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No. 96267-7

IN THE SUPREME COURT FOR 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.

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

ACLU OF WASHINGTON FOUNDATION

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I. INTRODUCTION

The American Civil Liberties Union of Washington ("ACLU") encourages this Court to hold that the equal protection prong of Const. art. I, § 12 provides broader protection than the Fourteenth Amendment. This Court has the ability "to evolve our state constitutional framework as novel issues arise to ensure the most appropriate factors are considered." *State v. Bassett*, 192 Wn.2d 67, 85, 428 P.3d 343 (2018). This case presents an appropriate opportunity to independently interpret this state constitutional provision, and to recognize that the disparate impact on Latinx farmworkers is sufficient to trigger heightened scrutiny under Const. art. I, § 12.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The ACLU is an amicus curiae, and its identity and interests are set forth in the accompanying Motion for Leave to file an amicus brief.

III. STATEMENT OF THE CASE

The parties have described the factual and procedural background. The most relevant fact for this amicus brief is that the Washington farmworkers who are excluded from overtime pay by RCW 49.46.130(2)(g), including the plaintiff class, are overwhelmingly Latinx—a fact that none of the parties dispute. *See* Pet'rs' Opening Br. at 6; Intervenor-Resp't Br. at 22 n. 15 (citing an academic study at CP 903-

906 showing a significant upward trend in the percentage of Latinx farm workers in Washington from 1900 to 2000); Opening Br. of Resp't at 37.[1]

IV. ARGUMENT

The Equal Protection Prong of Article I, § 12 of the Washington Constitution Provides Broader Protection than the Federal Equal Protection Clause.

The parties focused on tiered-scrutiny equal protection that is derived from federal law in their briefing. Although we agree with Petitioners that the agricultural exemption from overtime fails under any level of scrutiny, we urge this Court to recognize a broader reading of the equal protection prong of the state constitution. Const. art. I, § 12 provides broader protection than its federal counterpart, which has been interpreted to provide insufficient protections for minority groups disparately impacted by state legislation.

Amicus ACLU of Washington encourages the Court to explicitly recognize that disparate impact should trigger heightened scrutiny in Const. art. I, § 12 equal protection analysis. And we further encourage the

[1] *See also* CP 698 ¶ 11 (Decl. of P. Aguilar); CP 738 ¶ 5 (Decl. of J. Martinez-Cuevas). Even Respondents' expert states "the overwhelming number of farmworkers in Washington State and Yakima County are Latino." CP 821 ¶ 48 (Decl. of C. Strom) (describing 2016 Census Bureau data that shows 73 percent of people in Washington and 92 percent of people in Yakima working in "Farming, Fishing, and Forestry Occupations" are Latinx).

Court to recognize that the disparate impact doctrine should be applied based on present impact, not just what the landscape was when the law was enacted.

A. The issue is properly before the Court.

State constitutional analysis precedes a Federal Constitutional analysis. *State v. Gregory*, 192 Wn.2d 1, 14-15, 427 P.3d 621 (2018). This Court has inherent authority to reach constitutional issues that determine a case. *Seattle v. McCready*, 123 Wn.2d 260, 269-70, 868 P.2d 134 (1994). "State constitutions were originally intended to be the primary devices to protect individual rights, with the federal constitution a secondary layer of protection. Accordingly they were intended to provide broader protection." *State v. Smith*, 117 Wn.2d 263, 283, 814 P.2d 652 (1991) (Utter, J., concurring).

Respondents Deruyter Brothers Dairy, et al., argue that Const. art. I, § 12 equal protection is "substantially similar" to Federal Equal Protection. Opening Br. of Resp't at 35. *Cf. State v. Hart*, 125 Wash. 520, 525, 217 P. 45 (1923) (determining an independent analysis of the state and Federal Constitution was not necessary because "the reason and the result to be reached would necessarily be the same . . .."); *State v. Pitney*, 79 Wash. 608, 610, 140 P. 918 (1914) ("The provisions of the federal and the state Constitutions relative to the equal protection of the laws . . . are

substantially the same."). But *substantially similar* does not mean *identical*.

