No. 96267-7

SUPREME COURT OF THE STATE OF WASHINGTON

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,

and

WASHINGTON STATE DAIRY FEDERATION and WASHINGTON FARM BUREAU,
Intervenor-Respondents.

BRIEF OF FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The statement of identity and interest of amicus are set forth in the Motion for Leave to File that accompanies this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The exclusion of farmworkers from the overtime provisions of the Minimum Wage Act burdens Latinx almost exclusively—more than 99 percent of Washington farmworkers are Latinx. Br. of Pet'r at 6 (citing CP 460). Respondents and Intervenors ask this Court to ignore that jaw-dropping statistic and review the exclusion under traditional rational basis review, which allows hypothetical, conjectural, and post-hoc reasons to justify discriminatory outcomes, leaving courts to act often as little more than rubber stamps.

Respondents and Intervenors also ask the Court to consider only the farmworkers' demographics when the exclusion was passed and to ignore its natural consequence: that the carve out benefiting farm owners and operators—now largely agribusiness—at the expense of farmworkers contributed to the exit from farmwork by those with sufficient means and opportunities to work in other industries. Farmwork is now performed mainly by vulnerable Latinx farmworkers who are deprived of the health and safety benefits of overtime pay, who lack the same means or opportunities to work elsewhere, and who face many barriers to

engagement in the political process. Courts understand, though, that changed factual circumstances can be constitutionally significant.[1]

Here, both the stark disparate impact and the particular vulnerability of farmworkers are reasons that the Court should apply the "reasonable grounds" test that it already applies to privileges and immunities claims under article I, section 12 to the equal protection claim in this case.[2] Reasonable grounds scrutiny demands an actual—rather than hypothetical—link between the statutory classification and the stated legislative goal. *Schroeder v. Weighall*, 179 Wn.2d 566, 574, 16 P.3d 482 (2014) (courts must "scrutinize the legislative distinction to determine whether it *in fact* serves the legislature's stated goal") (emphasis in original). As under this Court's privileges and immunities jurisprudence, which applies "reasonable grounds scrutiny" when a law burdens access to a "privilege" or "immunity," government action that has a disparate impact on a protected class should also trigger "reasonable grounds scrutiny." This approach would articulate consistent and principled

[1] *See United States v. Carolene Products*, 304 U.S. 144, 153, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) ("constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *accord Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 203, 129 S. Ct. 2504, 174 L. Ed. 2d 140 (2009) ("the Act imposes current burdens and must be justified by current needs").

[2] Amicus supports Petitioners' argument that the disparate impact and imputed racial animus are sufficient to trigger either strict or intermediate scrutiny but does not address those arguments in this brief.

parameters of the equal protection guarantee afforded under article I, section 12.

Applying reasonable grounds scrutiny in this case would also be consistent with this Court's pragmatic approach to addressing discrimination. In the context of jury selection, this Court eschewed legal standards that allowed discrimination to persist and instead fashioned a new test to address discrimination of which it was aware.[3] Like *State v. Jefferson*, this case is an opportunity to ensure that discrimination is not perpetuated by legal standards that accept plausible-but-not-actual reasons for legislative carve-outs and allow courts to ignore changes in factual circumstances, as Respondents and Intervenors urge.

ARGUMENT

I. This Court Should Apply Reasonable Grounds Scrutiny Where Legislative Classifications Disproportionately Affect a Protected Group.

a. This Court Has Already Called for Heightened Scrutiny When Legislative Exclusions Disproportionately Affect a Suspect Class or Burden a Particularly Vulnerable Population.

While this Court has construed article I, section 12 of the Washington Constitution "as 'substantially similar' to the federal equal clause," it has also "recognized that article I, section 12 differed from and

[3] *State v. Jefferson*, 192 Wn.2d 225, 240, 429 P.3d 467 (2018).

was more protective than the federal equal protection clause." *Schroeder*, 179 Wn.2d at 572. Like the U.S. Supreme Court, this Court has adopted a tiered scrutiny approach, *id.* at 577-78, and rejected the proposition that strict scrutiny should always apply to statutory schemes that have a disparate impact on a protected class. *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 270, 668 P.2d 1278 (1983).

