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No. 1035195

SUPREME COURT OF THE STATE OF WASHINGTON

ASSURECARE ADULT HOME LLC, a Washington corporation; ASSURECARE ADULT FAMILY HOME CARE LLC, a Washington corporation; ASSURECARE FAMILY HOME CARE LLC, a Washington corporation; MARCELINA S. MACANDOG, an individual; and GERALD MACANDOG, an individual,

Petitioners,

v.

JOCYLIN BOLINA; ADOLFO PAYAG; MADONNA OCAMPO; HONORINA ROBLES; HOLLEE CASTILLO; and REGINALD VILLALOBOS,

Respondents.

BRIEF OF PETITIONER

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I. INTRODUCTION

For 36 years, adult family homes have been a heavily regulated, long-term care option in Washington that permits tens of thousands of Washingtonians with disabilities and infirmities to live in an intimate, residential home where they can receive the supportive care they need to maintain their independence within their communities in a non-institutional setting. These adult family homes can foster an inclusive home environment for their residents because at least one caregiver typically lives in and shares the home with the residents. This has been possible because there is a “live-in” exemption at RCW 49.46.010(3)(j) that exempts such caregivers from the Minimum Wage Act (“MWA”) when they are not working on their shifts.

On September 4, 2024, the King County Superior Court changed the rules for adult family homes in Washington by entering the Order Granting Plaintiffs’ Second Motion for Partial Summary Judgment (“the Order”). App. 1-21. In the

Order, the Superior Court ruled that the live-in exclusion of the MWA violates the Washington Constitution when it is applied to caregivers who live at the adult family homes where they also work. *See* App. 1-2 & 19, *citing* Wash. Con. art. I, § 12. The Superior Court acknowledged some of the complex and potentially ruinous financial impacts that its ruling could have for most adult family homes in Washington. *See* App. 18 n. 5. However, the Superior Court declined to rule on whether this decision should only apply prospectively. *See* App. 19 n. 6.

II. ASSIGNMENT OF ERROR

A. The King County Superior Court erred in ruling that the Minimum Wage Act (“MWA”) exclusion at RCW 49.46.010(3)(j), as applied to caregivers who reside on the premises of adult family homes where they work, (the “live-in exemption”) violates Article I, Section 12 of the Washington Constitution.

B. Alternatively, if the unconstitutionality of the MWA’s live-in exemption is affirmed, the King County

Superior Court erred in not deciding that its ruling should be applied only prospectively.

III. STATEMENT OF THE CASE

A. Adult Family Homes

The State of Washington began licensing adult family homes in 1989 as part of an ongoing effort to find less expensive alternatives to nursing homes within the context of long-term supportive care that is primarily paid for by Medicaid. *See* App. 148:20-23. Today, Washington has more than 2,800 adult family homes. *See* App. 144:10-11. These adult family homes are a heavily regulated, long-term care option that permit Washingtonians with disabilities and infirmities to live in real homes located among residential neighborhoods where they can receive the supportive care they need to maintain their independence within their communities. *See* App. 106:7-9, 111:3-22, 143:5 – 144:9. With the State permitting six to eight residents, adult family homes provide up to approximately 22,400 vulnerable Washingtonians access to

the housing and long-term supportive care they need. *See* App. 149:8-10; *also see* RCW 70.128.010(1). “A resident in an Adult Family Home has a surrogate home and family, allowing their care needs to be met in a noninstitutional manner.” App. 143:17-19.

To provide this supportive care and environment, at least one caregiver typically lives in an adult family home with its residents. *See* App. 106:7-9, 112:17-18. Caregivers who live in the adult family homes where they work receive free room and board for themselves and their families. *See* App. 107:16 – 108:6, 113:20-22, 147:16-18. Some live-in caregivers like Respondents also receive access to vehicles for their personal use. *See* App. 107:18. Such benefits allow caregivers to live in communities and to enjoy lifestyles that they could not otherwise afford. *See* App. 108:10-11, 114:1-4, 147:13-147. When they are not working, caregivers live their lives, freely coming and going from the home they share with the residents they care for. *See* App. 107:11 – 108:9. For all these reasons,

caregivers actively seek live-in caregiver positions at adult family homes. *See* App. 147:19-23.

Caregivers who reside at the adult family homes where they work have unique occupations and receive benefits that differ from that of conventional shift workers whose pay is governed by Washington’s Minimum Wage Act (“MWA”), 49.46 RCW. *See* App. 114:13-14. The MWA accommodates these complexities by exempting from its provisions caregivers whose jobs require them to reside in the adult family homes where they work. *See* RCW 49.46.010(3)(j).¹

The Washington Legislature last amended RCW 49.46.010(3)(j) in 1989 during the same legislative session that it enacted the statutes which first permitted adult

¹ The MWA sets minimum wages and benefits that employers must provide employees. *See, e.g.*, RCW 49.46.020. However, the MWA’s definition of an employee expressly excludes, “Any individual whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work time subject to call, and not engaged in the performance of active duties[.]” RCW 49.46.010(3)(j).

family homes. *See* RCWA 49.46.010 (West); *and see* MINIMUM WAGE, 1989 Wash. Legis. Serv. 1 (West); *cf.* RCWA 70.128.005 (West); *and cf.* SOCIAL AND HEALTH SERVICES—RESIDENTIAL CARE FACILITIES—REGULATIONS, 1989 Wash. Legis. Serv. 427 (West). In the 36 years since then, the Legislature amended RCW 49.46.010 an additional 12 times without making any further changes to RCW 49.46.010(3)(j). *See* RCWA 49.46.010 (West).² For these

² *Also see* HIGHER EDUCATION PERSONNEL BOARD—STATE PERSONNEL BOARD—TRANSFER TO PERSONNEL RESOURCES BOARD, 1993 Wash. Legis. Serv. Ch. 281 (S.H.B. 2054) (WEST); LABOR REGULATIONS—OVERTIME PAY—COMMISSIONED SALESPERSONS, 1997 Wash. Legis. Serv. Ch. 203 (S.S.B. 5569) (WEST); PERSONNEL SYSTEM REFORM ACT, 2002 Wash. Legis. Serv. Ch. 354 (S.H.B. 1268) (WEST); TECHNICAL CORRECTIONS—GENDER NEUTRAL TERMS, 2010 Wash. Legis. Serv. Ch. 8 (S.S.B. 6239) (WEST); INTERNS AND INTERNSHIPS—FARM INTERNSHIP PROGRAM--LIMITATIONS, 2010 Wash. Legis. Serv. Ch. 160 (S.S.B. 6349) (WEST); STATE GOVERNMENT, 2011 Wash. Legis. Serv. 1st Sp. Sess. Ch. 43 (S.S.B. 5931) (WEST); CONTRACTORS—NEWSPAPERS—JOURNALISTS, 2013 Wash. Legis. Serv. Ch. 141 (S.B. 5476) (WEST); LABOR AND EMPLOYMENT—INTERNS AND INTERNSHIPS—AGRICULTURE, 2014 Wash. Legis. Serv. Ch. 131 (S.S.B.

36 years, owners and operators of adult family homes have had no reason to believe that the MWA governed compensation of live-in caregivers at adult family homes. *See supra*.

Given how adult family homes have developed for the past 36 years, it would be cost-prohibitive for owners and operators of adult family homes if they would have to pay live-in caregivers if the MWA's live-in exception in RCW 49.46.010(3)(j) is held to be unconstitutional. *See App. 114:15-16*. This is because Medicaid currently pays for over 65% of all adult family home residencies at rates set by the State. *See App. 113:8-12; 114:16-17*. And as to Petitioners, Medicaid pays for nearly all the residencies at their adult family homes. *See App. 106:2-3*. While there have been some

5123) (WEST); ATHLETICS—AMATEUR SPORTS—NONEMPLOYEE STATUS, 2015 Wash. Legis. Serv. Ch. 299 (S.B. 5893) (WEST); WA LEGIS 212 (2020), 2020 Wash. Legis. Serv. Ch. 212 (S.B. 6421) (WEST); WA LEGIS 269 (2023), 2023 Wash. Legis. Serv. Ch. 269 (S.S.B. 5156) (WEST); *and* WA LEGIS 132 (2024), 2024 Wash. Legis. Serv. Ch. 132 (S.B. 6088) (WEST).

increases in Medicaid payment rates for adult family home residencies, adult family homes remain predominantly small businesses operating with thin margins. *See* App. 113:12-19. If the MWA's live-in exception is held to be unconstitutional and live-in caregivers must be paid past and/or future wages pursuant to the MWA, then the likely result will be turmoil for most adult family homes that causes many of them to close even if the State eventually increases Medicaid reimbursement rates. *See* App. 114:18-20, 115:1-4. With such closures, many of the most vulnerable Washingtonians likely will lose the only residential housing options available to them that can provide the supportive care they need. *See* App. 106:4-5, 114:20-21.

B. Respondents were Live-in Caregivers

Petitioners have operated their adult family homes since 2008. App. 105:19 – 106:1. Respondents worked at Petitioners' adult family homes for various periods between October 2014 and December 3, 2021. *See* App. 31-33. Respondents provided residential care and were responsible for three to six residents at

a time while working and living at Petitioners' adult family homes. App. 106:10-12 and 107:14. Respondents worked as caregivers performing the regular functions of caregivers at adult family homes. App. 106:18-19. The tasks Respondents were responsible for varied and included direct patient care as well as administrative and janitorial tasks. *Id.* Some residents required 24-hour care. App. 107:8. However, Respondents were not required to work 24-hour shifts. App. 107:9. Rather, Respondents along with other caregivers were assigned shifts to ensure that the adult family homes were staffed 24-hours a day. App. 107:9-10.

When Respondents were not working on one of their shifts, they went wherever they wanted: to the gym, the foodbank, transported their children to and from school, attended medical appointments, and used company credit cards to go shopping and out to lunch. App. 107:19 – 108:9. Due to the nature of the job, Respondents were not constantly working when they were on their shift, so they were provided ample

opportunities to take meal and rest breaks during their shifts.

App. 107:11-13. Respondents were also provided sick leave and vacation. App. 108:12.

By virtue of their employment at Petitioners' adult family homes, Respondents lived at the facilities where they worked. App. 106:10-12. Respondents were paid a flat rate for each day they worked. App. 107:16. Additionally, Respondents and their family members received free room and board that included food, internet access, utilities, and the use of a car. App. 107:21–108:6. Thus, Respondents and their families were able to enjoy a standard of living that could not otherwise afford. *See* App. 147:13-21.

C. Caregiving at Adult Family Homes is not Dangerous

While home health caregivers do suffer work-related injuries, the rate of such injuries is less than with other caregiving work. App. 148:1-9. The relative safety of home health caregiving is borne out by the fact that none of the Respondents suffered a work-related injury while Petitioner

employed them. App. 106:20-22. In fact, since 2008, only one caregiver working for Respondents has suffered a work-related injury, and it was a minor injury that required only one doctor's visit to resolve. App. 106:21 – 107:2. This is why the number of work-related injury claims against Respondents is well below the statewide average for all employers. App. 107:2-5. Thus, the below-average incidents of work-related injuries at Respondence's adult family homes evidences the fact that home health caregiving is not very dangerous work. *See supra*.

D. Procedure Below

Respondents worked as live-in caregivers at Petitioners' adult family homes at various times from 2014 to 2021. *See* App. 31:11 – 33:3. On April 11, 2023, Respondents filed their current complaint against Petitioners in King County Superior Court. *See* App. 26. This complaint seeks a declaration that the MWA's live-in exemption in RCW 49.46.010(3)(j) violates Article I, Section 12 of the Washington Constitution. *See* App. 43:21 – 46:5. Predominantly because Respondents contend that

this live-in exemption is unconstitutional, Respondents claim that Petitioners must compensate them for additional wages and benefits that they were due pursuant to the MWA. *See App. 27:15-21, 30:2-9, 38:15 – 43:20.*

Respondents filed a motion for partial summary judgment on June 27, 2024. *See App. 48-78.* With this motion, Petitioners sought an order declaring that RCW 49.46.010(3)(j) violates Article I, Section 12 of the Washington Constitution and therefore must be struck from the law. *See App. 57:7-9.*

Petitioners subsequently responded to this motion with their opposition. *See App. 79-104.* Petitioners asked the King County Superior Court to deny Respondent's motion by finding that the MWA's live-in exemption in RCW 49.46.010(3)(j) does not violate the Washington Constitution. *See App. 88:11-13.* In the alternative, if the Superior Court ruled that the live-in exemption was unconstitutional, Petitioners requested that the ruling not be applied retroactively. *See App. 88:13-15.* Respondents filed a reply to this opposition. *See App. 164-171.*

In an hour-long hearing, the King County Superior Court heard the parties' oral arguments on August 2, 2024. *See* App. 172-196.

