

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
10/7/2019 4:36 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 AND INTERVENOR'S  
ANSWER TO AMICUS CURIAE BRIEF OF THE AMERICAN  
CIVIL LIBERTIES UNION OF WASHINGTON**

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## I. INTRODUCTION

For the past decade and a half, this Court has consistently held that equal protection claims brought under article I, section 12 are analyzed under the equal protection standards first enunciated by the federal courts. Without addressing these prior cases, the American Civil Liberties Union of Washington (the ACLU) asks this Court to overturn this well-established precedent and hold that article I, section 12 is more protective than the federal equal protection clause *and* that disparate impact alone is enough to trigger heightened scrutiny.

The Court should reject the ACLU's requests for three reasons: First, the ACLU raises a novel argument that was not briefed by any party. This Court has consistently declined to address arguments raised solely by an amicus. It certainly should not abandon that rule in this case, where amicus is asking the Court to embark on a dramatically new course. Second, the ACLU does not even attempt to demonstrate that the Court's prior cases were incorrectly decided. It therefore does not meet its burden to overcome *stare decisis*. Finally, allowing disparate impact alone to trigger "heightened scrutiny" would have far-reaching consequences affecting even the most routine economic legislation, and would require the Court to impermissibly take on the legislature's role in balancing social policies and priorities. For each of these reasons, the Court should

reject the ACLU's invitation to radically alter Washington's article I, section 12 equal protection analysis.

## II. ARGUMENT

### A. The Court Should Not Address Arguments Raised Only by Amicus.

Amicus ACLU urges the Court to hold that disparate impact alone is sufficient to trigger heightened scrutiny under article I, section 12 of the Washington Constitution. *None* of the parties to this action raised that argument. This Court does not address arguments raised only by amici. This principle is especially important where, as here, the ACLU asks the Court to overrule well-established precedent.

It is well established that this Court does not “consider issues raised first and only by amicus.” *Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 827, 854 P.2d 1072 (1993) (declining to address amicus’ claimed violation of the Federal Fair Housing Act); *see also, e.g., Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984) (declining to address amici’s assertion that a trial court should review records in camera whenever a party invokes immunity from discovery for certain health care records, explaining “[t]his argument is raised only by amici, therefore we do not consider it”); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (declining to address constitutional issues raised by amicus and not presented to the trial court, stating “[i]t is further well

established that appellate courts will not enter into the discussion of points raised only by amici curiae”). This rule accords with the general principle that “the case must be made by the parties litigant, and its course and the issues involved cannot be changed or added to by “friends of the court.”” *Long*, 60 Wn.2d at 154 (quoting *Lorentzen v. Deere Mfg. Co.*, 66 N.W.2d 499, 503 (Iowa 1954)); see also *City of Lakewood v. Koenig*, 160 Wn. App. 883, 886 n.2, 250 P.3d 113 (2011) (declining to address arguments raised only by amici, explaining “[t]he case must be made by the parties and its course and issues involved cannot be changed or added to by friends of the court”).

The Court adheres to this rule even when an amicus raises Constitutional arguments, including where an amicus argues that the state Constitution provides greater protections than the federal constitution. For example, in *State v. Clarke*, the Court declined to consider amicus’ argument that “Washington Constitution article I, section 21 provides greater protection of a defendant’s right to a jury trial than does the federal constitution” because the petitioner “did not brief the issue, and this court does not consider arguments raised first and only by an amicus.” 156 Wn.2d 880, 894, 134 P.3d 188 (2006). See also, e.g., *State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010) (declining to address amicus’ argument that former RCW 9A.44.093(1)(b) violated respondent’s right to