However, this Court has suggested that something more than traditional rational basis review should apply to equal protection challenges to statutes that have a disparate impact based on race or other protected characteristics. In *Macias*, this Court wrote that when a statutory scheme has "a substantial disparate impact upon a racial minority," the Supreme Court's decision in *Plyler v. Doe* "suggests an intermediate standard may be appropriate." *Id*. at 271 (citing *Plyler v. Doe*, 457 U.S. 202, 216-17, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)).

This Court has also suggested that something more than traditional rational basis review should apply to equal protection challenges to statutes that burden particularly vulnerable populations. In *Schroeder*, this Court struck down a statute eliminating tolling of the statute of limitations for minors' medical malpractice claims. 179 Wn.2d at 569. Although *Schroeder* rested mainly on a privileges and immunities analysis, this Court observed that the statute "[r]aise[d] [c]oncerns" under its equal

protection cases. *Id*. at 577. The source of that concern was that, in addition to burdening an "important right," the statute "has the potential to burden a particularly vulnerable population not accountable for its status" because the law "places a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf." *Id.* at 578-79 (observing that the law will burden "children in the foster care system, children whose parents are themselves minors, and children whose parents are simply unconcerned").

Taken together, *Schroeder* and *Macias* suggest that article I, section 12's guarantee of equal protection calls for Washington courts to apply some form of heightened scrutiny if a statutory scheme will have a "substantial disparate impact" on a racial minority group or a "particularly vulnerable population." Further, *Schroeder* reflects that courts should consider whether, as a practical matter, the statute under review is likely to affect a subgroup that is particularly vulnerable, even if the larger category of which they are a part would not qualify for that label.

Where a statutory scheme has a disparate impact on a protected class or a particularly vulnerable group Washington courts should at minimum engage in reasonable grounds scrutiny, asking whether there is a fit between the classification and the actual legislative purpose. *Cf. Andersen v. King Cnty.*, 158 Wn.2d 1, ¶¶ 315-328, 138 P.3d 963 (2006)

(Fairhurst, J., dissenting) (inquiring whether there were reasonable grounds for DOMA's denial of the right to marry to same-sex couples), *abrogated by Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). Though in dissent, Justice Fairhurst subjected DOMA to what amounted to reasonable grounds scrutiny under the equal protection guarantee of article I, section 12. This reasoning was implicitly endorsed by the U.S. Supreme Court in *Obergefell v. Hodges*, which rejected the rationale that same-sex marriage would harm marriage as an institution because it would sever the connection between natural procreation and marriage. *Obergefell,* 135 S. Ct. at 2606-07.

Washington courts already demand actual fit between means and ends in the "reasonable grounds" prong of the privileges and immunities test. *See Ockletree v. Franciscan Health Sys.*,179 Wn.2d 769, 783, 317 P.3d 1009 (2014) ("To meet the reasonable ground requirement, distinctions must rest on 'real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.'"); *Schroeder*, 179 Wn.2d at 574 ("Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction. . . . Rather, the court will scrutinize the legislative distinction to determine whether it *in fact* serves the legislature's stated goal") (emphasis in original). Extending this approach to cases where government action has a disproportionate effect

on or burdens a particularly vulnerable group would be consistent with *Macias* and *Schroeder* and would harmonize the equal protection and privileges and immunities protections of article I, section 12.[4]

b. Applying Reasonable Grounds Scrutiny to Government Action that Disproportionately Affects a Protected Class Is Consistent with Federal Equal Protection Cases.

Applying reasonable grounds scrutiny in this case would be consistent with U.S. Supreme Court case law. As a general rule, traditional rational basis review is very deferential to legislative classifications. But the Supreme Court and other courts have also applied a more rigorous approach—including seeking actual legislative reasons—in some cases.[5] Further, while the U.S. Supreme Court has held that facially neutral statutes that have a disparate impact based on a protected characteristic do not automatically receive heighted scrutiny, *Washington v. Davis*, 426

[4] Reasonable grounds scrutiny could also be appropriate where there is evidence of legislative animus against a group to which heightened scrutiny does not normally apply. *See, e.g., U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 535-37, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (striking down statutory exclusion of households containing unrelated persons from food stamp program because evidence suggested the exclusion was adopted because of congressional animus against "hippies," and applying what is sometimes known as "rational basis with bite" to the government's alternative rationales for the exclusion).