On September 4, 2024, the King County Superior Court entered its Order Granting Respondents' Second Motion for Partial Summary Judgment ("the Order") entered by the King County Superior Court. App. 1-21. In this order, the Superior Court ruled that the Minimum Wage Act exclusion at RCW 49.46.010(3)(j) violates the Washington Constitution when it is applied to caregivers who live at the adult family homes where they also work. *See* App. 1-2 & 19, *citing* Wash. Con. art. I, § 12. The Superior Court declined to rule on whether this decision should only apply prospectively. *See* App. 19 n. 6.

On September 24, 2024, the King County Superior Court granted the parties' Stipulated Motion to Certify [the] Order for Discretionary Review and to Stay Case Pending Discretionary

Review. App. 22-25. The Court subsequently granted direct discretionary review on December 26, 2024.

IV. ARGUMENT

A. Summary Judgment Standard

Summary Judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”³ “A summary judgment is appropriate if reasonable persons could reach only one conclusion from all the evidence, together with all the reasonable inferences there from, viewed most favorably toward the non-moving party.”⁴

³ CR 56(c).

⁴ *Kesinger v. Logan*, 118 Wn.2d 451, 824 P.2d 1207 (1992).

**B. The Live-In Exemption (RCW 49.46.010(3)(j))
Does Not Violate Article I Section 12 of the
Washington Constitution**

In the Order, the Superior Court ruled that the live-in exception to the MWA found in RCW 49.46.010(3)(j) is unconstitutional as applied to live-in, caregiving in adult family homes because Petitioners have been granted a privilege or immunity and that no reasonable grounds exist that justify the privilege or immunity. *See* App. 19:7-10. This ruling fails to acknowledge both facts and law that undermine it.

The Superior Court predicates this ruling on Article I, Section 12 of the Washington Constitution, which provides, “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.”

The Washington Supreme Court has long approached the review of legislative enactments with great care, emphasizing that the wisdom of legislation is not justiciable and that the

Court should not second-guess the legislature.⁵ Furthermore, in matters of economic legislation such as minimum wage and overtime laws, the Washington Supreme Court has consistently followed "the rule giving every reasonable presumption in favor of the constitutionality of the law or ordinance ... to avoid substituting our judgment for the judgment of the Legislature."⁶ Finally, because the statute is presumed to be valid, evidence must exist beyond a reasonable doubt that grounds exist to find it unconstitutional.⁷ The Superior Court fails to provide the Legislature this deference in the Order.

1. The MWA's Live-In Exemption does not Implicate a Fundamental Right

For a violation of Article I, Section 12 to occur, the law or its application must confer a privilege to a class of citizens.⁸

⁵ *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 151, 459 P.2d 937 (1969).

⁶ *Shea v. Olson*, 185 Wn. 143, 152, 53 P.2d 615 (1936); *Sofie v. Fibreboard*, 112 Wn.2d 636, 642-43, 771 P.2d 711 (1989).

⁷ *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007)

⁸ *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004).

Courts apply a two-step analysis to determine whether a law implicates a privilege or immunity.⁹ In this context, “privileges” and “immunities” “pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship.”¹⁰

The first step is to analyze whether the law in question actually involves a privilege or immunity within the scope of the constitutional prohibition” by granting benefits to one group, to the disadvantage of another, with respect to a “fundamental right of citizenship.” If there is no privilege or immunity involved, then Article I, Section 12 is not implicated.¹¹ Conversely, if the law involves a privilege or immunity, and the statute does advantage one group to the detriment of another regarding a fundamental right, the Court

⁹ *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518-19, 475 P.3d 164 (2020).

¹⁰ *State v. Vance*, 29 Wn. 435, 458, 70 P. 34 (1902).

¹¹ *Grant County Fire Protection Dist. No. 5*, 150 Wn.2d at 812.

must then determine whether the legislature had a reasonable ground for granting the privilege.¹²

Applying these rules, the live-in exemption to the MWA does not involve a fundamental right, and because it does not grant an advantage to one group to the disadvantage of another. Even assuming that the statute grants adult family home owners a “privilege,” the Legislature has reasonable grounds for providing the exemption in the context of the subsequent statutes authorizing the creation and development of adult family homes, and the statute must be upheld.

- i. The exemption of live-in employees from the MWA is a creature of statute and does not implicate a fundamental right.*

RCW 49.046.010(3)(j) does not involve a fundamental right. While it exempts workers “whose duties require that he or she reside or sleep at the place of his or her employment or who otherwise spends a substantial portion of his or her work

¹² *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775–76, P.3d 1009 (2014).

time subject to call, and not engaged in the performance of active duties,” the obligation to pay a minimum wage and overtime was created by statute and did not exist when the Washington Constitution was drafted. Washington Courts are clear that not every statute authorizing a particular class to do or obtain something constitutes a “privilege” within the meaning of Article I, Section 12 but only those where it is, “in its very nature, such a fundamental right of a citizen that it may be said to come within the prohibition of the constitution, or to have been had in mind by the framers of that organic law.”¹³ Washington jurisprudence defines those fundamental rights narrowly.¹⁴

The Washington Supreme Court has repeatedly held that mere statutory rights are not "fundamental rights" within the ambit of Article I, Section 12. For example, in *Ass'n of*

¹³ *Vance*, 29 Wn. at 458–59, 70 P. 34.

¹⁴ *Am. Legion Post #149 v. Wash. State Dep't of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008)(citation omitted).

Washington Spirits, the Court observed that “[t]his court has explicitly recognized the distinction between privileges and rights granted only at the discretion of the legislature” and rejected the Respondents privileges and immunities claim, because the only right asserted here is not a "constitutional privilege.”¹⁵ The Superior Court relied heavily on *Martinez-Cuevas* to find otherwise; however, *Martinez-Cuevas* is distinguishable.

In *Martinez-Cuevas*, the Supreme Court held that dairy workers had a fundamental right to the health and safety protections of such overtime protections conferred by the MWA, which they were denied because a categorical exemption applied to all dairy workers.¹⁶ In contrast, here, the live-in exemption to the MWA at issue here does not apply to all adult family home caregivers. Rather, it applies only to adult

¹⁵ *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.* 182 Wn.2d 342, 340 P.3d 849 (2015).

¹⁶ *Martinez-Cuevas*, 196 Wn.2d at 521-522.

family caregivers who accept a caregiving role that requires them to live at an adult family home among other residents. This distinction has meaning because, in the Order, the Superior Court acknowledges, “The fair value of the room and board that the [Respondents] received is relevant to whether the [Respondents] received less compensation than the MWA requires.” App. 18:19. Thereby, this is not a case about whether caregivers who live and work at adult family homes are denied the health and safety protections afforded other workers under the MWA.

The live-in exemption essentially is a book-keeping exemption that enables adult family home employers to compensate live-in caregivers with valuable room and board for the caregivers and their families without having to account for monetary wage requirements under the MWA, too. This intent and purpose can and should be imputed to the Legislature since it enacted the statutes that authorized the creation of adult family homes and adopted how adult family homes would be

compensated under Medicaid.¹⁷ In this vein, if caregivers like where they and their families live already, then they do not have to accept an adult family home caregiving that includes room and board for them and their families in their compensation. Thus, while all caregivers may have a fundamental right to the health and safety protections afforded workers under the MWA, this fundamental right is not implicated when workers like live-in caregivers are provided non-monetary compensation that the MWA by its provisions expresses no need or requirement to regulate or quantify. Consequently, RCW 49.46.010(3)(j) does not implicate a privilege or immunity for live-in employees within the scope of Article I, Section 12.

ii. *RCW 49.46.010(3)(j) does not benefit one class to the detriment of another.*

Additionally, RCW 49.46.010(3)(j) does not grant an advantage to a group to the detriment of another. This is an

¹⁷ “[T]he legislature is presumed to enact laws with full knowledge of existing laws.” *Jametsky v. Olsen*, 179 Wn.2d 756, 766, 317 P.3d 1003, 1008 (2014) (citation omitted).

important requirement because the aim and purpose of the special privileges and immunities provision of Article I, Section 12, of the state constitution is to secure equality of treatment of all persons, without undue favor on the one hand.¹⁸

Thus, the Washington Supreme Court has held that the fundamental right to carry on business" is unconstitutionally implicated "by a municipal ordinance that attempted to insulate resident photographers from out-of-state competition by imposing restrictions on itinerant photographers."¹⁹ The Court concluded that the fee at issue "[did] not unfairly discriminate against a class of businesses to the benefit of another class of the same businesses."²⁰

The live-in exemption does not treat classes of the same business differently. Adult family homes provide a different service and are built around the availability of 24-hour care.

¹⁸ *Grant County II*, 150 Wn.2d at 810 (citation omitted).

¹⁹ *Ass 'n of Wash. Spirits*, 182 Wn.2d at 360.

²⁰ *Id.*

Live-in adult family home workers work under different circumstances than workers who are not required to live onsite. In this case, the statute exempts all employers who employ individuals who are required to live onsite. The statute applies equally if a person is employed by an adult family home or if they are employed directly by an individual or another entity, as long as the employee is required to live on site. Consequently, even if it did implicate a fundamental right (which it does not), it would not violate Article I, Section 12.

2. The MWA's Live-In Exemption does not Violate a Fundamental Right

The Washington Supreme Court's decision in *Martinez-Cuevas* illustrates why the MWA's live-in exemption does not violate a fundamental right under the state constitution. In *Martinez-Cuevas*, there was undisputed evidence that dairy workers were "exposed to physical strains, respiratory hazards, toxic chemicals, and risk of contracting diseases and injuries from animals; this exposure has led to cancer, respiratory

disease, and neurological conditions.”²¹ There was also undisputed evidence that the plaintiff dairy workers “both suffered injuries while working at [the] dairy farm.”²² Finally, there was undisputed evidence that “[o]vertime work [on dairy farms] is particularly injuries, resulting increased injuries, illness, and mortality.”²³ Thus, the Washington Supreme Court held that “[t]he extremely dangerous nature of dairy work entitles dairy workers to the statutory protection set out in article II, section 35.”²⁴

However, here, there is no evidence whatsoever that adult family home caregivers who live and work at adult family homes are at any greater risk of injury than caregivers who just work at adult family homes. Moreover, there is ample evidence that caregivers who live and work at adult family homes, especially Petitioners’ adult family homes, are not subjected to

²¹ *Martinez-Cuevas*, 196 Wn.2d at 520.

²² *Id.*

²³ *Id.*

²⁴ *Id.*, at 521.

injurious work conditions. *See supra*, III(C). Ultimately, there is no evidence suggesting that eliminating the MWA’s live-in exemption will do anything to improve worker safety at adult family homes; rather, the main consequence of striking down the exemption would be to make it much more complicated for caregivers and adult family home operators to sort out how to comply with the MWA when caregiver compensation includes valuable room and board for caregivers and their families.

3. The Legislature has Reasonable Grounds for the MWA’s Live-In Exemption.

The second step in privileges and immunities analysis requires a showing of a reasonable ground for granting a privilege or immunity.²⁵ The Article 1, Section 12 reasonable grounds test is more exacting than rational basis review.²⁶ Under the test, a court will not hypothesize facts to justify a legislative decision.²⁷ “Rather, the court will scrutinize the

²⁵ *Martinez-Cuevas*, 196 Wn.2d at 518-19.

²⁶ *Id.*, at 523.

²⁷ *Schroeder v. Weighall*, 179 Wn.2d 566, 574, 316 P.3d 482

legislative distinction to determine whether it in fact serves the legislature's stated goal.”²⁸ Speculation will not suffice.²⁹

While the Court may scrutinize the facts to determine whether they establish reasonable grounds for the overtime exemption, it cannot second guess the legislature's policy decisions.³⁰ Moreover, in matters of economic legislation such as minimum wage and overtime laws, there is a reasonable presumption in favor of the constitutionality of the law or ordinance, which avoids substituting the court’s judgment for the judgment of the legislature.”³¹

Moreover, The MWA live-in exemption does not exist in a legislative vacuum. While adult family homes did not exist when the Legislature first enacted the MWA and its live-in exemption, the Legislature enacted the adult family home

(2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Petstel Inc.*, 77 Wn.2d at 151.