privacy under Washington Constitution article I, section 7, explaining “[w]e need not address issues raised only by amici and decline to do so here”); *Rabon v. City of Seattle*, 135 Wn.2d 278, 291 n.4, 957 P.2d 621 (1998) (declining to address amicus’ argument that “nonuniform dog laws are violative of the fundamental right to travel,” explaining “[t]his is an issue raised only by amicus and we will not consider it”); *Am. Home Assurance Co. v. Cohen*, 124 Wn.2d 865, 878, 881 P.2d 1001 (1994) (declining to address amici’s argument that the insurance contract unconstitutionally discriminated against women, explaining “[o]rdinarily appellate courts will not consider an issue that has been raised only by amici, and we decline to consider the issue on that basis” (footnote omitted)). This principle is particularly appropriate when (as in this case) the parties and the trial court have not had an opportunity to fully develop the record on a novel constitutional claim, which, if adopted, would have ground-breaking implications for our State’s equal protection jurisprudence. *Cf. State v. Gonzalez*, 110 Wn.2d 738, 752 n.2, 757 P.2d 925 (1988) (declining to address amici’s argument “that the due process clauses of the state and federal constitutions support their position” where there was inadequate briefing); *Woo v. Fireman’s Fund Ins. Co.*, 161 Wn.2d 43, 66 n.10, 164 P.3d 454 (2007) (“We decline to reach the broad issue urged by [amicus] because we have limited briefing on it and need

not reach it to resolve the specific case before us. Moreover, because the issue was raised only by amicus curiae, we need not consider it.”).

In short, important policy underscores the Court’s long-standing refusal to entertain amicus’ invitations to adopt novel and dramatic changes to established constitutional precedent without the benefit of a record fully developed by the parties to a case. As it did in all of the foregoing cases, this Court should decline to address amicus’ novel modification of article I, section 12 precedent.<sup>1</sup>

**B. The ACLU Has Not Met Its Burden to Justify this Court Overturning Its Prior Decisions Interpreting Article I, Section 12 Equal Protection To Be Coextensive with Federal Equal Protection.**

Adherence to the general rule that the Court will not address an argument raised only by an amicus is particularly appropriate in this case, when amicus’ argument would require the Court to overturn its established

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<sup>1</sup> As the cited cases demonstrate, this Court generally declines to address arguments raised only by amici. Respondents recognize, however, that the Court may depart from this rule “if the parties ignore a constitutional mandate, a statutory commandment, or an established precedent” or if the issue is “necessary for decision.” *City of Seattle v. McCreedy*, 123 Wn.2d 260, 269, 868 P.2d 134 (1994). None of these considerations are met in this case. The parties addressed equal protection under the established article I, section 12 framework. Overturning this Court’s precedent and drastically changing the Court’s article I, section 12 analysis is not justified under the principles of stare decisis, nor is it necessary to the resolution of this case. If the Court is going to consider such a radical change of direction, it should do so in a case in which the issue is properly developed in the record and fully briefed by the parties.

framework for addressing article I, section 12. The principle of stare decisis has been “developed by courts to accomplish the requisite element of stability in court-made law.” *In re Determination of the Rights to the Use of the Waters of Stranger Creek & Its Tributaries in Stevens Cty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) [hereinafter *In re Waters of Stranger Creek*]. Stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Keene v. Edie*, 131 Wn.2d 822, 831, 935 P.2d 588 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)).

As this Court recently explained,

When a party asks this court to reject its prior decision, it “is an invitation we do not take lightly.” *State v. Barber*, 170 Wash.2d 854, 863, 248 P.3d 494 (2011). The question is not whether we would make the same decision if the issue presented were a matter of first impression. Instead, the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent[.]

*State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (emphasis in original). While stare decisis is not “an absolute impediment to change,” it sets a high bar. *Id.* (quoting *In re Waters of Stranger Creek*, 77 Wn.2d at 653). “[T]o effectuate the purposes of stare decises, this court will reject

its prior holdings only upon ‘a clear showing that an established rule is incorrect and harmful.’” *Id.* (quoting *In re Waters of Stranger Creek*, 77 Wn.2d at 653).

The ACLU did not even address this Court’s recent decisions setting forth the appropriate analysis for article I, section 12 claims, let alone show how those cases were wrongly decided. Accordingly, the Court should reject amicus’ invitation to overrule its well-established precedent.