[5] As the amicus brief filed in this case by the ACLU reflects, this Court should explicitly hold that the Washington Constitution is more protective than the U.S. Constitution, warranting a form of heightened scrutiny. *See generally* Br. of Amicus Curiae American Civil Liberties Union - Washington. Even if this Court declines to conduct a *Gunwall* analysis, existing threads of this Court's and the U.S. Supreme Court's jurisprudence support the application of reasonable grounds scrutiny rather than traditional rational basis review in this case, given the stark disparate impact and the particular vulnerability of the workers, almost all of whom are Latinx.

U.S. 229, 241, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), it has also held that the fact that a facially neutral statute has a disparate impact is relevant to whether the statute was adopted with an impermissible intent, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-67, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

In *Personnel Administrator of Massachusetts v. Feeney*, the Court discussed how to reconcile *Davis* and *Arlington Heights* in the context of a claim that a state hiring preference for veterans constituted unconstitutional discrimination based on gender. 442 U.S. 256, 273-74, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). The Court wrote that when a facially neutral statute has a disparate impact on a protected group, courts should ask "whether the adverse effect reflects invidious gender-based discrimination." *Id*. at 274 (citing *Arlington Heights*, 429 U.S. 252). In conducting that inquiry, the *Feeney* Court looked to the legislature's actual intent in adopting the veterans' preference—apparently "a perceived need to help a small group of older Civil War veterans,"—and considered "the totality of legislative actions establishing and extending the Massachusetts veterans' preference." *Id.* at 280; *see also Davis*, 426 U.S. at 266 ("[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"). Thus, while the Court

ultimately upheld the practices challenged in both *Davis* and *Feeney*, the fact that those practices had a disparate impact on a protected class led the Court to consider the governments' actual motives, rather than accepting post-hoc hypothetical justifications.

Three years after *Feeney*, the Court struck down a Texas statute excluding undocumented immigrant children from public schools in *Plyler v. Doe*. 457 U.S. at 230. The *Plyler* Court held that even though undocumented children were not a suspect class and education was not a fundamental right, "the discrimination . . . can hardly be considered rational unless it furthers some substantial goal of the state," *id*. at 224, a version of heightened scrutiny. The Court adopted this level of scrutiny because "certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection." *Id*. at 217. As a commentator recently described, *Plyler*'s approach reflects that "where the harm is great, a rational legislator would need much more convincing evidence of likely effectiveness towards a 'substantial goal' before she could conclude that it was rational to impose the harm"—a type of proportionate review that, even if not rising to the level of formal strict or even intermediate scrutiny,

nonetheless demands more than traditional rational basis review. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3093, 3174-75 (2015) (also observing that "disproportionality in the effects of laws, especially where laws have particularly adverse impact on traditionally discriminated against groups, may be a signal of process failures tainted by prejudices"); *see also Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1002 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), and *aff'd sub nom. Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (conducting rational basis review of Proposition 8, the constitutional amendment defining marriage as one between a man and a woman, and rejecting the hypothetical, conjectural, and ultimately irrational rationales for the restriction of marriage to heterosexual couples).

Since 1970, at least 19 out of over one hundred equal protection challenges decided under rational basis scrutiny have succeeded.[6] There has been, admittedly, opacity and inconsistency in the Court's decision-making, and commentators have searched high and low for unifying or

[6] *See* Raphael Holoszyc-Pimentel, Note, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. Rev. 2070, 2071-72 (2015) (noting that between 1971 and 2014, that the Supreme Court has held 17 times that a law violated equal protection in over 100 challenges under rational basis scrutiny). To this list, we add a 1970 case, *infra* n.8, and the 2015 *Obergefell* decision.

overarching principles that explain the decisions.[7] A close examination of the cases reveals that when governmental action fails rational basis scrutiny, the Court has often applied the equivalent of "reasonable grounds scrutiny," requiring an actual fit between the governmental action or law and a legitimate governmental interest. Stated differently, the U.S. Supreme Court has, under rational basis review, departed from its most deferential review and has given a harder look and required an actual fit when laws burden political participation;[8] when benefits were connected to state residency, including duration or when established;[9] or when laws have a disparate impacted based on gender;[10] poverty;[11] youth;[12] sexual

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[7] *E.g.*, Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 Va. L. Rev. 1627 (2016).