³¹ *Sofie*, 112 Wn.2d at 642-43.

enabling statutes knowing that the MWA’s live-in exemption would apply.³² Similarly, the Legislature did not amend or remove the live-in exemption when it amended the MWA numerous times in the decades since. In fact, adult family homes exist in Washington largely because the Legislature has been funding their care of most of their residents.³³ The intersection of all these enactments evidence the Legislature illustrate the balancing of public policies which provide reasonable grounds, and continuing need for, the live-in exemption of the MWA

Within this context, there is ample evidence that a Court ruling removing the live-in exemption would undermine the adult family home model of care that is providing for the well-being many of Washington’s disabled and infirm who have no other option to live in a real home where they can receive the

³² “[T]he legislature is presumed to enact laws with full knowledge of existing laws.” *Jametsky*, 179 Wn.2d at 766.

³³ *See supra*, §III(A).

care and support they need to live their lives as best they can on their own terms.³⁴

There are approximately 2,800 adult family home operations in Washington.³⁵ This is not nearly enough to keep up with the residential and care needs of Washington's aging population.³⁶ The adult family home system in Washington is designed to rely on having someone living in the adult family home.³⁷ Adult family homes typically operate on very thin margins given that most provide residential care paid for by Medicaid.³⁸ Yet, the Order of the Superior Court upends how adult family homes are able to recruit quality caregivers and provide residential care to their residents.

This case is not about whether the price of milk might need to go up a few cents because dairy workers working on

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

remote locations on industrial dairy farms need to be paid more due to their squalid living conditions and extremely hazardous work. Rather, this case is about whether courts should supplant the Legislature in making policy decisions as to how best to ensure that there are enough residential long-term care homes that can enable disabled and infirm Washingtonians to live their best lives as active members of their communities rather than force them to live in an institutional setting or, worse, on the street. Balancing the reasonable interests of residents receiving care and the workers providing care implicates policy-making decisions that the Legislature is entrusted to make; “the Legislature is the fundamental source for the definition of this state's public policy and we must avoid stepping into the role of the Legislature by actively creating the public policy of Washington.”³⁹ With this context, it cannot be unreasonable for the Legislature to uphold the live-in exception to the MWA for

³⁹ *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).

adult family home caregivers given how the Legislature’s policy-making decisions supporting the development of adult family homes have created thousands of residential living opportunities for disabled and infirm Washingtonians who would not have access to them otherwise.⁴⁰

C. Any Adverse Holding Should Only Be Applied Prospectively

“When retroactive application causes hardships and inequities, our Supreme Court allows courts to give only prospective effect to its decision to hold a statute unconstitutional.”⁴¹ A recognized reason to reject retroactive application is because of “justifiable reliance on a statute which is presumptively constitutional.”⁴² In situations like here where numerous business rely on the validity of laws in their contracting with the government and others, the Supreme Court

⁴⁰ *See supra*, §III(A).

⁴¹ *In re Marriage of Anderson*, 134 Wn. App. 506, 512, 141 P.3d 80, 83 (2006), *citing* *Bond v. Burrows*, 103 Wn.2d 153, 163–64, 690 P.2d 1168 (1984).

⁴² *Bond*, 134 Wn. App. at 164.

notes that prospective application of decisions is particularly appropriate “so as not to ‘jeopardize the massive contractual and governmental enterprises done under its protective shield[.]’”⁴³

Here, affirming the Order favor invalidates the exemption that had been law and relied upon by adult family home operators since the Legislature first created the possibility for adult family homes 36 years ago. The Legislature subsequently created and promoted the development of 2,800 adult family homes in Washington with the assumption that the live-in exemption was presumptively constitutional. There is no genuine dispute that retroactive application of any order holding the live-in exemption to be unconstitutional will produce a substantially inequitable result for adult family homes throughout Washington, perhaps bringing them to financial ruin

⁴³ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 273 n. 10, 208 P.3d 1092 (2009) (citation omitted).

as they learn they are responsible for paying years of backpay simply because they relied on the presumptive constitutionality of the statutory exemption.⁴⁴ Adult family home operators should not be punished for that reliance. Adult family home operators like Petitioners have had no reason to foresee the need to change how they were paying their workers when the state's Medicaid system is compensating adult family home operators with the assumption that the live-in exemption applies for at least one caregiver. Thus, adult family home operators have not had been given opportunity to negotiate for higher Medicaid reimbursement rates to reflect higher payroll costs either; indeed, why would the State of Washington agree to higher reimbursement rates when the live-in exemption to the MWA is presumptively constitutional? For these reasons, permitting retroactive MWA liability for Petitioners and other adult family home operators in Washington would be unfair and inequitable.

⁴⁴ *See supra*, §III(A).

V. CONCLUSION

The exemption of live-in employees from the definition of employee under the MWA does not violate the privileges and immunities prohibition of the Washington State Constitution Article I, Section 12. The live-in exemption to the MWA does not burden a fundamental right. The evidence makes clear that adult family home caregiving work is not made more dangerous because the live-in exemption allows live-in caregivers to be provided room and board for them and their families as non-monetary compensation. Moreover, there are ample and substantial public policies underlying the live-in exemption related to the Legislature encouraging the development and operation of more adult family homes to provide homes and care to some of the most vulnerable Washingtonians among us.

For these reasons, and all the other reasons enumerated above, Petitioners respectfully ask the Court to reverse the

Order and hold that the live-in exemption to the MWA is constitutional. Alternatively, if the

Even if the MWA's live-in exemption is held to be invalid, that decision should be applied purely prospectively. To do otherwise would inequitably upend how adult family homes have contracted with the state and others with likely ruinous outcomes simply because thousands of adult family home operators have conducted business for decades in reliance on the presumptive constitutionality of the MWA exemption.

VI. CERTIFICATION

This document contains 5,433 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 12th day of May 2025.

Respectfully submitted,

/s/Albert H. Kirby

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VII. CERTIFICATE OF SERVICE

I certify that on the date below I filed the Petitioners' Motion for Discretionary Review with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participants as follows:

Jeremiah Miller, WSBA #40949
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 12th day of May 2025 in Seattle,
Washington.

/s/ Lonnie Lopez
Lonnie Lopez, Paralegal

VIII. APPENDIX

Document Title	Pages
Order Granting Respondents' Second Motion for Partial Summary Judgement	1-21
Order Granting Stipulated Motion to Certify Order for Discretionary Review and to Stay Case Pending Discretionary Review	22-25
First Amended Civil Complaint for Damages and for Declaratory Relief	26-47
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Declaration of Marcelina Macandog in Support of Petitioners' Opposition to Respondents' Second Motion for Partial Summary Judgment	105-108
Declaration of John Ficker in Support of Petitioners' Opposition to Respondents' Motion for Partial Summary Judgment	109-136
Declaration of Mariann Mckee in Support of Petitioners' Opposition to Respondents' Second Motion for Partial Summary Judgment	137-163
Reply in Support of Respondents' Second Motion for Partial Summary Judgment	164-171
Verbatim Report of Proceeding before the Honorable Nicholas Straley August 2, 2024	172-196

HON. NICHOLAS B. STRALEY

THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JOCYLIN BOLINA; ADOLFO PAYAG;
MADONNA OCAMPO; HONORINA
ROBLES; HOLLEE CASTILLO; and
REGINALD VILLALOBOS,

NO. 23-2-05373-7 SEA

Plaintiffs,

ORDER GRANTING PLAINTIFFS' SECOND
MOTION FOR PARTIAL SUMMARY
JUDGMENT

v.

ASSURECARE ADULT HOME LLC, a
Washington Corporation; et al.,

Defendants.

I. INTRODUCTION

This matter came before the Court on Plaintiffs' second motion for partial summary judgment. The Plaintiffs, a group of people who lived and worked in the Defendants' adult family homes, challenge the constitutionality of RCW 49.46.010(3)(j) (hereinafter "live-in exclusion"). This provision excludes certain live-in and on-call work from coverage under

1 Washington’s Minimum Wage Act (hereinafter “MWA”). Plaintiffs assert that working and
2 living in an adult family home is employment that falls within article II, section 35 of
3 Washington’s Constitution (hereinafter “dangerous employments clause”). Relying on the
4 holding in *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 475 P.3d 164
5 (2020), they argue that by allowing the Defendants to avoid having to pay a minimum wage
6 or overtime, the live-in exclusion grants the Defendants a privilege or immunity for which no
7 reasonable ground exists. The live-in exclusion therefore violates article I, section 12 of
8 Washington’s Constitution (hereinafter “privileges and immunities clause”). For the reasons
9 set out below, the Court agrees and grants Plaintiffs’ motion.¹

10 **II. EVIDENCE AND ARGUMENT CONSIDERED**

11 The Court reviewed and considered the records related to this matter in reaching its
12 decision, including the following:

- 13 1. Plaintiffs’ Second Motion for Partial Summary Judgment;
- 14 2. Declaration of Adolfo Payag;
- 15 3. Declaration of Hollee Castillo;
- 16 4. Declaration of Honorina Robles;
- 17 5. Declaration of Jocelyn Bolina;
- 18 6. Declaration of Madonna Ocampo;
- 19 7. Declaration of Reginald Villalobos;
- 20 8. Declaration of Emily Grove in Support of Plaintiffs’ Second Motion For
Summary Judgment;

21 ¹ The Plaintiffs filed this motion after the Honorable Wyman Yip denied a prior motion for partial summary
22 judgment. The parties have introduced additional evidence before this Court that was not before Judge Yip.
Under the circumstances, the Court finds it appropriate to consider the Plaintiffs’ second motion anew.

9. Declaration of Jeremiah Miller in Support of Plaintiffs' Second Motion For Summary Judgment
10. Declaration of David C. Grabowski, PHD in Support of Plaintiffs' Second Motion for Summary Judgment and Attached Expert Report;
11. Declaration of Margaret Leland;
12. Defendants' Opposition to Plaintiffs' Second Motion for Partial Summary Judgment;
13. Declaration of Marcelina Macandog in Support of Defendants' Opposition to Plaintiffs' Second Motion for Summary Judgment;
14. Declaration of Mariann Mckee in Support of Defendants' Opposition to Plaintiffs' Second Motion for Partial Summary Judgment with attached Expert Report;
15. Declaration of John Ficker; and
16. Reply in Support of Plaintiffs' Second Motion for Partial Summary Judgment.

III. FACTUAL BACKGROUND

The Defendants employed the Plaintiffs as live-in, caregivers in adult family homes the Defendants owned and operated in different places in Western Washington. The Plaintiffs all immigrated to the United States from the Philippines.

Residents in the Defendants' homes are seriously disabled with different physical and cognitive impairments. They are generally not able to live on their own and require significant assistance with a range of activities of daily living. The Plaintiffs' duties included cooking, cleaning, shopping, supervising and transporting residents, providing for their routine and more intimate care needs, and various administrative tasks. Their jobs required that the Plaintiffs be responsive to any resident need no matter the time, day or night.

1 The Plaintiffs have presented expert testimony and research that shows that working in
2 adult family homes and, more specifically, working as a live-in caregiver in an adult family
3 home can cause injuries to such workers. These include the danger of significant
4 musculoskeletal injuries caused by having to lift residents or assist residents with activities of
5 daily living, risks associated with combative residents who may lash out and physically
6 assault caregivers, and exposure to bodily fluids. Requiring live-in workers to respond to
7 resident care needs at any time during the day or night can lead to accidents, physical and
8 psychological exhaustion, sleep deprivation, and mental health disorders.

9 Because of these types of injuries, Washington State Workers Compensation Claim
10 data indicate that workers in risk class 6509, which includes adult family home workers,
11 have a 40% higher rate of allowed claims than do all industries overall and the healthcare
12 industry in particular. *See* Exhibit 1 to Declaration of Margaret Leland. Based upon his
13 experience and review of relevant literature, Dr. Grabowski, the Plaintiffs' expert, opined
14 that "[l]ong-term care workers, like those employed at adult family homes, face a high risk of
15 occupational injuries." Exhibit 1 to Declaration of David C. Grabowski, PH.D. at ¶ 16. Dr.
16 Grabowski also reports that research shows that 88.4% of nursing assistants in long-term care
17 facilities report work-related musculoskeletal injuries and that "roughly one-third" of nursing
18 assistants in nursing homes, "experienced a physical injury from a resident assault over the
19 prior year." *Id.* at ¶¶ 17, 19. Injuries are more prevalent amongst caregivers required to work
20 overtime. *Id.* at ¶ 19. Even, the Defendants' expert agrees that this type of work can be
21 dangerous.
22

1 It is no secret that the Health Care industry, is prone to injuries. The industry,
2 largely led by women, who are tasked with bending, stooping, transferring, and
3 managing patients with Dementia and physical impairments are going to get hurt.
4 As a CNA, I had my first back injury my senior year of nursing school, while
maneuvering a patient in a wheelchair, I herniated a disk. My story is not atypical.
Each year, there are injuries to those who are providing care.