This Court has never definitively held that Washington's equal protection analysis is confined to the bounds of the Federal Equal Protection Clause. Instead, as equal protection doctrine has evolved, the Court has left open the possibility that Washington's equal protection prong may provide broader protection than the federal counterpart. *See Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 976, 948 P.2d 1264 (1997) (the Court "should not foreclose the possibility that there may be a context where [equal protection] should be independently examined . . .."); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 640, 771 P.2d 711 (1989) (explaining adherence to the federal tiered scrutiny model was appropriate because a separate analysis had not been argued); *Darrin v. Gould*, 85 Wn.2d 859, 868, 540 P.2d 882 (1975) ("[A]rt. I, § 12 may be construed to provide greater protection to individual rights than that provided by the Equal Protection Clause."). *See also DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998) (responding to an independent interpretation argument, but finding no "heightened scrutiny standard is justified *in this case*." (emphasis added)).

And when the context was appropriate, the Court has recognized that Const. art. I, § 12 equal protection is broader than Federal Equal

Protection. In *Hanson v. Hutt*, the Court held a statute denying unemployment insurance benefits based on pregnancy violated equal protection because a "classification based upon sex . . . is inherently suspect and therefore must be subject to strict judicial scrutiny." *Hanson v. Hutt*, 83 Wn.2d 195, 200-201, 517 P.2d 599 (1973) (discussing predictive plurality decisions from the United States Supreme Court but deciding not to wait.). *See also Darrin*, 85 Wn.2d at 877 (stating a public school's prohibition on girls playing contact football would be unlawful under equal protection if not directly unlawful under Const. art. 31, § 1, Washington's Equal Rights Amendment). In *Darrin*, the Court used the common sense approach to intent and recognized that all too often pedestals are revealed to be cages. *Id*. at 869. In contrast, the United States Supreme Court waited three more years before adopting intermediate scrutiny and recognizing gender as a quasi-suspect class. *See Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976).

B. Disparate impact on minority groups[2] should trigger heightened scrutiny under Const. art. I, § 12 equal protection.

In Federal Equal Protection analysis, courts do not apply heightened scrutiny to a law that falls more heavily on a minority group

[2] We adopt this Court's definition in *Am. Legion Post #149 v. Wash. Dep't of Health*, 164 Wn.2d 570, 608-09 n. 31,192 P.3d 306 (2008), and consider a minority group to be a class of people who have "suffered a history of discrimination, have as the characteristic defining the class an

without proof of discriminatory intent or purpose. *Washington v. Davis*, 426 U.S. 229, 242, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (*Davis* means "official action will not be held unconstitutional solely because it results in a racially disproportionate impact."). Thus, although in Federal Equal Protection analysis evidence of disparate impact can be considered, it is only in the most extreme cases that disparate impact alone will suffice to require heightened scrutiny. *See, e.g., The Comm. Concerning Cmty. Improvement v. Modesto*, 583 F.3d 690, 703 (9th Cir. 2009) (Except in the "rare case" of overwhelming impact, "[i]f there is no evidence of intentional discrimination … [the court] must inquire only whether the actions were rationally related to a legitimate governmental interest." (internal citation omitted)).

In the absence of a clear separate state constitutional analysis of equal protection, Washington State courts have largely followed this restrictive federal doctrine, requiring a strong—and often impossible to provide—showing of discriminatory intent. *See, e.g., State v. Johnson*, 194 Wn. App. 304, 308, 374 P.3d 1206 (2016) (noting that without "intent, a

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obvious, immutable trait that frequently bears no relation to ability to perform or contribute to society, and show that it is a minority or politically powerless class." (internal citation omitted).

generally applicable law with disparate impact is not unconstitutional."); *State v. Coria*, 120 Wn.2d 156, 175, 839 P.2d 890 (1992) (citing federal Circuit cases for the same); *Macias v. Dep't of Labor and Indus. of Wash.*, 100 Wn.2d 263, 270, 668 P.2d 1278 (1983) (noting that under the federal test successful claims that rely on disparate impact alone are limited to stark statistical patterns like those described in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)).