1. This Court has already determined when a separate analysis of article I, section 12 is required.

In *Grant County Fire Protection District No. 5 v. City of Moses Lake*, this Court engaged in the six-part *Gunwall*<sup>2</sup> analysis of article I, section 12. See *Grant Cty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806–11, 83 P.3d 419 (2004) [hereinafter *Grant County III*]. The Court concluded that “the privileges and immunities clause of the Washington State Constitution, article I, section 12, requires an independent analysis from the equal protection clause of the United States Constitution.” *Id.* at 805. This “independent ‘privileges’ analysis applies,” however, “only where a law implicates a ‘privilege’ or ‘immunity’ as defined in [this Court’s] early cases distinguishing the

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<sup>2</sup> *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

“fundamental rights” of state citizenship.” *Schroeder v. Weighall*, 179 Wn.2d 566, 572, 316 P.3d 482 (2014) (quoting and explaining *Grant County II*, 150 Wn.2d at 812–13).<sup>3</sup> When a case does *not* involve a “privilege” or “immunity,” this Court has explicitly held that an independent article I, section 12 analysis is not appropriate, and instead applies the equal protection analysis that has been developed by federal courts under the federal constitution. *See Andersen v. King County*, 158 Wn.2d 1, 16, 138 P.3d 963 (2006) (plurality opinion) (“[A]n independent state analysis [of article I, section 12] is not appropriate unless a challenged law is a grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applies under the federal equal protection clause.”), *abrogated on other grounds by Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).<sup>4</sup>

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<sup>3</sup> The analysis is the two-part test discussed at length in the parties’ briefs: First, the Court “ask[s] whether a challenged law grants a ‘privilege’ or ‘immunity’ for purposes of our state constitution. If the answer is yes, then [the Court] ask[s] whether there is a ‘reasonable ground’ for granting that privilege or immunity.” *Schroeder*, 179 Wn.2d at 573 (first quoting *Grant County II*, 150 Wn.2d at 812, then quoting *Grant Cty. Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731, 42 P.3d 394 (2002)).

<sup>4</sup> Although *Andersen* specifically refers to favoritism to a minority class, later cases have held that the independent two-step analysis applies whenever there is a grant of a privilege or immunity, “not just when it benefits a ‘minority class.’” *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 792, 317 P.3d 1009 (2014) (Stephens, J., dissenting); *see also*, e.g., *Am. Legion Post No. 149 v. Wash. State Dep’t of Health*, 164 Wn.2d

Since *Grant County II* and *Andersen*, this Court has consistently confirmed this approach to article I, section 12. For example, in *American Legion Post No. 149 v. Washington State Department of Health*, the Court concluded the right to smoke in a place of employment does not involve a privilege and therefore “there is no violation of article I, section 12.” 164 Wn.2d 570, 608, 192 P.3d 306 (2008). The Court then proceeded to address the petitioner’s equal protection claim by using the federal analysis, where “the appropriate level of scrutiny depends on the nature of the classification or rights involved.” *Id.* See also, e.g., *Ass’n of Wash. Sprints & Wine Distribs. v. Wash. State Liquor Control Bd.*, 182 Wn.2d 342, 359, 340 P.3d 849 (2015) (“We interpret our privileges and immunities clause independently of the federal clause. We apply a two-step analysis to article I, section 12. The first step is to determine whether the law in question involves a privilege or immunity; if not, then article I, section 12 is not implicated.” (internal citations omitted)).

In *Schroeder*, the Court explained that *Grant County II* requires an independent two-step privileges analysis “where a law implicates a ‘privilege’ or ‘immunity’ as defined in our early cases distinguishing the

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570, 606, 192 P.3d 306 (2008) (“The privileges and immunities clause is concerned both with “avoiding favoritism” and “preventing discrimination,” the latter being the primary purpose of the federal equal protection clause.” (quoting *Andersen*, 158 Wn.2d at 14)).

“fundamental rights” of state citizenship.” *Schroeder*, 179 Wn.2d at 572. *Grant County II* did not, however, overrule the “long line” of “state equal protection cases based on article I, section 12.” *Schroeder*, 179 Wn.2d at 577. Those cases “hold that article I, section 12 requires [the court] to apply different levels of scrutiny depending on whether the challenged law burdened a suspect class, a fundamental right, an important right or semisuspect class, or none of the above.” *Id.* This, of course, is the federal equal protection analysis.

When evaluating an equal protection challenge to a law that does not involve a privilege or immunity, the Court has consistently applied the federal analysis. *See, e.g., State v. Osman*, 157 Wn.2d 474, 483–84 & 483 n.11, 139 P.3d 334 (2006) (“We have held that the equal protection clause of the Fourteenth Amendment and article I, section 12 are substantially identical and subject to the same analysis.”); *Hirschfelder*, 170 Wn.2d at 550–51 (applying rational basis review to a claim that “former RCW 9A.44.093(1)(b) discriminates against employees of K-12 schools because the law does not prohibit employees in non-K-12 educational settings from having sexual contact with students”).