5 Expert Report of Mariann McKee, RN at 8.

6 As result of the risks of musculoskeletal injuries, assaults from combative residents and
7 exposures to infectious agents, research highlighted in Dr. Grabowski's report indicates that
8 long-term care facilities are one of the "most dangerous workplaces in the United States. *Id.*
9 at ¶ 17 (*quoting* Lapane KL, Dubé CE, Jesdale BM, *Worker injuries in nursing homes: is*
10 *safe patient handling legislation the solution?*, J. Nurs. Home Res. Sci. 2016 Oct 28; 2:110-
11 117).

12 The Plaintiffs in their individual declarations document that they have suffered the
13 types of injuries the research and expert reports indicate are likely for live-in adult family
14 home caregivers, generally. The Plaintiffs report:

- 15 • "[L]ower back, hip and shoulder injuries that continue to this day," "serious
16 physical and mental health problems," depression, sleep disorders and other short-
17 and long-term health problems. Declaration of Adolfo Payag at ¶¶ 20, 38-40;
18 Declaration of Hollee Castillo at ¶¶ 33-42; Declaration of Honorina Robles at ¶¶
19 19-22, 24, 27, 39-43; Declaration of Madonna Ocampo ¶¶ 10, 17-19; Declaration of
20 Joclyn Bolina at ¶¶ 23-27, 29, 32, 34-35, 53, 65-59; Declaration of Reginald
21 Villalobos at ¶¶ 20-22.
- Exposures to MRSA, COVID, hepatitis, residents' blood and bodily waste. Payag
Decl. at ¶¶ 28-30, 32-33; Castillo Decl. at ¶¶ 25-30; Robles Decl. at ¶¶ 29-30, 32-
36; Bolina Decl. at ¶¶ 42-44, 46; Villalobos Decl. at ¶¶ 15-16, 18.
- Needle sticks. Payag Decl. at ¶ 31; Bolina Decl. at ¶ 45; Villalobos Decl. at ¶ 17.

- Verbal and physical abuse from combative residents. Payag Decl. at ¶¶ 34-35; Castillo Decl. at ¶ 24; Robles Decl. at ¶¶ 25-26; Ocampo Decl. at ¶ 13; Bolina Decl. at ¶¶ 37-39; Villalobos Decl. at ¶ 19.

The Defendants argue that they have received only one claim for an employee injury during the 16 years that they have operated adult family homes, and it was not a serious injury. Declaration of Marcelena Macandog in Support of Defendants' Opposition to Plaintiffs' Second Motion for Partial Summary Judgment at ¶ 11-12. They also present evidence showing that their homes have a lower workers compensation experience factor than other similarly situated businesses. *Id.* at ¶ 13.

Plaintiffs allege that they experienced significant disruptions to their sleep on many occasions because they assisted residents at different times throughout the night. Plaintiffs indicate that they worked many more than 40 hours, most weeks. While the Defendants assert that the Plaintiffs did not work as much as indicated in the Plaintiffs' declarations, they do not deny that the Plaintiffs were at times sleep deprived or required to work more than 40 hours in a week.² The Defendants apparently did not keep track of the actual hours that the Plaintiffs worked while employed as live-in caregivers.

The Defendants paid each Plaintiff a flat, daily wage irrespective of how many hours a Plaintiff actually worked each day. The Defendants did not pay the Plaintiffs' overtime. In addition to the flat daily wages, the Plaintiffs also received room and board. The parties disagree regarding the quality of the housing that the Defendants provided.

² The Defendants have not asked the Court to delay ruling on this motion for partial summary judgment to allow them to depose any of the Plaintiffs or the Plaintiffs' expert related to any of the factual allegations contained in the Plaintiffs' declarations or the facts and opinions contained in the Plaintiffs' expert report. *See* CR 56(f).

1 By law the Defendants are required to always have a caregiver present in their homes.
2 However, they may use shift workers to meet this requirement. *See* WAC 388-76-10040
3 (requiring on-site staffing at all times, but allowing shift-based, caregiving schedules). The
4 Defendants did employ non-live-in, shift-based caregivers in some of their homes.

5 The Plaintiffs allege that the live-in arrangements allowed the Defendants to avoid
6 paying wages to shift-based workers for hours in which residents were asleep or during other
7 non-regular business hours. The Defendants relied upon the presence of the live-in workers
8 to cover any resident needs, no matter the hour, or the actual number of hours the individual
9 Plaintiff had already worked that week. The Plaintiffs allege that the Defendants limited
10 staffing in some adult family homes to only two live-in, caregivers who were responsible for
11 the operations of the home and the care needs of all adult family home residents at every
12 hour of every day.

13 Plaintiffs allege that due to these live-in arrangements Plaintiffs received less than the
14 state minimum wage at times and were denied meal and rest breaks. The parties agree that
15 the Defendants did not pay the Plaintiffs overtime while working at their adult family homes.

16 The Defendants acknowledge that they utilize the live-in caregiving model because it is
17 less costly to them than employing shift-based workers.

18 Workers at [adult family homes] who are required to live where they work have a
19 unique occupation that does not comport with standard shift work contemplated
20 by the MWA. It would be cost prohibitive for owners of [adult family homes]
21 who employ live-in employees to comply with MWA due to the expense.

22 Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 9.

IV. RULING AND RATIONALE

To succeed on their motion, the Plaintiffs must show that there are no genuine issues of material fact, and the Plaintiffs are entitled to judgment as a matter of law. CR 56. The Court must construe all facts and inferences in the light most favorable to the Defendants, the non-moving parties. *Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230 (2013)

A. Plaintiffs Bring an As Applied Challenge to the Live-in Exclusion.

As an initial matter the Court must determine whether the Plaintiffs bring a facial or an as applied challenge to the live-in exclusion. To be successful in a facial challenge the Plaintiffs must prove beyond a reasonable doubt that “no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.” *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004). By contrast, an as applied challenge “is characterized by a party's allegation that application of the statute in the specific context [before the Court] is unconstitutional.” *Id.* A successful as applied challenge bars application of the statute in similar circumstances in the future but does not invalidate the whole statute. *Id.* Whether a statute is unconstitutional on its face or as applied is a question of law. *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wn.2d 476, 503, 585 P.2d 71 (1978). Here, the Court rejects the Plaintiffs’ argument to the extent that they assert a facial challenge to the live-in exclusion, RCW 49.46.010(3)(j).³

³ The live-in exclusion to the MWA reads:

(3) “Employee” includes any individual employed by an employer but shall not include:

....

1 The Plaintiffs challenge the live-in exclusion related to live-in caregiving in adult
2 family homes. Courts have recognized that the live-in exclusion applies to other types of
3 work; including firefighting, law enforcement, cruise ship employment, sheepherding, and
4 potentially others. *See e.g., Aponte v. Mason Cnty. Fire Prot. Dist. No 16*, 641 F. Supp. 3d
5 1016, 1032 (W.D. Wash. 2022) (genuine issue of material fact existed whether firefighters
6 were required to reside in or sleep at their place of employment); *Berrocal v. Fernandez*, 155
7 Wn.2d 585, 121 P.3d 82 (2005) (live-in exclusion exempts sheepherding from MWA); *Strain*
8 *v. W. Travel, Inc.*, 117 Wn. App. 251, 70 P.3d 158 (2003) (live-in provision excludes over-
9 night cruise ship work from MWA); *Chelan Cnty. Deputy Sheriffs' Ass'n v. Chelan Cnty.*,
10 109 Wn.2d 282, 303, 745 P.2d 1 (1987) (genuine issue of material fact regarding whether
11 live-in exclusion applies to sheriff deputies who carry pagers); *cf. Teamsters Local Union*
12 *No. 117 v. State, Dep't of Corr.*, 145 Wn. App. 507, 515-16, 187 P.3d 754 (2008) (live-in
13 exclusion does not apply to some correctional officers who were required to carry a pager).

14 Some of these other occupations may be dangerous industries covered by the dangerous
15 employments clause. However, there is no evidence in the record to show that every
16 employment relationship that falls within the live-in exclusion is also part of a dangerous
17 industry. Therefore, the Court cannot find that “no set of circumstances exists in which the
18

19
20 (j) Any individual whose duties require that he or she reside or sleep at the place of his or her
employment or who otherwise spends a substantial portion of his or her work time subject to call,
and not engaged in the performance of active duties.

21 RCW 49.46.010(3)(j).
22

1 statute, as currently written, can be constitutionally applied.” *Moore*, 151 Wn.2d at 669. Any
2 facial challenge to the live-in exclusion necessarily fails.

3 *Martinez-Cuevas* does not require a different result. “[W]e hold that RCW
4 49.46.130(2)(g) violates article I, section 12 *as applied to dairy workers*, which is clearly
5 supported by the arguments presented and the factual record before us.” *Martinez-Cuevas*,
6 196 Wn.2d at 525 (emphasis added). The legislature when amending the MWA in response
7 to the *Martinez-Cuevas* case also understood that the case was an as applied challenge to the
8 MWA’s broader exclusion of all agricultural work. See 2021 Wash. Laws 249, Final Bill
9 Report ESSB 5172 (“On November 5, 2020, the Washington Supreme Court ruled in *Jose*
10 *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, that the current law exempting agricultural
11 workers from overtime pay, *as applied to dairy workers*, is unconstitutional under the
12 Washington State Constitution”) (emphasis added). While a facial challenge to the live-in
13 exclusion fails, the Court finds that the Plaintiffs can successfully challenge the live-in
14 exclusion “as applied” to live-in caregiving.

15 ***B. Privileges and Immunities Analysis.***

16 Plaintiffs assert that the live-in provision as applied to them is unconstitutional because
17 it violates the privileges and immunities clause. The Court undertakes a two-part inquiry to
18 determine whether a particular law violates the privileges and immunities clause.

19 First, [the Court] ask[s] whether a challenged law grants a privilege or immunity
20 for purposes of our state constitution. If the answer is yes, then [the Court] ask[s]
whether there is a reasonable ground for granting that privilege or immunity.

21 *Martinez-Cuevas*, 196 Wn.2d at 519. Only “privileges” or “immunities” that implicate
22 “fundamental rights of state citizenship” satisfy the first element. *Id.*

1 ***C. The Live-in Exclusion is a Privilege or Immunity Granted to the Defendants.***

2 As the *Martinez-Cuevas* Court recognized, workers in industries that fall within the
3 dangerous employments clause possess a fundamental right to the MWA’s statutory
4 protections, including a minimum wage and overtime. *Id.* at 521.

5 The dangerous employments clause reads:

6 The legislature shall pass necessary laws for the protection of persons working in
7 mines, factories and other employments dangerous to life or deleterious to health;
and fix pains and penalties for the enforcement of the same.

8 Wash. Const. article II, section 35.

9 This clause is clear. A covered “other employment” can be either “dangerous to
10 life” **or** “deleterious to health”. Black’s Law Dictionary defines “deleterious” in part as
11 “[u]nwholesome;’ psychologically or physically harmful.” *Deleterious*, Black’s Law
12 Dictionary (12th ed. 2024); *see also*, *Deleterious*, Oxford English Dictionary (“[c]ausing
13 physical harm or damage to a person or thing; detrimental to life or health; harmful
14 noxious”); *Deleterious*, Merriam-Webster Dictionary (“harmful often in a subtle or
15 unexpected way”). The plain language of the dangerous employments clause does not
16 require an industry to be life threatening. It must only be potentially harmful to worker
17 health.

18 The *Martinez-Cuevas* Court used different language to describe the types of industries
19 covered by the dangerous employments clause. *See e.g. id.* at 512 (analysis is of workers in
20 “dangerous industries”); *id.* at 519 (workers in “certain especially dangerous industries”
21 protected); *id.* at 520 (dairy workers covered under article II, section 35 because “they
22 worked long hours in conditions dangerous to life and deleterious to their health”); *id.* at 521

1 (“extremely dangerous nature of dairy work entitles dairy workers” to MWA protections). As
2 the *Martinez-Cuevas* Court acknowledged, dairy work is both potentially life-threatening and
3 dangerous to health. *Id.* at 520 (dairy work is both “dangerous to life **and** deleterious to
4 [worker’s] health”) (emphasis added). However, the plain language of article II, section 35
5 also covers other industries that are “deleterious to health,” even if less dangerous than dairy
6 work. *Compare id. with* article II, section 35 (“other employments dangerous to life **or**
7 deleterious to health”) (emphasis added). Accordingly, if working as a live-in caregiver in an
8 adult family home can be physically or psychologically harmful, those workers enjoy a
9 fundamental right to the MWA’s wage and hour protections. *Martinez-Cuevas*, 196 Wn.2d at
10 519.