[8] *Turner v. Fouche*, 396 U.S. 346, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970) (examining requirement of real property ownership as a condition for political participation); *Quinn v. Millsap*, 491 U.S. 95, 109 S. Ct. 2324, 105 L. Ed. 2d 74 (1989) (same).

[9] *Williams v. Vermont*, 472 U.S. 14, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985) (examining use tax assessed on cars registered in Vermont that advantaged Vermont residents); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 105 S. Ct. 2862, 86 L. Ed. 2d 487 (1985) (examining tax exemption differentiating between Vietnam War veterans based on when they established New Mexico residency); *Zobel v. Williams*, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982) (examining law providing different shares from Alaska's Permanent Fund based on length of Alaska residency).

[10] *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971) (examining preference for males when there were equally qualified female estate administrators); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972) (examining dissimilar treatment of married and unmarried persons and access to contraceptives).

[11] *Lindsey v. Normet*, 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972) (examining forcible detainer law whereby tenant must pay a bond equivalent to double the rent that would be owed as condition for appeal); *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972) (examining requirement that defendant be liable in debt for indigent criminal defense provided by state).

[12] *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 92 S. Ct. 1400, 31 L. Ed. 2d 768 (1972) (examining exclusion of illegitimate children from workers' compensation scheme);

orientation,[13] and other vulnerable statuses.[14]

Consistent with this approach, this Court in *Schroeder* and *Macias* has already suggested that rational basis review may require a more robust examination. Here, because the exclusion of farmworkers from overtime protections disparately impacts Latinx persons or affects a particularly vulnerable population, the Court should apply heightened rational basis scrutiny that requires an actual fit between the legislative end and means.

II. The Exclusion of Agricultural Workers from Overtime Has a Disparate Impact on a Racial Minority Group and Burdens a Particularly Vulnerable Population, Warranting Reasonable Grounds Scrutiny.

The statutory exclusion that exempts agricultural workers from overtime protections, RCW 49.46.130(2)(g), contributes to a racially segmented workforce in which all but the most vulnerable workers—workers who, it turns out, are nearly all members of a minority group—turn away from an occupation; this suggests a flawed political process and

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Plyler, 457 U.S. 202 (examining exclusion of undocumented children from public education).

[13] *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) (examining constitutional amendment forbidding local governments from enacting protections for "homosexual persons"); *United States v. Windsor*, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) (examining exclusion from federal tax exemption surviving same-sex spouse); *Obergefell*, 135 S. Ct. 2584 (examining exclusion of same-sex partners from marriage or having their marriages recognized).

[14] *Moreno*, 413 U.S. 528 (examining exclusion from food stamp program of households having an individual unrelated to other household members); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985) (examining zoning ordinance requiring special use permit for "homes for the mentally retarded").

ought to raise concerns about special interest favoritism that lies at the heart of this Court's privileges and immunities and equal protection jurisprudence. *Cf. Schroeder*, 179 Wn.2d at 577. Agribusiness ought not to receive economic benefits at the expense of Latinx farmworkers who are, for many reasons, among the most vulnerable members of the labor force.

Reasonable grounds scrutiny is appropriate in this case for two reasons: first, the exclusion's disproportionate effect is undeniable—nearly all agricultural workers in Washington today are Latinx. This alone is a reason to apply heightened scrutiny to the overtime exclusion, for the reasons described above.[15]

That farmworkers were not majority Latinx when the farmworker exclusion was first adopted should not insulate the statute from meaningful scrutiny now, contrary to the Respondents' and Intervenors' arguments. Review of statutes must account for changing facts. *Carolene Products*, 304 U.S. at 153 ("constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *accord Nw. Austin*

[15] Moreover, the Petitioners' brief and the amicus brief filed by the Farmworker Justice Project and Professor Marc Linder demonstrate that the farmworker exclusion from the Fair Labor Standards Act and other New Deal federal statutes was based on racial animus; it is possible that the Washington legislature either adopted its farmworker exclusion for the same reason, or was at least indifferent to the racist origins of the federal exclusion.

Mun. Util. Dist. No. 1, 557 U.S. at 203 ("the Act imposes current burdens and must be justified by current needs").

