No. 96267-7

GONZÁLEZ, J. (concurring)— Farmworkers across our state and our nation labor for subpoverty wages under dangerous working conditions to supply food for our tables. But since the 1930s, they have been excluded from many labor protections guaranteed to virtually all workers in other industries. Today, farmworkers continue to be excluded from the overtime protection of Washington's Minimum Wage Act (MWA). RCW 49.46.130(2)(g). This exclusion is unconstitutional on its face because it violates our state constitution's promise of equality under the law. *See* WASH. CONST. art. I, § 12. The exemption denies an important right to a vulnerable class, and defendants have not demonstrated it serves important governmental objectives. The plaintiffs are entitled to summary judgment.

ANALYSIS

Our state constitution provides that "[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or

corporations." WASH. CONST. art. I, § 12. This provision prohibits both special interest favoritism and discrimination. *Schroeder v. Weighall*, 179 Wn.2d 566, 577, 316 P.3d 482 (2014). Like the federal equal protection clause of the Fourteenth Amendment, article I, section 12 guarantees equal protection under the law, meaning all persons similarly situated will be treated alike absent a sufficient reason to justify disparate treatment. *Id.*; *State v. Phelan*, 100 Wn.2d 508, 512, 671 P.2d 1212 (1983).

If a law disadvantages a suspect class or infringes on a fundamental right, we apply strict scrutiny and require the State to demonstrate its classification has been narrowly tailored to serve a compelling governmental interest. *Darrin v. Gould*, 85 Wn.2d 859, 865, 540 P.2d 882 (1975) (noting race, alienage, and national origin are examples of suspect classifications); *Macias v. Dep't of Labor & Indus.*, 100 Wn.2d 263, 271, 668 P.2d 1278 (1983) (applying strict scrutiny to a provision of workers' compensation law that burdened seasonal farmworkers' fundamental right to travel).

We also apply a form of heightened scrutiny to laws that single out politically powerless and marginalized groups for differential treatment with respect to important rights. Under this intermediate scrutiny standard, we uphold the classification only if it furthers an important governmental objective. *Phelan*, 100 Wn.2d at 512-14 (applying intermediate scrutiny to a law that works a

deprivation of liberty for incarcerated people who are poor); *Schroeder*, 179 Wn.2d at 578-79 (noting intermediate scrutiny is warranted for a law that burdens vulnerable children's access to the courts); *see Plyler v. Doe*, 457 U.S. 202, 223-30, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (applying heightened scrutiny to a law denying undocumented immigrant children a basic public education). Because such groups do not enjoy equal access to the legislative process, the judiciary must be especially vigilant to make sure laws that treat them differently are justified. *See Schroeder*, 179 Wn.2d at 578-79 (noting children in the foster care system and those whose parents are themselves minors are less socially integrated and less likely to be represented in the democratic process).

The statutory exclusion of farmworkers from overtime pay deserves at least intermediate scrutiny. Farmworkers labor in arduous and dangerous conditions. Farmworkers are exposed to pesticides, use hazardous machinery, and work long hours in extreme heat and cold. Eric Hansen, MD, and Martin Donohoe, MD, *Health Issues of Migrant and Seasonal Farmworkers*, 14 J. HEALTH CARE FOR POOR & UNDERSERVED, 153, 155-57 (2003). Farmworkers are at risk of heat-related illness, bacterial and parasitic infections, toxic chemical injuries, certain types of cancer, and chronic musculoskeletal problems. *Id.* at 157-59. Yet, since the 1930s, lawmakers have systematically excluded them from health and safety

protections, including overtime pay, afforded to workers in other dangerous industries.

When federal lawmakers passed major labor reforms during the New Deal, they excluded farmworkers across the board. *See* Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 104 (2011). Farmworkers were excluded from the organizing and collective bargaining rights secured in the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. §§ 151-169; from the minimum wage protections in the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 203; and from old-age benefits and unemployment insurance in the Social Security Act of 1935, 42 U.S.C. ch.7. *Id.* at 109-124. Racism directly influenced these exclusionary policies. *Id.* at 104. Plantation agriculture, which dominated the southern economy, depended on the exploitation of a black labor force. *Id.*; CP at 934-39 (MARC LINDER, MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES 8-13 (1992)). To obtain the support of Southern Democrats, proponents of President Roosevelt's New Deal agenda made compromises to preserve a quasi-captive, nonwhite labor force and perpetuate the racial hierarchy in the South by excluding agricultural workers. Perea, *supra*, at 98-99; CP at 939.