2. The ACLU did not address this Court's recent decisions, let alone establish they are incorrect.

As demonstrated above, for nearly the last decade and a half this Court has consistently held that an independent analysis under article I, section 12 is appropriate only when the claim involves a "privilege" or "immunity." Absent that element, equal protection claims are addressed under the federal analysis.

Rather than try and establish why *Grant County II*, *Andersen*, and *American Legion*, were wrongly decided, the ACLU simply ignores them. It does not cite *Andersen* at all.<sup>5</sup> It cites *American Legion* only for its definition of "minority group." See Amicus Curiae Br. of the American Civil Liberties Union of Washington at 5–6 n.2 [hereinafter ACLU Amicus Br.]. Most strikingly, the ACLU does not explain why *Grant County II*'s *Gunwall* analysis of article I, section 12 was incorrect or why the Court should engage in a new *Gunwall* analysis when it has already determined that article I, section 12 requires a separate analysis only when a challenged law implicates a privilege or immunity. See *Am. Legion*, 164 Wn.2d at 597 ("[O]nce this court has established that a state

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<sup>5</sup> Indeed, the ACLU asserts that this Court "has never definitively held that Washington's equal protection analysis is confined to the bounds of the Federal Equal Protection Clause." See Amicus Curiae Br. of the American Civil Liberties Union of Washington at 4. This is directly contradicted by *Andersen*, 158 Wn.2d at 16 (plurality opinion).

constitutional provision warrants an analysis independent of a particular federal provision,’ a *Gunwall* analysis is unnecessary.” (quoting *Madison v. State*, 161 Wn.2d 85, 94, 163 P.3d 757 (2007) (plurality opinion)).<sup>6</sup>

In essence, the ACLU urges the Court to abandon its precedent and violate stare decisis because the ACLU would prefer a different result in this case. Because the ACLU has not demonstrated why this Court’s established precedent is incorrect *or* harmful, however, it has not met its burden to achieve that result. *See Otton*, 185 Wn.2d at 687–88 (“[W]e will not reject our precedent unless it is ‘both incorrect *and* harmful.’” (emphasis in original) (quoting *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011))).

**C. The ACLU’s Proposal that Disparate Impact Alone Should Trigger “Heightened Scrutiny” Would Have Unpredictable and Far Reaching Consequences and Require the Court to Make Policy Determinations Properly Left to the Legislature**

The ACLU’s proposal that disparate impact alone should be sufficient to trigger “heightened scrutiny” would require this Court to make policy decisions that are, respectfully, the purview of the legislature.

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<sup>6</sup> The ACLU cites portions of *Grant County II’s Gunwall* analysis to support the ACLU’s argument that the text of article I, section 12 and the Fourteenth Amendment are different and that “this Court can consider how other state supreme courts have interpreted similar equal protection clauses,” but it misses the distinction between the Court’s privileges and immunities analysis and its federal equal protection analysis. *See ACLU Amicus Br.* at 11, 12.

It would also be certain to have peculiar and far-reaching effects, exposing numerous statutes to equal protection challenges and “heightened scrutiny.”

Both this Court and the United States Supreme Court have long held that a statistical showing of disparate impact, alone, is insufficient to trigger heightened scrutiny. *See, e.g., Washington v. Davis*, 426 U.S. 229, 242, 66 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); *Macias v. Dep’t of Labor & Indus.*, 100 Wn.2d 263, 270, 668 P.2d 1278 (1983); *cf. State v. Coria*, 120 Wn.2d 156, 174–75, 839 P.2d 890 (1992) (“It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim” (quoting *United States v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990))). Instead, the party challenging the statute must provide some proof of discriminatory intent or purpose as *a* (but not necessarily *the*) motivating factor to trigger heightened scrutiny. *See, e.g., Vill. of Arlington Heights*, 429 U.S. at 265; *Macias*, 100 Wn.2d at 270.

Requiring some proof of discriminatory intent is justified by the sweeping consequences of a rule that would allow statistics alone to trigger heightened scrutiny. The Supreme Court recognized this point:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

*Davis*, 426 U.S. at 248.