11 As detailed above, the Plaintiffs have submitted expert testimony and research that lay
12 out the dangers of live-in caregiving in general. Even Defendant’s expert agrees that
13 caregiving will likely injure workers like the Plaintiffs. Here the undisputed evidence proves
14 that people in this line of work are at serious risk of musculoskeletal injuries, assaults at the
15 hands of combative patients, and potentially heightened exposure to infectious agents. The
16 Plaintiffs individual declarations describe short and longer term physical and psychological
17 injuries in line with the expert reports and evidence-based research.

18 The Plaintiff’s uncontroverted declarations also assert that they worked long hours and
19 were sleep deprived because of their job duties. The MWA’s statutory structure is in part a
20 recognition that working long hours in physical professions takes a psychological, physical
21 and social toll on workers. “The stated purpose of the Minimum Wage Act is to protect the
22 health and safety of Washington workers, as required by article II, section 35. This purpose

1 underlies the entirety of the act, including the overtime pay protections and exemptions.” *Id.*
2 at 525; *cf.*, *id.* at 520 (“[o]vertime work is particularly injurious”). Here, the Plaintiffs’
3 declarations describe physical, demanding labor, undertaken on little sleep and after many
4 other hours of work. Such working conditions are precisely those that the MWA is designed
5 to reduce or eliminate.

6 These and other individual facts related to the operations of the Defendants’ homes are
7 relevant to whether live-in caregiving in adult family homes is dangerous. However, the
8 Court’s analysis is broader than whether the Defendants operated safe adult family homes.
9 When determining whether the live-in exclusion grants a privilege or immunities, the Court
10 must decide whether live-in, caregiving in adult family homes in general falls within the
11 dangerous employments clause.

12 The live-in clause’s language makes this clear. “[T]he legislature shall pass necessary
13 laws for the protection of persons working in mines, factories and other employments
14 dangerous to life or deleterious to health[.]” Article II, section 35. This section requires that
15 the legislature pass laws impacting broad categories of employment, rather than directly
16 regulate individual employers within a particular industry.

17 For this reason, while the *Martinez-Cuevas* Court reviewed evidence regarding the
18 specific dairy farms where the plaintiffs worked, the Court also analyzed dairy work
19 generally and decided that dairy work as a whole fell within the dangerous employments
20 clause. *See Martinez-Cuevas*, 196 Wn.2d at 520-21 (discussing that dairy work generally is
21 dangerous, describing types of injuries that dairy workers as a group can suffer, and noting
22 that overtime work is particularly dangerous). Similarly, the Plaintiffs here have presented

1 evidence regarding their own experiences working in the Defendants' homes and more
2 generalized information about the health risks that all live-in adult family home workers face.

3 The Defendants' evidence suggests that they may run safe adult family homes.

4 However, they have not presented evidence that contradicts the Plaintiffs' evidence related to
5 the dangers of the industry more broadly. The Defendants have also presented evidence
6 regarding the benefits residents receive by living in adult family homes and the financial
7 challenges that adult family home operators face given applicable regulatory requirements
8 and available revenue sources. However, this evidence does not directly address whether
9 live-in caregiving in adult family homes is dangerous.

10 The Defendants have failed to show the existence of a genuine issue of material fact as
11 to whether live-in caregiving in adult family homes in general is potentially dangerous to the
12 people doing that work. The undisputed evidence in the record indicates that live-in, adult
13 family home caregiving can be "deleterious to health". Such work therefore falls within the
14 dangerous employments clause.

15 Furthermore, the live-in exclusion was "granted" to the Defendants. *See* article I,
16 section 12 Wash. Const. ("[n]o law shall be passed granting..."). Other employers do not
17 receive a similar exclusion from the minimum wage and overtime laws. Even the Defendants
18 are subject to the MWA when they employ non-live-in, shift-based workers. The Defendants
19 acknowledge that they use live-in workers rather than shift-based workers to save on labor
20 costs. The MWA's live-in exclusion grants the Defendants "a privilege or immunity from
21 providing overtime protections guaranteed to [live-in workers in adult family homes] under
22 article II, section 35." *Martinez-Cuevas*, 196 Wn.2d at 519.

1 ***D. There is No “Reasonable Ground” to Grant Adult Family Home Operators an***
2 ***Exemption from the MWA for Some of Their Workers.***

3 Having determined that the Defendants have received a privilege or immunity, the
4 Court turns to the second part of the constitutional analysis: whether reasonable grounds exist
5 to grant adult family home operators an exemption from the MWA for people who live and
6 work in their homes. It is undisputed that the MWA protects the Defendants’ employees who
7 do not also live on the premises.

8 The privileges and immunities clause “reasonable ground” test is more exacting than
9 rational basis review. *Id.* at 523. The Court must “scrutinize the legislative distinction to
10 determine whether it in fact serves the legislature’s stated goal.” *Schroeder v. Weighall*, 179
11 Wn.2d 566, 574, 316 P.3d 482 (2014)). Any such distinction must be “justified in face and
12 theory”. *Martinez-Cuevas*, 196 Wn.2d at 523.

13 The legislature enacted minimum wage and overtime laws to protect workers.

14 Since the enactment of Washington's original minimum wage act, the legislature
15 and the people have repeatedly amended this chapter to establish and enforce
16 modern fair labor standards, including periodically updating the minimum wage
 and establishing the forty-hour workweek and the right to overtime pay.

17 RCW 49.46.005(2); *see also*, *Martinez-Cuevas* at 521 (MWA is “[n]ecessary to safeguard the
18 health, safety and general welfare of Washington citizens”) (*citing* RCW 49.46.005(1)). The
19 legislature recognized that long hours for little pay, particularly in industries that require
20 demanding labor, are likely to injure workers, physically, emotionally and socially.

21 “[M]inimum wage laws have a remedial purpose of protecting against ‘the evils and
22 dangers resulting from wages too low to buy the bare necessities of life and from long hours

1 of work injurious to health[.]” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d
2 851, 870, 281 P.3d 289 (2012) (quoting *U.S. v. Rosenwasser*, 323 U.S. 360, 361 (1945)).⁴

3 The MWA’s overtime mandate limits the number of hours that individual workers must work
4 by significantly increasing the marginal cost to an employer of using an individual worker
5 more than 40 hours in a week. *See Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460, 68
6 S.Ct. 1186 (1948) (overtime laws “compensate those who labored in excess of the statutory
7 maximum number of hours for the wear and tear of extra work and to spread employment
8 through inducing employers to shorten hours because of the pressure of extra cost.”) Here,
9 because the Defendants pay a flat daily wage and do not pay overtime, their marginal hourly
10 labor cost decreased with each additional hour per day and per week the Plaintiffs worked.

11 Unlike other industries where live-in or on-call work is essential to the industry’s
12 operations, *see e.g. Strain*, 117 Wn. App. 251 (live-in exclusion applies to crew member on
13 over-night cruises), the Defendants can staff their homes with shift-based, non-live-in
14 workers. They choose not to do so because of the lower labor costs associated with live-in
15 workers. *See Defendants’ Opposition* at 9. In fact, one of the Defendant’s experts opines that
16 non-compliance with the MWA is essential to the financial operations of at least some adult
17 family homes. Ficker Decl. at ¶¶ 32-33.

18 The Defendants essentially argue that the legislature has allowed them to pay less than
19 the minimum wage and incentivized them to require live-in caregivers to work more than 40
20 hours a week, rather than utilize shift-based workers. Any such incentives do not serve the
21

22 ⁴ Courts interpret Washington’s MWA and its provisions in light of the similar language and purpose behind the federal Fair Labor Standards Act. *Anfinson*, 174 Wn.2d at 868.

1 MWA’s purposes and do not rest on “reasonable grounds”. The financial challenges that
2 home operators may face and the unquestionable benefits to residents of living in adult
3 family homes do not justify denying some of the people employed in the industry their basic
4 wage and hour rights.

5 Moreover, the legislature has explicitly identified the importance of trained,
6 professional, and skilled caregivers in adult family homes. “The legislature finds that many
7 residents of community-based long-term care facilities are vulnerable and their health and
8 well-being are dependent on their caregivers. The quality, skills, and knowledge of their
9 caregivers are the key to good care.” RCW 70.128.005(3). Overworked, underpaid adult
10 family home staff risk not only their own health and safety, but also that of the people under
11 their care; realities in conflict with the entire regulatory scheme governing the operations of
12 adult family homes. “The provider must promote the health, safety, and well-being of each
13 resident residing in each licensed adult family home.” WAC 388-76-10015(3); *see also* RCW
14 70.28.005(2) (“the development and operation of adult family homes that promote the health,
15 welfare, and safety of residents, and provide quality personal care and special care services
16 should be encouraged”); RCW 70.28.005(4) (“[t]he legislature finds that the state of
17 Washington has a compelling interest in developing and enforcing standards that promote the
18 health, welfare, and safety of vulnerable adults residing in adult family homes.”) Any
19 exclusion of live-in adult family home workers from basic wage and hour laws that allows
20 the Defendants to require long hours at low pay, undermines this express legislative directive
21 related to the health and safety of residents of adult family homes.
22

1 In addition, the Plaintiffs’ evidence shows that exclusions from wage and hour laws for
2 this type of caregiving work are rooted in historical, racialized and misogynist views
3 regarding the workers who have traditionally provided these services and the nature of the
4 work itself. Defendants acknowledge that “[c]aregiving is often seen as an entry level, low
5 wage position with no career ladder[.]” Defendants’ Opposition at 8. It is no accident that all
6 of the Plaintiffs are recent immigrants to the United States. This unfortunate historical legacy
7 cannot provide reasonable grounds for excluding live-in caregiving from basic wage and
8 hour protections. *Cf. Martinez-Cuevas*, 196 Wn.2d at 533 (Gonzalez, C.J. concurring)
9 (excluding primarily immigrant and Latino farmworkers “from health and safety protections
10 cannot be justified by an assertion that the agricultural industry, and society’s general
11 welfare, depends on a caste system that is repugnant to our nation’s best self.”)

12 The Plaintiffs received additional compensation in the form of room and board along
13 with their wages. Undoubtedly, it can be difficult to calculate the full compensation that a
14 live-in worker receives. Nonetheless, considering the more stringent “reasonable grounds”
15 analysis, these difficulties standing alone do not justify carving out live-in adult family home
16 workers from basic wage and hour protections that other adult family home workers who do
17 not live on the premises enjoy.⁵

19 ⁵ The fair value of the room and board that the Plaintiffs received is relevant to whether the Plaintiffs received
20 less compensation than the MWA requires. Moreover, the Court understands that the Defendants and other
21 adult family home operators are significantly constrained by the reality that a large percentage of their revenues
22 come from State Medicaid payments. Like the Defendants, the State has benefited from the lower labor costs
associated with denying live-in adult family home workers wage and hour protections enjoyed by other people
doing the same work on a shift basis. However, neither the total compensation the Plaintiffs received nor the
financial challenges facing family home operators directly relate to the question before the Court here, whether
the live-in exclusion violates the privileges and immunities clause as applied to live-in caregiving in adult
family homes.

1 The Court finds that the live-in exclusion as applied to live-in workers in adult family
2 homes does not “in fact serve[] the legislature’s stated goal” in the MWA or the laws
3 requiring protections for residents of adult family homes. RCW 70.128 *et seq.*; WAC 388-76
4 *et seq.* It’s application here also reflects outdated views of the value of the work and of the
5 people who have traditionally provided these services. Accordingly, no reasonable grounds
6 exist that justify any such exclusion.