Farmworkers were also excluded when lawmakers enacted additional worker protections in the early 1970s. In 1971, Congress created the Occupational Safety and Health Administration (OSHA) to set and enforce workplace safety and health standards. Despite pesticides amounting to a major occupational hazard for farmworkers, Congress did not give OSHA the authority to regulate farmworker pesticide exposure. *See* Alexis Guild and Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 178 (2018). Instead, Congress gave exclusive regulatory power to the United States Environmental Protection Agency (EPA), which, unlike OSHA, must conduct a cost-benefit analysis—taking into account interests other than worker safety—before passing workplace pesticide standards. *Id.*; Keith Cunningham-Parmeter, *A Poisoned Field: Farmworkers, Pesticide Exposure, and Tort Recovery in an Era of Regulatory Failure*, 28 N.Y.U. REV. L. & SOC. CHANGE 431, 448-52 (2004).

When adopting and adapting parallel state programs to protect workers, many state lawmakers continued to exclude farmworkers from minimum wage, overtime, and workers' compensation laws. When the Washington legislature enacted the MWA in 1959, it looked to the FLSA and imported wholesale the exclusion of farmworkers from minimum wage and overtime protections. LAWS OF 1959, ch. 294, § 3. It was not until 1989, and only through the initiative

process, that farmworkers gained coverage under the MWA's minimum wage provision. LAWS OF 1989, ch. 1, § 1. Washington's workers' compensation law also excluded all farmworkers when it was originally enacted, and then it failed to cover farmworkers on equal terms with other workers until this court held that an exclusion for some seasonal farmworkers was unconstitutional. *Macias*, 100 Wn.2d at 264.

Disparate treatment of farmworkers under labor laws endures. Farmworkers still rely on the EPA, rather than OSHA, for pesticide safety standards. Farmworkers remain excluded from the NLRA's protections for organizing and bargaining, and only about two percent of farmworkers belong to unions. *See* Press Release, U.S. Dep't of Labor, Bureau of Labor Statistics News Release: Union Members—2019 (Jan. 22, 2020), https://www.bls.gov/news.release/pdf/union2.pdf [https//perma.cc./X7GP-3GES]. While the FLSA's minimum wage requirements now apply to most agricultural workers, farmworkers are still excluded from the right to overtime pay, workers on small farms are not entitled to receive minimum wage, and children as young as 12 are legally allowed to work in fields.

Poverty, fear of deportation, and barriers to health care and education persist in farmworker communities. *See* CP at 442-68 (WASHINGTON STATE FARMWORKER HOUSING TRUST, A SUSTAINABLE BOUNTY: INVESTING IN OUR

AGRICULTURAL FUTURE, THE WASHINGTON STATE FARMWORKER SURVEY (2008)); CP at 569-580 (U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 2013-2014 (2016)). Farmworkers remain among the poorest workers in the nation and often live in substandard housing conditions. CP at 451 (describing rodent infestations, lack of heat, poor water quality, and electrical problems), 450, 579; Hansen, *supra*, at 155. Almost three-quarters of farmworkers in the country are immigrants, the overwhelming majority from Mexico. CP at 577. Almost three-quarters of farmworkers are most comfortable speaking in Spanish, and 43 percent speak little or no English at all. *Id.* at 578. In Washington, 99 percent of farmworkers are Latino, and more than three-quarters of farmworkers do not read or write in English. *Id.* at 459-60. Very few farmworkers have health insurance or adequate access to medical care. *See id.* at 453, 579; Hansen, *supra*, at 160 (citing lack of transportation, insurance, and sick leave; language barriers; limited clinic hours; and illiteracy as barriers to medical care). The average farmworker has completed an eighth-grade education. *See* CP at 578. Farmworkers experience shorter life expectancy, experience higher incidences of disease and disability, and experience high rates of sexual harassment. Hansen, *supra*, at 156-59; CP at 199. Farmworkers remain some of

the most impoverished and socially excluded members of our society. It is no coincidence the law continues to disfavor them.

Subjugated to second-class worker status, farmworkers are precisely the type of politically powerless minority whose interests are a central concern of equal protection. *See Mathews v. Lucas*, 427 U.S. 495, 505-06, 96 S. Ct. 2755, 49 L. Ed. 2d 651 (1976) (recognizing illegitimate children as semisuspect class because the law has long placed them in an inferior position relative to legitimate children); *Plyler*, 457 U.S. at 218-23 (recognizing immigrant children as a vulnerable group because they are an underclass denied benefits that our society makes available to others); *Schroeder*, 179 Wn.2d at 578-79 (finding disadvantaged children, who are less socially integrated and less likely to be represented in the democratic process, are a vulnerable class).