Second, application of reasonable grounds scrutiny is warranted because, following this Court's language in *Schroeder*, farmworkers are a particularly vulnerable group. To discern whether a statutory classification should receive some form of heightened scrutiny, this Court has applied the standards discussed in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). *See State v. Schaaf*, 109 Wn.2d 1, 19, 743 P.2d 240 (1987) (applying *Cleburne* factors and deciding that age-based classifications did not merit heightened scrutiny). Those factors include: whether the classification is relevant to legitimate state interests; whether lawmakers have a record of responsiveness towards the needs of the group; whether the group is politically powerless; and whether the group is definable. *City of Cleburne*, 473 U.S. at 442-46; *cf. Plyler* at 220 (applying heightened scrutiny even though "undocumented status is not irrelevant to any proper legislative goal" and is not "an absolutely immutable characteristic").

Agricultural workers will have difficulty protecting themselves in the political process. There are reasons to believe that, as a group, farmworkers are politically powerless, and—as this case shows and as is discussed at greater length in other briefs—lawmakers do not have a

record of responsiveness towards their needs. *See, e.g.*, CP 699 (discussing opposition from legislators backed by agricultural interests to increasing the minimum wage for farmworkers before passage of I-588). Among other reasons, many farmworkers face barriers to political engagement, including underrepresentation in local offices, racialized bloc voting, low voter registration and electoral participation rates, hazardous job conditions, poor housing conditions, insufficient health care, and immigrant status. CP 722-729. Some speak only Spanish or an indigenous language, and therefore may find engaging in the political process daunting because of language barriers. Agricultural workers suffer high rates of occupational injuries and illness, which are compounded by working overtime, Br. of Amici Curiae National Employment Law Project, Familias Unidas Por La Justicia, and United Farmworkers of America at 5-11, making political participation more challenging. And Washington farmworkers' average annual income is below the poverty line. *See* CP 728. These are among the factors demonstrating why farmworkers as a group are particularly vulnerable and less likely to engage in the political process.

III. This Court Should Review the Overtime Exclusion In Light of Its Actual Purpose, Instead of a Hypothetical Purpose, Ensuring that Hypothetical or Conjectural Justifications Do Not Justify Discriminatory Outcomes.

When a classification creates a disproportionate impact or may have resulted from legislative animus, courts have recognized that they should examine more closely the actual reasons offered to support a statutory classification—precisely what this Court does when it appears that legislative action is the result of special interest favoritism in the privileges and immunities context. This "search for the link between classification and objective [that] gives substance to the Equal Protection Clause." *Romer v. Evans*, 517 U.S. 620, 632, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996); *cf. Schroeder* 170 Wn.2d at 577. Accepting any plausible reason for a classification to suffice, rather than searching for the *actual* reason for the classification, permits the continuance of status quo and weakens the promise of equal protection.

For example, in *Perry*, apart from the reasons that were entirely irrational,[16] the Court's rational basis review discerned that even while some of the interests in and of themselves were legitimate, none were *actually* related to the classification drawn by Proposition 8. *Id.* at 1002; *e.g.*, *id.* at 999-1000 (explaining that Proposition 8 is *less* likely to lead to

[16] *E.g.*, preserving the institution of marriage as between a man and a woman as a matter of tradition cannot form a rational basis. *Id.* at 998.

more California children being raised in stable households, so Proposition 8 undermined the legitimate interest of creating stable households). The search for an actual fit between the classification and the interest left the court with no conclusion other than that Proposition 8 was motivated by animus. *Id.* at 1002; *see also Andersen*, 158 Wn.2d ¶¶ 315-328 (Fairhurst, J., dissenting) (conducting a similar critique of DOMA by inquiring whether there was reasonable grounds for denying same-sex couples the right to marry).

In other doctrinal contexts, this Court has recognized that legal standards requiring a showing of purposeful discrimination cannot redress discriminatory outcomes that result from implicit biases and systemic inequality. In recognition that even after *Batson*, "peremptory challenges have become a cloak for race discrimination," *State v. Saintcalle*, 178 Wn.2d 34, 45, 309 P.3d 326 (2013) (citing Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (Aug. 2010)), *abrogated by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), this Court called for a "new framework," *id.* at 54.

