vesting discretion in the legislature to provide for the enforcement of the same. Consequently, Plaintiffs’ privileges or immunities challenge to RCW 49.46.130(2)(g) must be rejected.

4. Washington case law consistently requires proof of a discriminatory “benefit and burden” effect when applying article I, § 12 to economic regulation; the statutory exemption of agriculture from entitlement to overtime pay does not satisfy that element.

Plaintiffs criticize DeRuyter for “incorrectly” suggesting that Washington applies a three-part test to privileges and immunities claims, Response and Reply, p. 2 n. 1, although DeRuyter’s Opening Brief clearly states: “The Court applies a two-step process to claims that a statute violates Washington’s privileges or immunities clause.” DeRuyter’s Opening Brief, at 16. Apparently, Plaintiffs’ confusion stems from DeRuyter’s observation that in cases involving economic regulation, the

first step of the Court’s analysis depends on whether the statute “unfairly discriminates against a class of businesses to the benefit of a class of the same business, regarding a ‘fundamental right’ of state citizenship.” *Id.* at 16 (quoting *Ass’n of Washington Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 340 P.3d 849 (2015)). DeRuyter made that point, and addressed the absence of the requisite discriminatory “burden/benefit” showing in this case, because this Court’s decisions have consistently required statutory challenges to prove a benefit/burden impact in cases involving economic regulation, such as this one.

“A ‘privilege’ is an exception from a regulatory law that benefits certain businesses at the expense of others.” *Ass’n of Washington Spirits*, 182 Wn.2d at 360 (emphasis supplied).<sup>15</sup> The *Washington Spirits* Court explained this requirement by discussing *Ralph v. City of Wenatchee*, 34 Wn.2d 638, 641, 209 P.2d 270 (1949), noting that “*Ralph* involved an action to enjoin the enforcement of a municipal ordinance that purposefully distinguished between resident and itinerant photographers,” which “unreasonably discriminated against itinerant photographers by requiring licensing fees when resident photographers were not subject to

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<sup>15</sup> Citing *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008) (citing Jonathan Thompson, *The Washington Constitution’s Prohibition on Special Privileges and Immunities: Real Bite for “Equal Protection” Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1268 (1996))

licensing fees.” Consequently, the ordinance “unfairly discriminated against a class of businesses to the benefit of another class of the same business, depriving affected class members of the common right to engage in trade. Noting that the right to sell liquor was not a fundamental right, the *Washington Spirits* Court rejected the plaintiff’s argument that the ordinance burdened a fundamental right to do business: “Unlike the statute at issue in *Ralph*, ... WAC 314-23-025 does not unfairly discriminate against a class of businesses to the benefit of another class of the same businesses.” *Id.*<sup>16</sup> The lead opinion in *Ockletree v. Franciscan Health Sys.* also emphasized this element:

Here, Ockletree fails to establish how RCW 49.60.040(11) confers a benefit to religious nonprofits at the expense of other organizations that are subject to WLAD. While Ockletree asserts that religious nonprofits are not subject to “liability for damages under WLAD or the costs attendant on statutory compliance,” he fails to show how secular employers who are subject to the antidiscrimination law bear any greater expense or costs because religious

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<sup>16</sup> See also *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008) (“a ‘privilege’ normally relates to an exemption from a regulatory law that has the effect of benefiting certain businesses at the expense of others”); *Ex parte Camp*, 38 Wash. 393, 80 Pac. 547 (1905) (ordinance requiring a license for the peddling of fruits, vegetables, etc., but exempting farmers disposing of produce grown by themselves, was unconstitutional because it permitted growers of fruits and vegetables to sell while prohibiting others from doing the same thing); *Seattle v. Dencker*, 58 Wash. 501, 108 Pac. 1086 (1910) (invalidating city ordinance that imposed a license tax on the sale of goods by automatic devices but discriminated between different merchants selling the same class of goods).

nonprofits are exempt, and we find no basis to support that argument. Pl.’s Opening Br. at 28. Thus, the exemption does not offend the anticompetitive concerns underlying article I, section 12. 179 Wn.2d 769, 781-82, 317 P.3d 1009 (2014)(emphasis supplied).<sup>17</sup>

The benefit/burden rule this Court has consistently applied to economic regulation applies in this case and compels rejection of Plaintiffs’ new-found argument that RCW 49.46.130(2)(g) unconstitutionally impairs a farmworker’s right to “work and earn a wage.”<sup>18</sup> While plaintiffs argue that the agricultural exemption implicates a supposed “right to work subject to the same conditions afforded other wage earners engaged in the business of selling their labor,” Response and Reply p. 15, they did not, do not, and cannot suggest that the overtime exemption benefits one class of agricultural workers (or employers) to the detriment of another group in

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<sup>17</sup> Plaintiffs’ Response and Reply completely ignores this well-established precedent. Instead, at n. 1, p. 2, Plaintiffs cite *Schroeder v. Weighall*, 179 Wn.2d 566, 572-74, 316 P.3d 482 (2014), and a dissenting opinion in *Anderson v. King County*, 158 Wn.2d 1, 124-25, 138 P.3d 963 (2006), to suggest that the Court’s privileges and immunities analysis does not require “discrimination between two classes of businesses.” But neither *Schroeder* nor *Anderson* involved economic regulation: *Schroeder* concerned a statute of limitations for minors in medical malpractice cases, and *Anderson* involved the Defense of Marriage Act, which prohibited same-sex marriages.