But there is no reason to doctrinally limit Const. art. I, § 12 equal protection in this manner. This Court should reject the onerous burden federal law places on minority groups that are disproportionately harmed by state legislation and interpret the state constitution's equal protection to provide broader protections against disparate impact discrimination. In *Macias*, this Court acknowledged this possibility: "Furthermore, our state constitution privileges and immunities clause, Const. art. I, § 12, independently supports our conclusion that this provision denies appellants equal protection of the law." *Id*. at 275 (holding a limitation on workers' compensation that applied only to agricultural workers unconstitutional because it burdens migrant workers' travel rights).

This Court also recently acknowledged that the disproportionate impact of a facially neutral statute may violate equal protection: "Thus, even if minors generally do not constitute a semisuspect class under article

I, section 12, the group of minors most likely to be adversely affected by [the statute at issue] may well constitute the type of discrete and insular minority whose interests are a central concern in our state equal protection cases." *Schroeder v. Weighall*, 179 Wn.2d 566, 579, 316 P.3d 482 (2014). Given the awful reality of structural racial differentiation, this "central concern" of state equal protection about the impact of statutes on people not responsible for their status should lead to a searching review where, as in the present case, the statute's impact falls heavily on a racial minority.

Intervenor-Respondents Washington State Dairy Federation and Washington Farm Bureau point out that the racial makeup of a burdened group may change between the time a statute is enacted and the time the law is applied. Intervenor-Resp't Opening Br. at 26-27. But a change in who is impacted over time would not affect the analysis we propose.

Under the proposed framework, if a minority group demonstrates disparate impact today, this Court should require far more than the mere rational basis review that the federal cases counsel. Only through requiring much more than hypothetical (or even actual) merely rational reasons for economic legislation can the Court honor the importance and seriousness of this kind of dramatic racially disparate impact and mitigate the economic harm done to people who already have less social and political power.

A law that disadvantages a particular minority group today, but when enacted 60 years ago affected a different minority group, creates a distinction, but one without any important difference. Both disadvantaged groups have a smaller voice in the political forum. Equal protection is a constitutional safeguard that protects vulnerable people's civil rights and liberties. All people in Washington should be afforded an equal protection that is substantive, not merely a formalistic concept. Thus, this Court should consider the context in which a discriminatory law operates, both its history and its current impact. The overtime exemption creates an undisputed heavy disparate impact on Latinx workers, and this Court should impose heightened scrutiny in this context.

C. Examination of the *Gunwall* factors demonstrates that equal protection under Const. art. I, § 12 should be recognized as independent of and broader than Federal Equal Protection.

Six nonexclusive neutral factors help determine when the Washington Constitution should be applied independently from the Federal Constitution: "(1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." *State v. Gunwall,* 106 Wn.2d 54, 58, 720 P.2d 808 (1986) (the *Gunwall* factors).[3]

[3] The Court has sometimes articulated a second step that focuses on specific application of a constitutional provision that has previously been independently interpreted. *See, e.g., State v. McKinney*, 148 Wn.2d 20, 26,

The Court has also considered inadequate federal protection in particular contexts as an additional factor triggering an independent review under the Washington Constitution. *See State v. Boland*, 115 Wn.2d 571, 577-580, 800 P.2d 1112 (1990) (holding the police violate Const. art. I, § 7 privacy rights when they search a person's curbside garbage, even though the United States Supreme Court held to the contrary when applying the Fourth Amendment).

The first, second, third, fourth, and sixth *Gunwall* factors all favor an independent and broader analysis. The fifth factor neither favors nor disfavors a separate analysis for equal protection. The additional factor (inadequate federal protection) strongly favors independent analysis.

1. <u>The first and second factors focus on the text of each constitution and both favor an independent Const. art. I, § 12 analysis.</u>

"No 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." Const. art. I, § 12.