The Court arrived at a new framework in *Jefferson*, implementing a meaningful change to *Baston*'s third step, and ensuring that courts will no longer rubber stamp plausible race-neutral reasons offered for strikes. Instead of inquiring in relevant part whether there was evidence of

"purposeful discrimination" in the exercise of the peremptory challenge, courts now must ask "whether an objective observer could view race or ethnicity as a factor in this use of the peremptory strike." 192 Wn.2d at 249-50. An objective observer knows about the existence and extent of explicit and implicit bias and knows that racial discrimination has a long and pernicious history, both nationally and locally. *Id.*

This Court recognized that without a rule that requires the independent corroboration of the objective observer, reasons based on juror conduct and demeanor could be used by individuals seeking to intentionally discriminate in jury selection, effectively masking their true intentions. In addition to enabling the law of jury selection to better root out implicit and explicit bias against jurors of color, the Court in *Jefferson* also took a larger step in recognizing that legal standards must meaningfully address discriminatory outcomes.

Long before *Jefferson*, this Court interpreted the employment discrimination provisions of the Washington Law Against Discrimination (WLAD) to permit disparate impact liability,[17]creating a remedy for those impacted by facially neutral employment practices that had discriminatory results. In *Fahn v. Cowlitz County*, 93 Wn.2d 368, 375–77, 610 P.2d 857

[17] While legislatures have explicitly created causes of action for disparate impact in other contexts, *infra* n.18, it is notable that this Court's interpretation of WLAD created a pathway to remedy disparate impact.

(1980), *amended sub nom. Fahn v. Civil Serv. Comm'n of Cowlitz Cnty.*, 621 P.2d 1293 (1981), this Court held that WLAD, with its legislative mandate for liberal construction, would provide a remedy for employment practices that were discriminatory in *effect* as well as those based on discriminatory intent. The *Fahn* Court adopted the disparate impact framework from *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), which recognized that Title VII's proscription of "not only overt discrimination but also practices that are fair in form, but discriminatory in operation," 93 Wn.2d at 431, could not be achieved unless the statute was construed to bar "practices ... neutral on their face, and even neutral in terms of intent [that] operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.[18]

[18] Congress later codified Title VII's provision of disparate impact recovery in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k) (2000) ("An unlawful employment practice based on disparate impact is established under this subchapter only if...a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity....").

The embracing of disparate impact theory in this context grew out of the limitations of the disparate treatment theory of recovery, which allows a defendant to rebut a prima facie case with any "legitimate" nondiscriminatory reasons for its treatment of the employee, and then requires proof of intentional discrimination to overcome the proffered nondiscriminatory reasons (through demonstration of pretext). *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1993) (discriminatory motive critical to a claim of disparate treatment).

Other federal antidiscrimination statutes recognize the importance of redressing discriminatory outcomes, embracing legal standards that do not permit status quo based on hypothetical or conjectural nondiscriminatory reasons for a particular action. *See, e.g.*,

Petitioners have demonstrated that the agricultural exemption fails reasonable grounds scrutiny, as the exclusion of farmworkers from overtime protection bears no natural, reasonable, or just relation to the undisputed goal of the MWA's overtime provision—protecting worker health and safety. Br. of Pet'r at 23-26; *see also id.* at 38-41 (establishing that the exemption is so attenuated from the MWA's goal of protecting worker health and safety that it fails rational basis review).

CONCLUSION

This Court should apply reasonable grounds scrutiny and determine that the exclusion of agricultural workers from overtime violates the equal protection guarantee embedded in article I, section 12.

RESPECTFULLY SUBMITTED this 9th day of September, 2019.

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Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., __ U.S. __, 135 S. Ct. 2507, 2516, 2518, 192 L. Ed. 2d 514 (2015) (discriminatory housing practices defined by the FHA contain language that permits disparate impact theories, as the statutory "text refers to the consequences of actions and not just to the mindset of actors."). As the Supreme Court has explicitly recognized, disparate impact liability under the FHA "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Id.* at 2522.

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I declare under penalty of perjury under the laws of the State of Washington, that on September 9, 2019, the forgoing document was electronically filed with the Washington State Supreme Court Portal, which will effect service of such filing on all attorneys of record.

Signed in Seattle, Washington, this 9th day of September, 2019.

s/ Jessica Levin
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