<sup>18</sup> No case has recognized any such fundamental right. While Washington has recognized a fundamental right “to hold specific private employment free from unreasonable governmental interference,” *Duranceau v. City of Tacoma*, 27 Wn. App. 777, 780, 620 P.2d 533 (1980) (emphasis original), the overtime exemption of RCW 49.46.130(2)(g) does not interfere with the ability to hold agricultural employment in any way.

the same class. Consequently, even if the Court were to assume the existence of a fundamental right “to work and earn a wage,” RCW 49.46.130(2)(g) does not grant a privilege under art. I § 12. For the same reason, it does not grant an unconstitutional privilege regarding the fundamental right to “do business” more generally.

5. The agricultural exclusion does not violate the equal protection provisions of article I, § 12.

For reasons previously addressed by DeRuyter and the Intervenor defendants, the agricultural overtime exemption triggers neither strict nor intermediate scrutiny. Because the statute readily passes deferential, rational basis review, Plaintiffs go to great lengths to avoid that standard. For reasons discussed above, however, Plaintiffs’ reliance on the alleged history of the FLSA is irrelevant in this case. Plaintiffs’ thinly-veiled attempt to argue a “disparate impact” case is equally unavailing. Plaintiffs’ argument that the overtime exemption now impacts a Latinx population to a greater extent than it did in the past is simply irrelevant, because statistical evidence of disparate impact, without direct evidence of purposeful discrimination or intent, does not trigger strict scrutiny. *Macias v. Dep’t of Labor & Indust.*, 100 Wn.2d 263, 270, 668 P.2d 1278 (1983); *see also State v. Clark*, 76 Wn. App. 150, 156, 883 P.2d 333 (1994) (“a statistical showing of disparate impact on minorities, without more, fails to

establish an equal protection violation.”). “It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim.” *State v. Coria*, 120 Wn.2d 156, 175, 839 P.2d 890 (1992) (quoting *United States v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990)).

6. The alleged “racist history” of the agricultural exemption from entitlement to overtime pay is irrelevant to the issues before the Court; otherwise, the record evidence either compels summary judgment against Plaintiffs’ Complaint, or requires reversal of the trial court’s partial summary judgment order.

Plaintiffs’ Amended Complaint alleged that “[a]gricultural work was performed predominantly by Black workers when Congress enacted the FLSA and by Latino workers at the time the Washington Legislature enacted RCW 49.46.130.”<sup>19</sup> On the foundation of these alleged “facts,” Plaintiffs claimed that RCW 49.46.130(2)(g) is “rooted in racial animus” against those groups. When the time came to support that allegation by admissible evidence, however, Plaintiffs proffered only two hearsay sources--excerpts from a single book and a single law review article.<sup>20</sup>

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<sup>19</sup> Amended Complaint, ¶ 102, CP 40.

<sup>20</sup> Plaintiffs’ Motion for Summary Judgment cited only Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* 128-32, 174 (1992), and 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, 114-17 (2011). CP 104, 105. Thus, Plaintiffs’ recent argument (Response and Reply p. 27) that Dr. Strom did not “engage with the robust collection of works cited by” Plaintiffs is disingenuous, at best – there was no such “robust collection” with which

In response, DeRuyter objected to Plaintiffs' hearsay (CP 750), and filed the sworn Declaration of Dr. Claire Strom, an internationally acclaimed expert on U.S. agricultural history.<sup>21</sup> Professor Strom cited actual U.S. Census data that unequivocally disproves Plaintiffs' allegation: agricultural work was not performed predominantly by Black workers at the time the FLSA was enacted,<sup>22</sup> and agricultural work was not performed predominantly by Latinx workers at the time the Washington Legislature enacted the Minimum Wage Act or RCW 49.46.130.<sup>23</sup> Professor Strom's extensively sourced 26 page Declaration details the actual origins of and the legislature's reasons for the agricultural exclusion.

Plaintiffs did not challenge Dr. Strom's qualifications as an expert witness, or submit any opposing declaration evidence to dispute the facts and opinions set forth in her Declaration. Instead, Plaintiffs' Reply Brief made a new argument--that the Court could take judicial notice of supposed "legislative facts" allegedly established by "historical

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to engage, and Dr. Strom engaged directly with the allegations of Plaintiffs' Amended Complaint, which she directly and indisputably rebutted.

<sup>21</sup> CP 796-822,

<sup>22</sup> CP 798, ¶ 6.