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60 P.3d 46 (2002) (the second step may be needed because a "determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context") (internal quotation marks and citations omitted). Because this Court has not previously applied *Gunwall* to the state equal protection prong, this step is unnecessary here because the relevant considerations are part of the *Gunwall* analysis.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, § 1.

"[T]he text of the clause in each constitution varies significantly." *Grant Cty. Fire Prot. Dist. No. 5 v. Moses Lake*, 150 Wn.2d 791, 806, 83 P.3d 419 (2004) [*hereinafter Grant County II*]. The main difference is that Washington's text prohibits the creation of a special privilege or immunity that does not *equally belong to all* and the Fourteenth Amendment prohibits the denial of *equal protection of the laws* to any person.

This Court has made clear that even though the text of the Washington provision focuses on special interest legislation, there is also an analytically distinct equal protection principle inherent in Const. art. I, § 12. One of the meanings of Const. art. I, §12 is that "persons similarly situated with respect to the legitimate purpose of the law [will] receive like treatment." *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987) (internal quotation marks and citation omitted). *See also Schroeder*, 179 Wn.2d at 577 (recognizing that while *Grant County II* "emphasized article I, section 12's concern with special interest legislation, … it did not overrule [the] long line of article I, section 12 cases addressing laws that

burden vulnerable groups."). The differences in text, in context with the application of the other factors, support independent state analysis.

2. The third factor considers the constitutional history, including the treatment of similar state constitutions, and favors an independent and broader analysis.

Const. art. I, § 12 equal protection was ratified during the Washington Constitutional Convention after the summer of 1889 and has remained unchanged. The provision is similar to Or. Const. art. I, § 20,[4] and the Oregon provision mirrors Ind. Const. art. I, § 23[5], which was written before the Fourteenth Amendment. *See* 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, 1253 (1996).

Because there is no other direct constitutional history, this Court can consider how other state supreme courts have interpreted similar equal protection clauses. *Grant County II*, 150 Wn.2d at 808 (citing *Smith*, 117 Wn.2d at 287 (Utter, J., concurring)). Oregon applies an equal protection analysis different from the federal test. *See State v. Clark*, 291 Or. 231,

[4] "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." Or. Const. art. I, § 20.
[5] "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." Ind. Const. art. I, § 23.

236 n.8, 630 P.2d 810 (Or. 1981), *cert. denied*, 454 U.S. 1084, 102 S. Ct. 640, 70 L. Ed. 2d 619 (1981); *See also* David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988). Indiana also applies an independent equal protection analysis under the Indiana state constitution. *See Collins v. Day*, 644 N.E.2d 72 (Ind. 1994).

We do not suggest the Court should adopt either Oregon's or Indiana's articulation of equal protection. Washington's constitutional doctrine should of course focus on Washington-specific considerations under the *Gunwall* criteria. But it is noteworthy that these similar constitutional provisions have been interpreted to contain an equal protection requirement that is independent from Federal Equal Protection. This Court can, and should, also independently interpret Washington's equal protection prong.

3. <u>The fourth factor, considering preexisting state law, favors an independent and broader analysis.</u>

"Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights." *Gunwall*, 106 Wn.2d at 61. Early Washington cases applying the equal protection analysis favor a broader application because they employ a test that is strikingly different from the contemporary federal rational

basis test, particularly regarding deference to lawmakers. For example, in *State ex rel. Bacich v. Huse,* the Court described the inquiry: "A classification, to be legal and valid, must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject-matter of the act in respect to which the classification is made," 187 Wash. 75, 83-84, 59 P.2d 1101 (1936) (holding unconstitutional a law that denied a license to operate a gill net, unless the applicant had a license in two select years). And, as shown by the cases discussed at pp. 4-5 and 7-8 above, this Court has several times suggested that state equal protection could well be broader in an appropriate context, and has found the interests of "discrete and insular" minorities to be a "central concern" of state equal protection analysis. These precedents point toward independent analysis in the context of the present case.