7 For the reasons stated above, the Court finds that the Defendants have been granted a
8 privilege or immunity and that no reasonable grounds exist that justify the privilege or
9 immunity. The MWA live-in exclusion is unconstitutional as applied to live-in, caregiving in
10 adult family homes.⁶

11 ///

12 ///

17 ⁶ The Defendants ask that the Court rule that its decision only apply prospectively. The Court does not do so
18 now. The Court will need to consider the potential prejudice to the Defendants of retroactive application, among
19 other issues. *Bond v. Burrows*, 103 Wn.2d 153, 164, 690 P.2d 1168 (1984) (as part of analysis, courts should
20 examine “financial and administrative hardships” that might arise from retroactive application of ruling). There
21 remain relevant genuine issues of material fact to be determined at trial with respect to this question. These
22 issues include, but are not necessarily limited to, disputes regarding the actual number of hours the Plaintiffs
worked, the breaks that Plaintiffs were able to take during the day, and the value of the housing and board the
Plaintiffs received while working for the Defendants. In addition, the Court does not reach the alternative issue
that the Plaintiffs present and takes no position on whether the live-in exclusion does not apply to the Plaintiffs
because their job duties did not actually “require that [they] reside or sleep” at the Defendants’ adult family
homes.

1 Therefore, the Court hereby enters the following ORDER:

2 **ORDER**

3 1. The Plaintiffs' motion for partial summary judgment is granted.

4
5 DATED this 4th day of September, 2024.

6 Electronic signature below.

7 JUDGE NICHOLAS B. STRALEY

King County Superior Court
Judicial Electronic Signature Page

Case Number: 23-2-05373-7
Case Title: BOLINA ET AL VS ASSURECARE ADULT HOME ET AL
Document Title: ORDER

Signed By: Nicholas Straley
Date: September 04, 2024



Judge: Nicholas Straley

This document is signed in accordance with the provisions in GR 30.

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O=KCDJA, CN="Nicholas Straley:
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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

JOCYLIN BOLINA; ADOLFO PAYAG;
MADONNA OCAMPO; HONORINA
ROBLES; HOLLEE CASTILLO; and REGINA
VILLALOBOS,

Plaintiffs,

vs.

ASSURECARE ADULT HOME LLC, a
Washington corporation; ASSURECARE
ADULT FAMILY HOME LLC, a Washington
corporation; ASSURECARE FAMILY HOME
CARE LLC, a Washington corporation;
MARCELINA S. MACANDOG, an individual;
GERALD MACANDOG, an individual,

Defendants.

CASE NO. 23-2-05373-7 SEA

**ORDER GRANTING STIPULATED
MOTION TO CERTIFY ORDER FOR
DISCRETIONARY REVIEW AND TO
STAY CASE PENDING DISCRETIONARY
REVIEW**

THIS MATTER came before the Court on the Stipulated Motion to Certify Order for Discretionary Review and to Stay Case Pending Discretionary Review which was joined by all parties who have appeared in this case. This Court has considered the following:

1. The parties' Stipulated Motion to Certify Order for Discretionary Review and to Stay Case Pending Discretionary Review ("the Stipulated Motion");
2. The Court's Order Granting Plaintiffs' Second Motion for Partial Summary Judgment ("the Order") on September 4, 2024; and
2. The pleadings, records, and files herein.

1 **ORDER**

2 Being fully advised, and finding that there is good cause, the Court now ORDERS and
3 DECREES that the Stipulated Motion is GRANTED. The Court further ORDERS as follows:

- 4 1. The Court certifies that the Order involves a controlling question of law as to which there
5 is substantial ground for a difference of opinion and that immediate review of the Order
6 may materially advance the ultimate termination of the litigation.
- 7 2. All proceedings before this Court are stayed pending the Washington Supreme Court's
8 decision on discretionary review of the Order.
- 9 3. The parties shall file a joint status report with the Court no later than November 15, 2024,
10 if the Washington Supreme Court has not accepted review by that date. The parties
11 should address whether the current trial date of December 16, 2024 should be continued
12 as part of the joint status report.

13 IT IS SO ORDERED.

14 DATED this 24th day of September, 2024.

15 Electronic signature below.

16

HONORABLE NICHOLAS STRALEY

1 Presented by:

2 FAIR WORK CENTER

3
4 /s/ Jeremiah Miller

Jeremiah Miller, WSBA No. 40949

5 Emily Grove, WSBA No. 52867

Janae Choquette, WSBA No. 58701

6 *Attorneys for Plaintiffs*

7 and

8 SEATTLE LITIGATION GROUP, PLLC

9
10 /s/ Albert H. Kirby

Albert H. Kirby, WSBA No. 40187

11 *Attorneys for Defendants*

King County Superior Court
Judicial Electronic Signature Page

Case Number: 23-2-05373-7
Case Title: BOLINA ET AL VS ASSURECARE ADULT HOME ET AL
Document Title: ORDER

Signed By: Nicholas Straley
Date: September 24, 2024



Judge: Nicholas Straley

This document is signed in accordance with the provisions in GR 30.

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O=KCDJA, CN="Nicholas Straley:
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E-FILED
CASE #: 23-2-05373-7 SEA

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOCYLIN BOLINA; ADOLFO PAYAG;
MADONNA OCAMPO; HONORINA
ROBLES; HOLLEE CASTILLO; AND
REGINALD VILLALOBOS

Plaintiffs,

vs.

ASSURECARE ADULT HOME LLC, A
WASHINGTON CORPORATION;
AMAZING HOME ADULT FAMILY
HOME LLC, A WASHINGTON
CORPORATION; ASSURECARE ADULT
FAMILY HOME LLC, A WASHINGTON
CORPORATION; ASSURECARE FAMILY
HOME CARE LLC, A WASHINGTON
CORPORATION; REGAL HOME CARE
LLC; A WASHINGTON CORPORATION;
MARCELINA S. MACANDOG, AN
INDIVIDUAL; GERALD MACANDOG, AN
INDIVIDUAL

Defendants

Case No.: 23-2-05373-7 SEA

FIRST AMENDED CIVIL COMPLAINT FOR
DAMAGES AND FOR DECLARATORY
JUDGMENT

Plaintiffs, Jocylin Bolina, Adolfo Payag, Madonna Ocampo, Honorina Robles, Hollee Castillo, and Reginald Villalobos, by and through the undersigned counsel, bring this action against Defendants Assurecare Adult Home LLC, Amazing Home Adult Family Home LLC, Assurecare Adult Family Home LLC, Assurecare Family Home Care LLC, Regal Home Care

FIRST AM. CIVIL COMPLAINT FOR DAMAGES
AND DECLARATORY JUDGMENT - 1

APP. 26

FAIR WORK CENTER
116 Warren Avenue North
Seattle, WA 98109
(206) 331-3824

1 LLC, (collectively “Assurecare Adult Family Homes”) Marcelina S. Macandog, and Gerald
2 Macandog and state as follows:

3 **I. NATURE OF ACTION**

4 1. This case involves a group of Filipino caregivers who worked at adult family
5 homes owned by Defendants in Washington State. Defendants required Plaintiffs to work shifts
6 as long as 24 hours in these homes where Plaintiffs were responsible for nearly all business
7 operations, including administering medications, bathing, cooking, janitorial services, providing
8 companionship, and transporting residents offsite for appointments and other activities. Plaintiffs
9 cared for many elderly or disabled patients every day, engaging in back-breaking labor under
10 dangerous, and sometimes life-threatening, conditions. Some Plaintiffs suffered repetitive stress
11 injuries from moving and bathing residents and others contracted illnesses like COVID-19 from
12 their place of work. Despite the injuries and illnesses suffered by Plaintiffs, Defendants did not
13 provide sick leave. For this hard and dangerous work, Defendants paid an hourly wage for
14 employees of as little as four dollars per hour, without breaks.

15 2. Plaintiffs bring this action against Defendants for the willful withholding of wages
16 earned for all hours worked, in violation of Washington’s Industrial Welfare Act and Minimum
17 Wage Requirements and Labor Standards Act.

18 3. Plaintiffs also bring this action seeking a declaratory judgment that the “live-in”
19 exemption to Washington’s Minimum Wage Requirements and Labor Standards Act is
20 unconstitutional as it is a privilege or immunity granted to employers of live-in employees
21 without a reasonable basis, and otherwise lacks any rational basis. This exemption is the product
22 of a racist and sexist history, imported from discriminatory exemptions in New Deal legislation.

1 The Washington legislature offered no other justification for the exemption when it became law
2 in the 1960s.

3 II. PARTIES

4 4. Plaintiff Jocylin Bolina (“Bolina”) is a resident of the State of Washington. At all
5 relevant times, Plaintiff Bolina was employed by Defendants.

6 5. Plaintiff Adolfo Payag (“Payag”) is a resident of the State of Washington. At all
7 relevant times, Plaintiff Payag was employed by Defendants.

8 6. Plaintiff Madonna Ocampo (“Ocampo”) is a resident of the State of Washington.
9 At all relevant times, Plaintiff Ocampo was employed by Defendants.

10 7. Plaintiff Honorina Robles (“Robles”) is a resident of the State of Washington. At
11 all relevant times, Plaintiff Robles was employed by Defendants.

12 8. Plaintiff Hollee Castillo (“Castillo”) was a resident of the State of Washington at
13 all relevant times. At all relevant times, Plaintiff Castillo was employed by Defendants.

14 9. Plaintiff Reginald Villalobos (“Villalobos”) is a resident of the State of
15 Washington. At all relevant times, Plaintiff Villalobos was employed by Defendants.

16 10. Defendant Assurecare Adult Home LLC (“Assurecare”) is a Washington
17 corporation with a date of incorporation of May 20, 2008. Defendant Assurecare is registered in
18 the State of Washington, UBI no. 602-833-710, and conducts business in Tacoma, Washington.

19 11. Defendant Amazing Home Adult Family Home (“Amazing”) is a Washington
20 corporation with a date of incorporation of January 20, 2022. Defendant Amazing is registered
21 in the State of Washington, UBI no. 604-857-864, and conducts business in Auburn, Washington.

22 12. Defendant Assurecare Adult Family Home LLC (“Assurecare Home”) is a
23 Washington corporation with a date of incorporation of February 9, 2016. Defendant Assurecare

1 Home is registered in the State of Washington, UBI no. 603-583-874, and conducts business in
2 Bremerton, Washington.

3 13. Defendant Assurecare Family Home Care LLC (“Assurecare Family”) is a
4 Washington corporation with a date of incorporation of January 25, 2017. Defendant Assurecare
5 Family is registered in the State of Washington, UBI no. 604-083-613, and conducts business in
6 Tacoma, Washington.

7 13. Defendant Regal Home Care LLC (“Regal”) is a Washington
8 corporation with a date of incorporation of August 4, 2021. Defendant Regal is registered in the
9 State of Washington, UBI no. 604-789-534, and conducts business in Bellevue, Washington.

10 14. Defendant Marcelina S. Macandog (“Macandog”) is a resident of King County,
11 and was the owner of Assurecare Adult Family Homes during all times relevant to this litigation.
12 At all relevant times, all acts and omissions of Defendant Macandog were performed individually
13 and within the scope of her work as the owner and manager of Assurecare Adult Family Homes.

14 15. Defendant Gerald Macandog (“G. Macandog”) is a resident of King County,
15 and was the owner of Assurecare Adult Family Homes during all times relevant to this litigation.
16 At all relevant times, all acts and omissions of Defendant G. Macandog were performed
17 individually and within the scope of his work as the owner and manager of Assurecare Adult
18 Family Homes.

19 III. JURISDICTION AND VENUE

20 16. This Court has jurisdiction of Plaintiffs' claims pursuant to RCW 2.08.010 and
21 RCW 7.24.110. Plaintiffs have arranged for timely service on the Attorney General as required
22 by RCW 7.24.110.

23 17. Venue is proper in this court, pursuant to RCW 4.12.020 and RCW 4.12.025.

1 residential settings rather than being institutionalized, caregivers are paid strikingly low
2 wages. Caregivers are far more likely than other workers to live in poverty, and they generally
3 lack health care and retirement benefits.

4 24. Live-in caregivers' work is dangerous. Caregivers face bloodborne pathogens
5 and other biological hazards, physical injury from assisting patients with low mobility, violence
6 from patients, and unhygienic and dangerous conditions in the workplace. In 2021, caregivers
7 in assisted living facilities had an illness and injury rate in the top twenty for all professions,
8 exceeding the injury rates for steelworkers and meat processors, among others.

9 V. FACTUAL ALLEGATIONS

10 The Nature of Plaintiffs' Work for Defendants

11 25. From March 1, 2018 to December 3, 2021, Plaintiff Bolina worked as a Caregiver
12 for Defendants in a facility located in Auburn, Washington.

13 26. From March 1, 2018 through January 1, 2020, Plaintiff Bolina's rate of pay was
14 \$130.00 per day.