<sup>23</sup> CP 815, ¶¶ 41-42.

scholarship.”<sup>24</sup> Plaintiffs’ Reply and Response to this Court doubles-down on that argument.<sup>25</sup> The book excerpts and articles Plaintiffs cite, however, are not the type of *evidence* that is subject to judicial notice. “Judicial notice, of which courts may take cognizance, is composed of facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. The court may ‘. . . resort to encyclopedias, authoritative works upon the subject, reports of committees, scientific bodies, and any source of information that is generally considered accurate and reliable . . . .’” *State ex rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963) (quoting *Ritholz v. Johnson*, 244 Wis. 494, 502, 12 N. W. (2d) 738, 741 (1944) (emphasis supplied)). Legislative facts are social, economic, and scientific realities or facts that enable the court to interpret the law; established truths, facts or pronouncements that do not change from case to case. *Wyman v. Wallace*, 94 Wn.2d 99, 102, 615 P.2d 452 (1980); *State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005). The articles and excerpts on which Plaintiffs rely make an argument—they cite certain excerpts from the legislative history to assert a position--but they do not set forth indisputable facts. The Court should note that Plaintiffs submitted

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<sup>24</sup> Plaintiffs’ Reply Memorandum in Support of Motion for Summary Judgment, CP 1036.

<sup>25</sup> *Id.*, pp. 22-23.

*no* evidence to support their conclusory assertion that the supposed “weight” of authority supports their position, let alone any evidence that the view is universally considered true.<sup>26</sup>

Thus, if Plaintiffs’ allegation of “racial animus” were actually a fact that is material to Plaintiffs’ claims, summary judgment must be granted against Plaintiffs’ Amended Complaint (or, at the very most, denied in light of the obvious dispute on the issue). In truth, however, Plaintiffs’ reliance on the alleged “history of the FLSA” is clearly misplaced, because whatever the origin of the federal exclusion, there is no dispute that Washington’s legislature was not motivated by racial animus when it passed the MWA. Plaintiffs do not even *attempt* that argument, let alone offer evidence to prove it--indeed, they do not even contend that the Washington Legislature was aware of the allegedly racist underpinnings of the FLSA exclusion. Response and Reply, p. 29. Dr. Strom’s Declaration details the reasons for the Washington legislature’s economic policy choice. Laid bare, Plaintiffs’ argument is a transparent attempt to color the Court’s analysis of the law and prompt it to interfere

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<sup>26</sup> Indeed, at least two scholars have concluded that the agricultural exclusion was an "anomaly," "not the product of a deliberate policy." See Michael H. LeRoy & Wallace Hendricks, Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?, 48 EMORY L.J. 489, 490-91 (1999). And of course, Plaintiffs ignore entirely the indisputable fact that the vast majority of agricultural labor at the passage of the FLSA was white.

with the Washington legislature’s economic regulation because a different legislative body passed a different law, at a different time, through alleged prejudice against a different group of persons. The fact that the MWA was largely based on the FLSA, however, does not “taint” the MWA – neither its purpose nor effect were discriminatory, and this Court should not entertain any such argument in addressing Plaintiffs’ claims.

7. The issue of prospective application is squarely before the Court, and the Court should exercise its inherent authority to order that any holding adverse to RCW 49.46.130(2)(g) shall have only prospective effect.

Plaintiffs’ argument that the DeRuyters’ request for prospective application is not properly before the Court is incorrect. “Where changes in the law cannot be made without undue hardship, [the Court has] discretion to apply a new rule of law purely prospectively.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). “By its very nature, the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law.” *Id.* at 279 (emphasis supplied); *accord Jackowski v. Borchelt*, 174 Wn.2d 720, 731, 278 P.3d 1100 (2012). Indeed, the Court has even raised the issue *sua sponte*. *C.f. Taskett v. King Broadcasting Co.*, 86Wn.2d 439, 546 P.2d 81 (1976). In any event, the Court can certainly decide the issue when a request for prospective application *has* been raised and briefed by the

parties. The Court's discretion is properly exercised when, as in this case, retrospective application will unfairly penalize parties who justifiably entered into contractual relations in reliance on longstanding statutory authority and administrative guidance. *In re Marriage of Anderson*, 134 Wn.App. 506, 512, 141 P.3d 80 (2006) (citing *Bond v. Burrows*, 103 Wn.2d 153, 163-64, 690 P.2d 1168 (1984) (court's holding that RCW 82.04.2902(1) and (2) are unconstitutional would be given only prospective application)).

### III. CONCLUSION

There is no fundamental positive right to overtime pay as required of a privileges or immunities challenge, and RCW 49.46.130(2)(g) satisfies the rational basis test for equal protection analysis. Nor is there any fundamental or constitutionally important right to legislative protection for workers in dangerous jobs, and the exemption of agriculture from overtime pay does not benefit one class of workers at the expense of another. Plaintiffs' allegation that the exemption has an increased statistical impact on Latinx workers is irrelevant, given that the statutory exemption was not racially motivated. Plaintiffs' constitutional challenge to the statute must be rejected, and the Court should remand for entry of judgment in favor of DeRuyter and Intervenors. Otherwise, the Court

should make clear that any other result will have only purely prospective application.

RESPECTFULLY SUBMITTED this 15th day of July, 2019.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury and in accordance with the laws of the State of Washington that on July 15, 2019, I caused a true and correct copy of the foregoing to be served on the following persons by electronic mail:

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**July 15, 2019 - 4:33 PM**

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**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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