NO. 96267-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS, et al., Appellants,

v.

DERUYTER BROTHERS DAIRY, INC., et al., Respondent

AMICUS CURIAE BRIEF OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCATION

Jesse Wing, WSBA #27751
Tiffany Cartwright, WSBA #43564
MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Telephone: (206) 622-1604
Facsimile: (206) 343-3961

Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
705 Second Avenue, Suite 1050
Seattle, Washington 98104
Telephone: (206) 447-1560
Facsimile: (206) 447-1523

Attorneys for Washington Employment Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

STATE CONSTITUTION

STATE STATUTES

OTHER AUTHORITIES

I. INTRODUCTION AND IDENTITY OF AMICUS CURIAE

Plaintiffs claim that the exemption from overtime pay to workers in the agricultural industry, RCW 49.46.130(2)(g), violates the Washington Constitution, Article I, Section 12 of the Privileges or Immunities Clause. The trial court ruled that the statute implicated the "right to work and earn a wage" and that this right was fundamental under Article I, Section 12. The Court reserved the issue of whether there existed reasonable grounds for the agricultural overtime exemption. The Court rejected the Plaintiffs' argument that Art. II, Section 35 of the state constitution, which mandates the legislature pass laws to protect workers in "employments dangerous to life or deleterious to health," created a "fundamental" right. Both sides appealed and this Court granted direct review.

The Washington Employment Lawyers Association ("WELA") argues that the "right to work and earn a wage" is "fundamental" within the meaning of Article I, Section 12 of the state constitution. Privileges or Immunities that undermine this fundamental right are unconstitutional unless reasonable grounds exist to justify the privilege or immunity. Article I, Section 12 prohibits privileges or immunities when granted in favor of one industry as opposed to other industries or in favor of one corporation over others within the same industry.

WELA is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 200 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life.

II. SUMMARY OF ARGUMENT

The Washington Territorial Legislature was known for granting special favors "which were mostly monopolies for roads, bridges, trails, ferries, and the like." *See* Zellers, P. Andrew Rorholm, *Independence for Washington State's Privileges and Immunities Clause*, 87 Wash. L. Rev. 331 (2012) (citing Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution: A Reference Guide* 26-27 (G. Alan Tarr ed., 2002)). Article I, Section 12 of the Washington Constitution was enacted to prohibit this type of undue political influence. It was enacted with the remedial purpose to create a restraint on the influence of powerful and wealthy special interest groups. That restraint is today as compelling and necessary as when the state constitution was first ratified.

The "right to work and earn a wage" is "fundamental" within the meaning of Article I, Section 12. Even if not explicitly articulated in Washington's early cases, "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity . . . ." *Truax v.*

Raich, 239 U.S. 33, 41 (1915). The right to work is "the most precious liberty that man possesses." *Barsky v. Board of Regents of Univ. of NY*, 347 US 442, 472 (1954) (J. Douglas dissenting). A right is not fundamental if it is granted only at the discretion of the legislature. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 794, 317 P.3d 1009 (2014) (Opinion of Stephens, J.). Beyond question, the right to work and earn a wage is not granted only at the discretion of the legislature; it is fundamental to a person's livelihood; it is fundamental to the ability to survive. The rejection of the "right to work and earn a wage" as a fundamental right will exist as a ticking time bomb waiting to cause untold destruction to the rights of employees.

The purpose of Article I, Section 12 is to prevent undue political influence from allowing the legislature to grant special favors to the wealthy and politically connected, undercutting fundamental rights belonging to "all citizens, or corporations." The plain language and historical context of this provision mandates its application regardless of whether the privileges or immunities are granted to different industries or to corporations within the same industry.

//

III. ARGUMENT

A. The Right to Work and Earn a Wage is a Fundamental Right Within the Meaning of the Privileges and Immunity Clause; Article I, Section 12.

Article I, Section 12 of the Washington Constitution guarantees 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 equally belong to all citizens, or corporations." The structure of the state constitutional "privileges or immunities" clause in Article I, Section 12 is very different than the equal protection clause of the 14th Amendment. The text of the federal constitution shows concern with "majoritarian threats of invidious discrimination against non-majorities," whereas the state provision "protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of *all citizens*." *Anderson v. King County*, 158 Wn.2d 1, 14, 138 P3d 963 (2006) (emphasis added). In *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), the Court confirmed that Washington State's framers were concerned with "undue political influence exercised by those with large concentrations of wealth, which they feared more than they feared oppression by the majority." *Id*. at 808. "When the State's police power is manipulated to serve private interests at the expense of the common good, such legislation

must be condemned as unreasonable and unlawful." *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 608, 192 P.3d 306 (2008).