15 27. From January 2, 2020 through January 1, 2021, Plaintiff Bolina's rate of pay was
16 \$140.00 per day.

17 28. From January 2, 2021 through December 3, 2021, Plaintiff Bolina's rate of pay
18 was \$150.00 per day.

19 29. From January 21, 2017 to August 21, 2020, Plaintiff Payag worked as a Caregiver
20 for Defendants in facilities located in Lakewood and Bremerton, Washington,

21 30. From January 21, 2017 to January 1, 2018, Plaintiff Payag's rate of pay was
22 \$100.00 per day.

1 31. From January 2, 2018 to August 21, 2021, Plaintiff Payag's rate of pay was
2 \$120.00 per day.

3 32. From October 2014 to March 2021, Plaintiff Ocampo worked as a Caregiver for
4 Defendants in a facility located in Lakewood, Washington.

5 33. From October 2014 to January 2016, Plaintiff Ocampo's rate of pay was \$125.00
6 per day.

7 34. From February 2016 to 2019, Plaintiff Ocampo's rate of pay was \$130.00 per day.

8 35. From 2019 to March 2021, Plaintiff Ocampo's rate of pay was \$140.00 per day.

9 36. From 2016 to November 17, 2020, Plaintiff Robles worked as a Caregiver for
10 Defendants in a facility located in Lakewood, Washington.

11 37. From 2016 to June 2019, Plaintiff Robles' rate of pay was \$110.00 per day.

12 38. From June 2019 to November 17, 2020, Plaintiff Robles' rate of pay was \$130.00
13 per day.

14 39. From April 28, 2018 to August 1, 2021, Plaintiff Castillo worked as a Caregiver
15 for Defendants in facilities located in Lakewood, Bremerton, Auburn, and Bellevue, Washington.

16 40. From April 28, 2018 to January 1, 2019, Plaintiff Castillo's rate of pay was
17 \$100.00 per day.

18 41. From January 2, 2019 to January 1, 2020, Plaintiff Castillo's rate of pay was \$110
19 per day.

20 42. From January 2, 2020 to August 1, 2021, Plaintiff Castillo's rate of pay was
21 \$145.00 per day.

1 43. From January 1, 2019 to September 2020, Plaintiff Villalobos worked as a
2 Caregiver for Defendants in facilities located in Lakewood, Auburn, Bremerton, and Bellevue
3 Washington.

4 44. From January 1, 2019 to January 1, 2020, Plaintiff Villalobos' rate of pay was
5 \$130.00 per day.

6 45. From January 2, 2020 to September 2020, Plaintiff Villalobos' rate of pay was
7 \$145.00 per day.

8 46. On information and belief, Defendants Macandog and G. Macandog owned,
9 operated, and managed Assurecare Adult Family Homes during all times relevant to this
10 litigation.

11 47. Throughout Plaintiffs' employment, Plaintiffs were consistently scheduled for 12
12 or 24 hours shifts at Defendants' direction.

13 48. No Plaintiff had an employment agreement that required them to live at or sleep
14 at Defendants' place of business.

15 49. Defendants communicated to Plaintiffs that they were expected to be available
16 throughout their shifts without uninterrupted breaks and enabled a working environment that
17 regularly led to Plaintiffs working full days without sleep and in constant active duty.

18 50. As caregivers, Plaintiffs provided ongoing care to patients during their shifts.
19 Plaintiffs' duties included assisting patients with personal care and hygiene, following healthcare
20 plans prescribed by the patients' doctors, assisting patients with eating, exercising and other
21 routine tasks, providing emotional support, encouragement, mobility assistance, and
22 administering medications. Plaintiffs also continuously followed a patient rotation schedule
23 which required checking in on rooms and patients, rotating and shifting sleeping patients to
24

1 ensure they did not get bed sores, and escorting and assisting patients going to the bathroom and
2 other similar tasks throughout the day and night.

3 51. Plaintiffs were also responsible for administrative tasks, all janitorial services, and
4 general upkeep of the home throughout their shifts.

5 52. Plaintiffs shopped for groceries and cleaning supplies and cooked meals for
6 patients on a budget determined by Defendants.

7 53. While Plaintiffs were provided with limited sleeping accommodations, they were
8 consistently unable to use them for their intended purpose as their numerous job duties
9 necessitated that they regularly work throughout the night.

10 54. All patients in the home had access to call buttons that would immediately ring
11 the caregivers at the press of a button.

12 55. Plaintiffs were directed by Defendants to respond to all patient needs 24 hours a
13 day irrespective of whether Plaintiffs were attempting to sleep, rest, or eat a meal.

14 56. Plaintiffs performed work for the entirety of their shifts and were not allowed to
15 sleep or rest while working.

16 57. Defendants had no systems or processes in place to allow for Plaintiffs to take
17 uninterrupted meal or rest breaks.

18 59. Defendants did not provide Plaintiffs with additional compensation when their
19 meal or rest break was missed or cut short.

20 60. In addition to working without meal or rest breaks, Plaintiffs were consistently
21 scheduled to work in excess of 40 hours per week.

22 61. Defendant's practice of overscheduling Plaintiffs was a result of their regular
23 practice of understaffing individual adult family homes with only two caregivers working up to
24

1 24 hours a day for 6 or more patients seven days a week.

2 **Failure to Pay for all Hours Worked**

3 62. Plaintiffs were provided their schedule either verbally or via text message by
4 Defendants. The text message schedules generally were of an image of the schedule for
5 caregivers for the month in a calendar format.

6 63. The paychecks issued by Defendants to Plaintiffs always reflected less hours than
7 actually worked by Plaintiffs, resulting in consistent failure to pay Plaintiffs for all hours worked.
8 Defendants also paid some wages in cash, without records.

9 64. Throughout Plaintiffs' employment, Plaintiffs directly requested that Defendants
10 pay them for all hours worked. Defendants gave Plaintiffs conflicting explanations for why they
11 had not been paid for all the hours they had worked.

12 65. Defendants regularly communicated to Plaintiffs that Defendants did not have
13 money to pay more.

14 66. Defendants used taxes, licenses, and lack of patient income to justify their failure
15 to pay more to Plaintiffs.

16 67. Even after Plaintiffs raised concerns about the wages they were owed,
17 Defendants continued to willfully fail to pay Plaintiffs for all hours worked.

18 69. In addition, Defendants created an environment that discouraged Plaintiffs from
19 reporting Defendants' practices to the Department of Labor and Industries ("Department").
20 Defendants would communicate with Plaintiffs and other caregivers to ask about if anyone had
21 filed a complaint, chilling Plaintiffs' confidence in their ability to complain without retaliation.

22 70. Defendant Marcelina S. Macandog believed that Plaintiff Castillo had complained
23 to the Department and removed all patients from his home though she required Plaintiff Castillo
24

1 to stay on the premises and continue with all duties other than patient care.

2 **Failure to Pay Minimum Rate of Compensation**

3 71. Defendants Assurecare, Amazing, Assurecare Family and Regal are located and
4 do business in the Cities of Lakewood, Auburn, Bremerton, and Bellevue in Washington. During
5 all relevant times to this litigation, Plaintiffs worked for Defendants in the aforementioned
6 homes.

7 72. Throughout Plaintiffs employment, Defendants never paid Plaintiffs the required
8 minimum wage rate.

9 73. The range of daily rates paid to Plaintiffs by Defendants, as set forth in paragraphs
10 25 through 45 was between \$100.00 and \$150.00 per day during all relevant times. This equates
11 to an hourly rate range of \$4.17 to \$6.25 for a 24-hour shift, or \$8.33 to \$12.50 per hour for a
12 twelve-hour shift, generally well below the minimum wage requirements in the state of
13 Washington.

14 74. The minimum wage rate for employers in Washington was: \$12.00 per hour in
15 2019; \$13.50 per hour in 2020; \$13.69 per hour in 2021; \$14.49 per hour in 2022.

16 75. Throughout Plaintiffs' employment, Plaintiffs repeatedly requested payment of at
17 least the required minimum wage rate in direct conversations with Defendants.

18 76. Defendants, in deliberate and willful disregard of the legal requirements known
19 to Defendants, continued to pay a lower than minimum wage hourly rate to Plaintiffs.

20 77. Defendants have created and fostered a workplace culture that forces workers to
21 work consistently through their shifts without meals, rest, or sleep.

22 78. Defendants have failed to pay Plaintiffs at the required minimum wage rate and
23 for all hours worked. In failing to provide wages, Defendants benefitted from Plaintiffs' labor

1 without compensating Plaintiffs.

2 **Defendants' Withholding of Wages was Willful**

3 79. Defendants actively established and maintained systems and processes to make
4 it as difficult as possible for Plaintiffs to understand the extent to which their rights were being
5 violated.

6 80. The pattern of violations began at the outset of the employment relationship with
7 the hiring process where Plaintiffs did not have a formal understanding about their employment
8 terms and working conditions.

9 81. Defendants, whenever possible, had employees communicate with new hires
10 and other employees about hiring, firing, wages, and work hours so that employees, including
11 Plaintiffs, did not have a formal understanding about their employment terms and working
12 conditions.

13 82. Defendants' Employees, including Plaintiffs, were not provided with any
14 onboarding or official documentation of the employment relationship.

15 83. Defendants did not maintain complete or accurate employment records
16 for employees as required by law.

17 84. Defendants did not maintain accurate records related to the basis upon
18 which wages were paid to each worker.

19 85. Defendants did not maintain records related to the number of actual hours worked
20 by each worker.

21 86. Defendants did not maintain a summary time record for each worker showing
22 the actual number of hours worked each workday.

87. Defendants paid some wages in cash, and when they did, Defendants did not maintain detailed records of those wages.

88. Defendants routinely evaded questions or provided misleading answers in response to attempts by Plaintiffs to understand pay practices.

89. Throughout Plaintiffs' employment, Defendants acknowledged their failures to follow Washington state wage law in direct communication with Plaintiffs using differing justifications for their failure to follow Washington state law.

90. On multiple occasions, when confronted with questions about their practices, Defendants engaged in behaviors that chilled attempts made by Plaintiffs to hold Defendants accountable.

91. Those chilling behaviors also served the purpose of discouraging any other employees from engaging in protected activity.

92. These specific instances reflect a broader pattern of conduct by Defendants against employees of deceit to enable continued violations of the law without repercussion.

V. CLAIMS

**FIRST CAUSE OF ACTION
VIOLATIONS OF RCW 49.46.090
FAILURE TO PAY ALL WAGES**

93. Plaintiffs reallege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

94. RCW 49.46.090(1) provides that “[a]ny employer who pays the employee less than wages to which such employee is entitled under or by virtue of [the MWA], shall be liable to such employee affected for the full amount of such wage rate, less any amount actually paid

1 to such employee by the employer, and for costs and such reasonable attorney's fees as may be
2 allowed by the court."

3 95. Plaintiffs are covered employees under the MWA because they were employed
4 by Defendants, performed work for Defendants, and the exemption for live-in employees under
5 RCW 49.46.010(3)(j) is unconstitutional. See the Seventh Cause of Action, below.

6 96. Alternatively, Plaintiffs are covered employees under the MWA because they
7 were employed by Defendants, performed work for Defendants, and are not exempt under RCW
8 49.46.010(3)(j) because they were not "required" to live in or sleep at their place of employment.
9 Plaintiffs were not subject to agreements that required them to live or sleep where they worked.
10 Also, many caregiving facilities operate without live-in caregivers, so Plaintiffs are not members
11 of a class of workers who are required to live or sleep where they work.

12 97. By the actions alleged above, the Defendants violated the provisions of RCW
13 49.46.090 by failing to pay wages to Plaintiffs, as well as by failing to provide rest and meal
14 breaks to which they were entitled but did not receive.

15 98. As a result of these unlawful acts, Plaintiffs have been deprived of such
16 compensation in amounts to be determined at trial. Plaintiffs are entitled to recover such amounts,
17 including interest thereon, attorneys' fees and costs.

18 **SECOND CAUSE OF ACTION**
19 **VIOLATION OF RCW 49.12.020 and WAC 296-126-093**
20 **FAILURE TO PROVIDE REST PERIODS**

21 99. Plaintiffs reallege and incorporate by reference each and every allegation set forth
22 in the preceding paragraphs.

23 100. Defendants' failure to provide employees with rest breaks constitutes a violation
24 of the Industrial Welfare Act, RCW 49.12, and its implementing regulations.

1 101. As a result of Defendants' acts and omissions, Plaintiffs have been damaged in
2 amounts as will be proven at trial.