The exclusion of farmworkers from overtime pay deprives them of an important health and safety protection that is afforded to other workers. The framers of our state constitution directed the legislature to enact health and safety protections for workers in dangerous industries. *See* WASH. CONST. art. II, § 35. The legislature did so when it enacted minimum wage and overtime requirements to protect workers from the harmful effects of low wages and long hours. *Parrish v. W. Coast Hotel Co.*, 185 Wash. 581, 587-89, 55 P.2d 1083 (1936), *aff'd*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937); *Anfinson v. FedEx Ground Package*

Sys., Inc., 174 Wn.2d 851, 870, 281 P.3d 289 (2012). Farmworkers are no less in need of this protection than workers in other industries.

The exclusion of farmworkers can be justified only if it furthers an important governmental interest. *Phelan*, 100 Wn.2d at 512. DeRuyter argues the exemption, by sparing agricultural employers from the costs of overtime, furthers the government's interest in supporting the agricultural industry. *See* Opening Br. of Resp'ts/Cross-Appellants at 10 (citing the widespread belief that farming is a vital occupation that merits government aid), 11-12 (citing the agrarian myth and twin ideals that farming is good for the farmer and vital for the nation), 25 (noting agriculture's importance to the state); Intervenor Resp'ts and Cross-Pet'rs' Opening Br. at 31 n.16 (same). But the desire to spare employers in one industry from costs cannot, by itself, justify excluding some workers from the health and safety protections afforded to others. If it could, workers' equal protection rights would be subject to unrestricted legislative license, and equal protection would be an empty promise. *See Higgs v. W. Landscaping & Sprinkler Sys., Inc.*, 804 P.2d 161, 166 (Colo. 1991).

DeRuyter's appeal to the general welfare also does not save the law. DeRuyter contends the prosperity of the agricultural industry is vital to the welfare of Washingtonians. *See, e.g.*, Opening Br. of Resp'ts/Cross-Appellant at 25. But the promise of equal protection does not tolerate laws that aim to advance the

general welfare at the expense of a permanent underclass. For this reason, the United States Supreme Court in *Plyler* struck down a Texas law excluding undocumented immigrant children from the free public education system. *Plyler*, 457 U.S. at 205, 230. The Court found the State's interest in preserving resources for the education and welfare of other children could not justify perpetuating an underclass of state residents denied the ability to advance and participate in society. *Id.* at 218-24, 227. Excluding farmworkers from health and safety protections cannot be justified by an assertion that the agricultural industry, and society's general welfare, depends on a caste system that is repugnant to our nation's best self.

CONCLUSION

Today we face a global pandemic, and while many others stay home, farmworkers continue to go to work because they are recognized as essential. But they go to work on unequal terms. They deserve better. In my view, plaintiffs are entitled to summary judgment and to reasonable attorney fees in an amount to be determined by the clerk of this court, pursuant to RCW 49.48.030 and RAP 18.1. *See Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 306-07, 996 P.2d 582 (2000).[1]

[1] I agree with the majority that DeRuyter's request for prospective-only application is not properly before us. If it were, I would decline DeRuyter's request to apply any adverse decision only prospectively to future litigants. *See* Opening Br. of Resp'ts/Cross-Appellants at 44-49. The

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general rule is that a new decision applies retroactively to both the litigants before the court and in subsequent cases. *Taskett v. King Broad. Co.*, 86 Wn.2d 439, 448-49, 546 P.2d 81 (1976). We may use our equitable discretion to apply our decision only prospectively in exceptional cases where we are overruling a law that was justifiably relied on and retroactive application would be substantially unfair. *Id.*; *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 272, 208 P.3d 1092 (2009). In balancing the equities, we consider both the reliance interests *and* the considerations that compel our ruling. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543-44, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991). We apply the *Chevron Oil* test, which asks whether "(1) the decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed, (2) retroactive application would tend to impede the policy objectives of the new rule, and (3) retroactive application would produce a substantially inequitable result." *Lunsford*, 166 Wn.2d at 272 (footnote omitted) (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971)). The *Chevron Oil* test contemplates prospective only application in the rare case where retroactive application would not only impose great costs (factor 3) but would also have little benefit (factor 2). This is not an exceptional case that satisfies the test. Under the second factor, retroactive application of the decision will *further*, rather than impede, the policy objective of the decision. Farmworkers deprived of overtime pay have been denied equal protection of the law, and retroactive application would give them a remedy for this constitutional wrong. While I recognize DeRuyter relied on a statute that had not yet been challenged, its reliance interest is outweighed by the overriding equities that favor retroactivity.