4. <u>The fifth factor, structural differences, neither favors nor disfavors an independent analysis for equal protection.</u>

Generally, the federal and state constitutions differ because where the Federal Constitution is a grant of enumerated powers, the state constitution "serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives." *Gunwall,* 106 Wn.2d at 62. Based on this logic, a number of cases conclude these structural differences will always support an independent analysis. *E.g.*,

Seeley v. State, 132 Wn.2d 776, 789-90, 940 P.2d 604 (1997); *Schaaf*, 109 Wn.2d at 16 (explaining "[t]he federal constitution is a grant of limited powers, while the state constitution limits the otherwise plenary power of the state.").

But the Equal Protection Clause serves to limit states from denying all persons equal protection of the laws. And Const. art. I, § 12 serves to limit state lawmakers from granting special privileges or immunities. Both seek to curb legally endorsed inequality; both place limits on state and local governments. The structural differences neither favor nor disfavor an independent analysis for equal protection purposes.

5. <u>The sixth factor favors an independent analysis because ensuring equal protection is one of the rare tools to combat structural racism and this is a matter of particular state concern.</u>

The agricultural overtime exemption will always disadvantage a "discrete and insular minority," whoever may comprise that minority at a given time in the state's history. Today, that disadvantaged and exploited group is Latinx farmworkers—a group with indisputably little political power, working in geographic isolation in a physically dangerous occupation while also dealing with barriers related to immigration, race, language, and socio-economic background.

This state has repeatedly underscored its commitment to racial equality, and where appropriate diverged from federal doctrine to do so.

Compare Gregory, 192 Wn.2d 1 (this Court found that convincing statistical evidence was enough to invalidate the death penalty because stark racial disparity rendered the punishment "cruel" under Const. art. I, § 14 and so was not consistent with the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 23-24 (internal citations omitted)) *with McCleskey v. Kemp,* 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (statistics showing racial bias in imposition of the death penalty were not enough to show a violation of equal protection absent showing of purposeful discrimination in individual cases). As in *Gregory*, this Court should find that clear racial disparities are more than enough to trigger heightened scrutiny in reviewing legislation like that in the present case.

Const. art. I, § 12 equal protection relates to matters of particular state and local concern and should be interpreted more broadly than, and independently from, the Federal Equal Protection Clause. When the disparate impact on a minority group is as severe as it is in this case, Washington's equal protection should require heightened scrutiny.

6. <u>The additional factor, when federal protection is insufficient, is also significant because Federal Equal Protection is not adequate.</u>

The Federal Equal Protection doctrine is inadequate to address the many ways in which minority groups can be indisputably and unfairly

singled out by government action. As shown above, severe disparate impact on a minority group may well not be enough under the federal test. *Cf.* Mario L. Barnes and Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1084-85 (2011) (describing the deficiencies of federal doctrine).

We agree with petitioners that RCW 49.46.130(2)(g) cannot withstand any level of scrutiny. *See* Pet'rs' Opening Br. at 31-41.[6] But there are many instances in which the federal doctrine will be inadequate to protect a minority group that is being egregiously disadvantaged. The Washington Constitution should fill this void. This Court should hold that Washington's equal protection allows a minority group to seek protection from clear disparate impact of a facially neutral law through heightened scrutiny review.

V. CONCLUSION

The statute that results in the denial of overtime pay to agricultural workers, RCW 49.46.130(2)(g), visits an indisputable disparate impact on a minority group, Latinx workers. Context matters in this analysis, and so

[6] We also agree with the Korematsu Center that existing law should be interpreted to require at least "reasonable ground" review of claims under the equal protection prong of Const. art I, § 12. *Amicus* Brief of Fred T. Korematsu Center for Law and Equality. However, the Court should go further and independently interpret the provision to explicitly require heightened scrutiny where disparate racial impact is present.

the Court should consider both the historical background of the statutory language and the inherent unfairness of the law as it impacts the workers today. The Court should review the statute under a heightened level of scrutiny under Const. art. I, § 12 equal protection.

RESPECTFULLY SUBMITTED this 9th day of September, 2019,

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