Indeed, such a scenario could come to pass in Washington. As one example, sales taxes are inherently regressive in nature—they take a higher percentage of income from low income persons than from high income persons. See *Washington: Who Pays? 6th Edition*, Institute on Taxation and Economic Policy (Oct. 2018), <https://itep.org/whopays/washington/>. If a higher percentage of minorities are low income than are caucasians in Washington, the sales tax has a disparate impact on minorities. If disparate impact alone were enough to trigger heightened scrutiny, Washington’s sales tax rate could promptly be subject to an equal protection challenge.

Requiring more than statistics to trigger heightened scrutiny also properly recognizes the role of the legislature in evaluating and balancing competing policies and priorities. The Supreme Court explained, “it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from

reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality.” *Vill. of Arlington Heights*, 429 U.S. at 265. It is only “[w]hen there is proof that a discriminatory purpose has been a motivating factor in the decision, [that] this judicial deference is no longer justified.” *Id.* at 265–66. Absent that proof, however, separation of powers and the role of the legislature counsels against judicial second guessing.

This Court has repeatedly recognized that “[e]qual 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); *see also, e.g., State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789 (2004) (“Equal protection is not intended to provide complete equality among individuals or classes but equal application of the laws.”). This Court has also recognized that “[t]he Legislature is uniquely able to hold hearings, gather crucial information, and learn the full extent of the competing societal interests.” *Burkhart v. Harrod*, 110 Wn.2d 381, 385, 755 P.2d 759 (1988). It is then the responsibility of the legislature—not the Court—to make policy determinations. *Cf. McCleary v. State*, 173 Wn.2d 477, 517, 269 P.3d 227 (2012) (“The legislature’s ‘uniquely constituted fact-finding and opinion gathering processes’ provide the best forum for addressing the difficult policy questions inherent in forming the details of an education system.”

(quoting *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 90 Wn.2d 476, 551, 585 P.2d 71 (1978) (Utter, J., concurring)). Looking again at the sales tax example discussed above, *perhaps* regressive taxation is bad public policy—but that is clearly a decision for the legislature to make, not the courts. So too with entitlement to overtime pay. So long as the legislature does not have a discriminatory motive or intent, the Court should defer to the legislature’s determination that the policy justifies a disparate impact, and not subject those decisions to “heightened scrutiny.”

Ignoring this time honored balance of power, the ACLU would have the Court engage in a “heightened scrutiny” analysis *whenever* a law results in disparate impacts. *See* ACLU’s Amicus Br. at 1. Notably, other than saying that the “Court should require far more than the mere rational basis review that the federal cases counsel,” the ACLU does not define “heightened scrutiny,” *or* explain what the Court would need to find to sustain legislation that results in a disparate impact. *Id.* at 8. It appears that the ACLU would have the Court evaluate the benefits and disadvantages of a statute, and then balance those factors against any disparate impact the statute might have. Respectfully, this is not the role of the Court.<sup>7</sup>

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<sup>7</sup> If the Court were to adopt the ACLU’s novel approach, its decision should apply prospectively. As explained in Respondents/Cross-Appellants’ Opening Brief, prospective application of any ruling that does or may result in invalidating RCW 49.46.130(2)(g) is necessary to avoid a

Notably, the ACLU's approach is not the only way to address the issue of which it complains. Rather than requiring the Court to go on a fact-finding/policy-determining mission, the ACLU could accomplish the same goal by going directly to the legislature. The ACLU can petition the legislature to require a disparate impact analysis, either before legislation is passed or when, as in this case, there has been a significant demographic shift since a statute's enactment. That analysis would require the legislature to address, head on, the disparate impact of legislation and provide an opportunity for public comment. Not only would this approach result in an analysis better suited for the legislature rather than the Court, it would provide a substantial record for any future constitutional challenge.

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miscarriage of justice in this case. *See* Opening Br. of Resp'ts/Cross-Appellants at 44–54.

### III. CONCLUSION

For the reasons stated above, Respondents/Cross-Appellants and Intervenor respectfully request that this Court reject the ACLU's invitation to overturn this Court's well established article I, section 12 equal protection framework.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of October, 2019.

*s/John Ray Nelson*

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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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