"[N]ot every statute authorizing a particular class to do or obtain something involves a 'privilege' subject to article I, section 12." *Grant County,* 150 Wn.2d at 812. Rather, "'privileges and immunities' 'pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship.'" *Id*. at 812-13. In *State v. Vance,* 29 Wash. 435, 70 P. 34 (1902), the Court considered the meaning of "fundamental rights" within the context of the U.S. Constitution and concluded that they include:

> the right to remove to and *carry on business* therein; the right, by usual modes, to acquire and hold property, and to protect and defendant the same in the law; the rights to the usual remedies to collect debts, and to *enforce other personal rights*; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from.

Id. at 458 (emphasis added). The "right to work and earn a wage" is included in the recognized right to "carry on business" conducted by those who earn a daily wage. The "right to work" is also a "personal right" without which an individual cannot survive.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich,* 239 U.S. 33, 41

(1915). "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause." *United Building & Constr. Trades Council of Camden Cty. v. Mayor and Council of Camden*, 465 U.S. 208, 219 (1984) (citing *Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371, 387 (1978) (equating the fundamental rights of the "pursuit of common callings" with "the ability to transfer property, and access to courts, respectively")); *see also Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 588-89 (1972) ("And it is also liberty—liberty to work—which is the 'very essence of the personal freedom and opportunity' secured by the Fourteenth Amendment") (J. Marshall dissenting); *Barsky v. Board of Regents of Univ. of NY,* 347 U.S. 442, 472 (1954) ("Man has indeed as much right to work as he has to live, to be free, to own property") (J. Douglas dissenting).

In *Duranceau v. Tacoma*, 27 Wn. App. 777, 620 P.2d 533 (1980), the City of Tacoma enacted a regulation which denied the use of an access road to any employer who employed an individual who resided in the Town of Lester, Washington. The City of Tacoma informed Plaintiff's employer that it would be denied use of the access road because it employed Plaintiff who lived in the Town of Lester. After Plaintiff was terminated from employment, he brought suit against the City of Tacoma alleging, *inter alia*, a violation of 42 U.S.C. § 1983 for the violation of his

fundamental right to earn a living. *Id*. at 779. The trial court granted summary judgment in favor of the Tacoma and the Plaintiff appealed. The Court of Appeals reversed.

The Court of Appeals ruled that even the City of Tacoma's interest in protecting its property did not "exempt[] it from constitutional limitations in establishing or operating a classification system which impinges on fundamental rights . . . ." *Id*. at 779-780. "The right to hold specific private employment free from unreasonable government interference is a fundamental right which 'comes within the liberty and property concepts of the Fifth Amendment.' This fundamental right is protected against state interference by the Fourteenth Amendment" *Id*. at 780 (citing *Greene v. McElroy*, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment, ...")).

The fundamental nature of the right to work and earn a wage does not compel the legislature to pass any particular piece of legislation. But when the legislature chooses to act in ways that implicate that right—such as through wage and hour laws—the Privileges & Immunities clause requires it to have reasonable grounds to draw distinctions between certain classes of corporations or citizens, to guard against the possibility of powerful interests using their influence to gain unreasonable advantages.

For example, the legislature has declared that "[b]eginning January 1, 2019, and until January 1, 2020, every employer shall pay to each of his or her employees who has reached the age of eighteen years wages at a rate of not less than twelve dollars per hour." RCW 49.46.020(c). Having decided to set a floor for what the right to work and earn a wage is worth in Washington, the Privileges and Immunities clause requires only that the legislature have reasonable grounds for drawing distinctions between classes of citizens, industries, or individual corporations when it sets that floor. Otherwise, one could easily imagine a scenario in which powerful industries—be it railroads in the late 19th century or technology companies today—gain exemptions from otherwise generally applicable wage protections based solely on the strength of their influence, rather than reasonable public policy that serves the interests of all citizens. That is exactly the type of manipulation of "the State's police power . . . to serve private interests at the expense of the common good" that the Privileges and Immunities clause was intended to guard against. *See Am. Legion*, 164 Wn.2d at 608.

Here, RCW 49.46.130(1) states that "no employer shall employ any of his or her employees for a workweek longer than forty hours unless such employee receives compensation for his or her employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he or she is employed." Subsection (g) of the

statute broadly restricts the payment of overtime to workers in the agricultural industry. There is no question that this exemption provides a significant benefit to agribusiness at the expense of farmworkers, particularly in comparison to other industries—such as workers in retail warehouses packing consumer goods for shipment rather than fruit into crates—that face similar time pressures and seasonal demands but are not exempted from overtime protections. As the trial court correctly observed, RCW 49.46.130(2)(g) "treats a class of workers in a significantly different fashion than other wage earners engaged in the business of selling their labor." CP 1213–14. In making that distinction, the Washington legislature has effectively decided that the right of farmworkers to work and earn a wage is worth less than that of other citizens. The trial court correctly recognized that this right is fundamental to state citizenship for purposes of Article I, Section 12, and it is entirely consistent with the history, purpose, and modern interpretation of the Privileges and Immunities clause to require the legislature to support this exemption with reasonable grounds.

B. The Privileges and Immunities Clause is Not Limited to Favoritism within the Same Industry.

The plain language of Article I, Section 12 states: "No law shall be passed granting to *any* citizen, class of citizens, or corporation other than municipal, privilege or immunities which upon the same terms shall not equally belong to *all* citizens, or corporations." (Emphasis added).

Nonetheless, Respondents/Cross-Appellants, the Deruyters, argue that the privileges and immunities clause forbids discrimination only "against a class of businesses to the benefit of another class of the *same* businesses." Deruyters Br. at 20 (emphasis added). Based on this interpretation, the Deruyters argue that because the farmworker exemption benefits the entire agricultural industry (as opposed to, for example, dairies but not apple orchards), it does not offend Article I, Section 12. This argument contravenes the plain language of our State's Constitution, ignores the history and purpose of the privileges and immunities clause, and mischaracterizes the relevant case law.

First, this argument is untenable because it requires rewriting the plain words of our State's Constitution. "When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation." *City of Bothell v. Barnhart*, 172 Wn.2d 223, 229 (2011) (quoting *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004)). "The courts cannot engraft exceptions on the constitution, no matter how desirable or expedient such exception might seem." *Id.* (quoting *Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975)). The language of Article I, Section 12 is unambiguous that a privilege or immunity granted to *any* corporation is subject to scrutiny under the clause if it is not granted on the same terms to *all* corporations. The reading advocated by the Deruyters, however, would

require rewriting our Constitution to read: "No law shall be passed granting to any . . . corporation . . . privileges or immunities which upon the same terms shall not equally belong to all . . . corporations *engaged in the same business*." That interpretation would significantly alter the meaning of the clause and cannot be squared with the plain language. It might be that the legislature has reasonable grounds for distinguishing among various types of corporations or different industries, but that inquiry occurs at a later step in the analysis. The mere fact that favorable treatment is granted to an entire industry or class of businesses cannot shield it from review.

Second, the interpretation advocated by the Deruyters would render meaningless the historical context of Washington's privileges and immunities clause, which was intended in large part to counteract the influence of a powerful industry—railroads—not one particular competitor within an industry. The framers of Washington's constitution were motivated by a desire to prevent governmental favoritism in commercial affairs, due to a growing distrust of the cozy relationship between the Washington Territorial Legislature and corporations. *See* Michael Bindas et al., *The Washington Supreme Court and the State Constitution: A 2010 Assessment*, 46 GONZ. L. REV. 1, 24 (2011); Lebbeus J. Knapp, *The Origin of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 227, 228 (1913). In particular, the Washington

constitutional convention was noted for its distrust of the influence of railroads, due to the relationship between railroad companies and legislators. Bindas, *supra*, at 24. Many delegates to the convention were "suspicious and distrustful" of railroads because the Territorial legislature had spent "much of its time granting special acts and privileges" and the railroads "often lobbied lawmakers, offering free passes to legislators." *Id.* at 24, n.133. The acts passed by the Territorial Legislature privileging the railroad industry included acts exempting railroad companies from taxation until railroads were completed or in use for transportation and restraining liquor sales along the path of the railroads' construction. *See, e.g.*, Statutes of the Territory of Washington, Made And Passed (1871), http://leg.wa.gov/CodeReviser/documents/Sessionlaw/1871pam1.pdf; Secretary of State, *Territorial Timeline* (last visited July 11, 2019), https://www.sos.wa.gov/legacy/timeline/timeline.aspx?s=1871&e=1880. Against this backdrop, the drafters of the Washington Constitution sought to limit the influence of powerful industries—not just particular competitors—by creating restrictions such as the privileges and immunities clause intended to "prevent the oppressive use of corporate power." Knapp, *supra*, at 239. The ability of one class of businesses—be it agricultural, aerospace, technology, retail, or any other—to wield its influence to gain exemptions from otherwise generally applicable employment regulations is exactly the type of privilege or immunity the

drafters of the Washington Constitution intended Article I, Section 12 to guard against.

Finally, the Deruyters' argument conflicts with longstanding case law. As far back as 1909, this Court applied the privileges and immunities clause to strike down an ordinance that singled out an entire class of employers, rather than particular competitors within the same industry. In *City of Spokane v. Macho*, an ordinance prohibited employment agencies—but no other businesses—from making "any willful misrepresentation to any person seeking employment through such office." 51 Wash. 322, 322–23, 98 P. 755 (1909). In striking down the ordinance, citing cases applying Article I, Section 12, this Court observed: "It cannot be denied that the business of the employment agent is a legitimate business, as much so as is that of the banker, broker, or merchant; . . . The vice of the section under discussion lies in this: That it makes an act criminal in one who may be engaged in a lawful business, while the act committed under like circumstances by another may not be so." *Id.* at 324. The Court went on to explain that when a legislative body is "exercising its power to regulate a business," the regulation "must treat alike all of a class to which it applies, and must bring within its classification all who are similarly situated or under the same condition." *Id.* The "classification must be based on some reason suggested by a difference in the situation and circumstances of the subjects treated, and

no arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar." *Id.* at 325 (emphasis added). More recently, the Court has acknowledged that the "constitution's particular concern with the 'undue political influence' exercised by a privileged few and drew on early decisions addressing that concern through the reasonable ground analysis." *Schroeder v. Weighall*, 179 Wn.2d 566, 572, 316 P. 3d 482 (2014) (citing *Grant County II*, 150 Wn.2d at 805-11, 83 P.3d 419 (2004)).

More than one hundred years later, in the *Ockletree* case, five justices agreed that the exemption of religious and sectarian organizations from the Washington Law Against Discrimination—which applies to religious non-profits across industries, as well as to organizations that provide purely charitable services and do not have competitors in the marketplace in any traditional sense—"is subject to scrutiny under the privileges and immunities clause of article I, section 12 of the Washington Constitution." *Ockletree*, 179 Wn.2d at 806 (Opinion of Wiggins, J.). The Deruyters' argument that somehow special legislative treatment is insulated from review under article I, section 12 so long as the privilege or immunity is granted to an entire industry or class of businesses makes no sense in light of the language, history, or longstanding interpretation of the clause, and this Court should expressly reject that proposition.

IV. CONCLUSION

The "right to work and earn a wage" is a fundamental right within the meaning of Article I, Section 12 of the state constitution. Privileges or immunities may not be granted in favor of one industry as opposed to other industries or in favor of one corporation over others within the same industry.

Respectfully submitted this 9th day of September 2019.

__/s/_ Tiffany Cartwright_____
Jesse Wing, WSBA #27751
Tiffany Cartwright, WSBA #43564
MACDONALD HOAGUE & BAYLESS
705 Second Avenue, Suite 1500
Seattle, Washington 98104
Telephone: (206) 622-1604
Facsimile: (206) 343-3961

___/s/_ Jeffrey Needle_____
Jeffrey L. Needle, WSBA #6346
LAW OFFICE OF JEFFREY L. NEEDLE
705 Second Avenue, Suite 1050
Seattle, Washington 98104
Telephone: (206) 447-1560
Facsimile: (206) 447-1523

LAW OFFICE OF JEFFREY NEEDLE

September 09, 2019 - 10:59 AM

Transmittal Information

Filed with Court:	Supreme Court
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

The following documents have been uploaded:

- 962677_Briefs_20190909105712SC646580_7632.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was Martinez-Cuevas WELA Amicus Brief.pdf
- 962677_Motion_20190909105712SC646580_5285.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was Martinez-Cuevas WELA Motion to Appear as Amicus Curiae.pdf

A copy of the uploaded files will be sent to:

- andrea.schmitt@columbialegal.org
- anne.dorshimer@stoel.com
- asilver@frankfreed.com
- cheli.bueno@columbialegal.org
- cindy.castro@stoel.com
- debbie.dern@stoel.com
- hohaus@frankfreed.com
- joe.morrison@columbialegal.org
- john.nelson@foster.com
- litdocket@foster.com
- lori.isley@columbialegal.org
- mcote@frankfreed.com
- tim.oconnell@stoel.com

Comments:

WELA Amicus Brief and Motion for Leave to File

Sender Name: Jeffrey Needle - Email: jneedlel@wolfenet.com
Address:
705 2ND AVE STE 1050
SEATTLE, WA, 98104-1759
Phone: 206-447-1560

Note: The Filing Id is 20190909105712SC646580