3 102. Defendants' refusal to provide payment for missed rest breaks constitutes
4 willful withholding of wages under the Wage Rebate Act, RCW 49.52.050 & .070.

5 **THIRD CAUSE OF ACTION**
6 **VIOLATION OF RCW 49.12.020 and WAC 296-126-092**
7 **FAILURE TO PROVIDE MEAL PERIODS**

8 103. Plaintiffs reallege and incorporate by reference each and every allegation set forth
9 in the preceding paragraphs.

10 104. Defendants' failure to provide employees with legally sufficient meal periods
11 constitutes a violation of the Industrial Welfare Act, RCW 49.12, and its implementing
12 regulations.

13 105. As a result of Defendants' acts and omissions, Plaintiffs have been damaged in
14 amounts to be proven at trial.

15 106. Defendants' refusal to pay for missed meal periods constitute willful withholding
16 of wages under the Wage Rebate Act, RCW 49.52.050 & .070.

17 **FOURTH CAUSE OF ACTION**
18 **VIOLATION OF RCW 49.46.130**
19 **FAILURE TO PAY OVERTIME WAGES**

20 107. Plaintiffs reallege and incorporate by reference each and every allegation set
21 forth in the preceding paragraphs.

22 108. RCW 49.36.130 provides that "no employer shall employ any of [their]
23 employees for a workweek longer than 40 hours unless such employee receives compensation for
24 his employment in excess of the hours above specified at a rate not less than one and one-half
the regular rate at which they are employed."

1 109. Plaintiffs are covered employees under the MWA, entitled to overtime payments
2 for hours worked in excess of 40 in a workweek. They are not exempt under RCW
3 49.46.010(3)(j) because they were employed by Defendants, performed work for Defendants,
4 and the exemption for live-in employees under RCW 49.46.010(3)(j) is unconstitutional. See the
5 Seventh Cause of Action, below.

6 110. Alternatively, Plaintiffs are covered employees under the MWA, entitled to
7 overtime payments for hours worked in excess of 40 in a workweek because they were employed
8 by Defendants, performed work for Defendants, and were not “required” to live in or sleep at
9 their place of employment. Plaintiffs were not subject to agreements that required them to live
10 or sleep where they worked. Also, many caregiving facilities operate without live-in caregivers,
11 so Plaintiffs are not members of a class of workers who are required to live where they work.

12 111. By the actions alleged above, Defendants have violated the provisions of RCW
13 49.46.130 by failing to pay overtime wages to Plaintiffs during workweeks in which
14 Plaintiffs worked over forty hours but were not credited for all hours worked and workweeks
15 in which missed rest and meal break time extended the workweek beyond forty hours.

16 112. As a result of the unlawful acts of Defendant, Plaintiffs have been deprived
17 of compensation in amounts to be determined at trial, and Plaintiffs are entitled to recovery of
18 such damages, including interest thereon, as well as attorneys’ fees and costs under RCW
19 49.46.090.

20 **FIFTH CAUSE OF ACTION**
21 **VIOLATION OF RCW 49.48.010**
22 **UNPAID WAGES UPON CESSATION FROM EMPLOYMENT**

23 113. Plaintiffs reallege and incorporate by reference each and every allegation set forth
24 in the preceding paragraphs.

1 114. RCW 49.48.010 provides that “[w]hen any employee shall cease to work for
2 an employer, whether by discharge or by voluntary withdrawal, the wages due him or her
3 on account of his or her employment shall be paid to him or her at the end of the established pay
4 period.” The statute further provides that “[i]t shall be unlawful for any employer to withhold
5 or divert any portion of an employee’s wages . . .”

6 115. Plaintiffs are covered employees under RCW 49.48.082, as they were employed
7 by Defendants and performed work for Defendants, meeting the definition of employee in RCW
8 49.46.010. They are not exempt under RCW 49.46.010(3)(j) because the exemption for live-in
9 employees under RCW 49.46.010(3)(j) is unconstitutional. See the Seventh Cause of Action,
10 below.

11 116. Alternatively, Plaintiffs are covered employees under RCW 49.48.082, as they
12 were employed by Defendants and performed work for Defendants, meeting the definition of
13 employee in RCW 49.46.010. They are not exempt under RCW 49.46.010(3)(j) because they
14 were not “required” to live in or sleep at their place of employment Plaintiffs were not subject to
15 agreements that required them to live or sleep where they worked. Also, many caregiving
16 facilities operate without live-in caregivers, so Plaintiffs are not members of a class of workers
17 who are required to live where they work.

18 117. By the actions alleged above, Defendants have violated the provisions of RCW
19 49.48.010 by failing to pay Plaintiffs wages owed for missed rest and meal breaks, for all
20 hours of work, and for overtime hours worked.

21 118. As a result of the unlawful acts of Defendants, Plaintiffs have been deprived
22 of compensation in amounts to be determined at trial, and are entitled to the recovery of
23 such damages, including interest thereon, attorneys’ fees under RCW 49.48.030, and costs.

1 **SIXTH CAUSE OF ACTION**
2 **VIOLATION OF RCW 49.52.050**
3 **WILLFUL REFUSAL TO PAY WAGES OWED**

4 119. Plaintiffs reallege and incorporate by reference each and every allegation set forth
5 in the preceding paragraphs.

6 120. RCW 49.52.050(2) provides that any employer who “willfully and with intent
7 to deprive the employee of any part of his wages, pays any employee a lower wage than the
8 wage such employer is obligated to pay such employee by any statute, ordinance, or contract”
9 is guilty of a misdemeanor.

10 121. RCW 49.52.070 provides that any employer who violates the foregoing statute
11 shall be liable in a civil action for twice the amount of wages withheld, together with costs of
12 suit and reasonable attorneys’ fees.

13 122. Violations of RCW 49.12.020 and WAC 296-126-092 constitute violations of
14 RCW 49.52.050.

15 123. Violations of RCW 49.46.090 constitute violations of RCW 49.52.050.

16 124. The alleged unlawful actions by Defendants against Plaintiffs as set forth
17 above were committed willfully and with intent to deprive Plaintiffs of wages. Thus,
18 Defendants have violated the provisions of RCW 49.52.050.

19 125. As a result of these unlawful acts, Plaintiffs have been deprived of
20 compensation in an amount to be determined at trial. Pursuant to RCW 49.52.070 Plaintiffs
21 are entitled to recover twice such amounts as well as attorneys’ fees and costs.

22 **SEVENTH CAUSE OF ACTION**
23 **UNIFORM DECLARATORY JUDGMENT ACT, RCW 7.24.010-090**
24 **DECLARATION THAT RCW 49.46.010(3)(J) VIOLATES THE PRIVILEGES AND**
 IMMUNITIES CLAUSE OF THE WASHINGTON STATE CONSTITUTION,
 ARTICLE I, SECTION 12

1 126. An actual dispute exists between (1) Plaintiffs and (2) Defendants. The parties
2 have genuine and opposing interests, which are direct and substantial, and a judicial
3 determination of those opposing interests will be final and conclusive.

4 127. The constitutionality of the live-in employee exemption under RCW
5 49.46.010(3)(j) presents an issue of major public importance.

6 128. The MWA’s purpose is to “protect[] the immediate and future health, safety
7 and welfare of the people of this state.” RCW 49.46.005(1). The minimum wage, overtime,
8 and sick leave protections in the MWA are critical for employees’ health and safety.

9 129. Workers engaged in “working in mines, factories and other employments
10 dangerous to life or deleterious to health” must receive the benefits of laws passed to protect
11 such workers, as a fundamental right of state citizenship. Wash. Const. Art. II, § 35.

12 130. Plaintiffs, employed in an industry that is dangerous to their lives and
13 deleterious to their health, have been denied the minimum wage, overtime, and sick leave
14 protections that other similarly situated Washington workers receive. The exemption of these
15 workers was not explained by the legislature when it adopted the exemption. The exemption
16 is, instead, the product of the racist and sexist exclusions of female and non-White workers
17 from vital workplace protections.

18 131. The Washington State Constitution’s privileges and immunities clause
19 provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation
20 other than municipal, privileges or immunities which upon the same terms shall not equally
21 belong to all citizens, or corporations.” Wash. Const. Art. I, § 12. This provision prohibits
22 both favoritism or special treatment for a small group while disadvantaging others and
23 discrimination against vulnerable minority groups.

1 132. The exemption of live-in caregivers from the protections of the MWA
2 provides their employers with a privilege that is not extended to other similarly situated
3 employers or employees.

4 133. There is no reasonable ground for distinguishing between (1) employers who
5 employ workers in mines, factories, or other dangerous work and (2) employers like
6 Defendants that are exempt from the requirements of the MWA.

7 134. Alternatively, the Washington State Constitution's privileges and immunities
8 clause is also an equal protection guarantee, even where no fundamental right of state
9 citizenship is at issue.

10 135. The MWA creates a class of employees guaranteed minimum wages, overtime
11 premiums, and sick leave, but excludes live-in caregivers from those protections.

12 136. Live-in caregivers excluded from the protections of the MWA are similarly
13 situated to other workers who are guaranteed the protections of the MWA. There is no
14 characteristic of live-in caregivers that distinguishes them from other, covered employees.
15 The exemption is also contrary to the purpose of the MWA.

16 137. Live-in caregivers are predominantly people of color and women, groups that
17 have suffered a history of discrimination based on immutable traits that bear no relation to
18 their ability to work or to contribute to society.

19 138. Under any level of scrutiny, the live-in caregiver exemption to the MWA
20 violates the equal protection guarantee in the Washington State Constitution's privileges and
21 immunities laws because it is unequivocally the product of racist and sexist policies. Live-in
22 caregivers, like domestic workers generally, were excluded from the workplace protections
23 in landmark New Deal legislation explicitly to deny Black and female workers minimum
24

1 labor standards. These exclusions were imported without discussion into the MWA, resulting
2 in the live-in caregiver exemption.

3 139. Plaintiffs are therefore entitled to a declaratory judgment that the live-in
4 employee exemption under RCW 49.46.010(3)(j) violates the privileges and immunities
5 clause of the Washington State Constitution. Wash. Const. Art. I, § 12.

6 VI. PRAYER FOR RELIEF

7 WHEREFORE, Plaintiffs requests that this Court grant the following relief:

8 A. Judgment against the Defendants on the causes of action listed above;

9 B. Award compensatory and exemplary damages to Plaintiffs, including but not limited to,
10 past and future wages;

11 C. Prejudgment and postjudgment interest;

12 D. Declare that RCW 49.46.010(3)(j)'s exemption of employees required to live or sleep at
13 their workplace from all protections of the Minimum Wage Requirements and Labor Standards
14 Act, RCW 49.46, violates the privileges and immunities clause of the Washington State
15 Constitution, Art. I, § 12

16 E. Enjoin Defendants and their officers, agents, successors, employees, representatives, and
17 any and all persons acting in concert with Defendants, from engaging in the unlawful conduct
18 set forth herein;

19 F. Order Defendants to undertake trainings, and submit to compliance checks to promote
20 future compliance with the law;

21 G. Award to Plaintiffs reimbursement for out-of-pocket expenses, litigation costs, and
22 reasonable attorney fees pursuant to RCW 49.60.030(2), RCW 49.48.030; and

23 ///

1 H. Provide such other and further legal and equitable relief as this Court deems just and
2 proper.

3 Dated this 11th day of April, 2023.

4
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**SUPERIOR COURT IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

JOCYLIN BOLINA; ADOLFO PAYAG;
MADONNA OCAMPO; HONORINA
ROBLES; HOLLEE CASTILLO; and
REGINALD VILLALOBOS

Plaintiffs,

vs.

ASSURECARE ADULT HOME LLC, a
Washington Corporation; ASSURECARE
ADULT FAMILY HOME LLC, a Washington
Corporation; ASSURECARE FAMILY
HOME CARE LLC, a Washington
Corporation; MARCELINA S. MACANDOG,
an individual; and GERALD MACANDOG,
an individual

Defendants.

Case No.: 23-2-05373-7 SEA

PLAINTIFFS' SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:
AUGUST 2, 2024

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1 **I. Introduction and Relief Requested.**

2 Plaintiffs were Adult Family Home caregivers, tasked with a responsibility critical to a
3 humane society: protecting and caring for elderly and disabled people. Their jobs included
4 physically demanding and dangerous tasks, resulting in exposure to serious workplace injuries
5 and illnesses. Despite the high priority of their work, and its inherent danger, they were paid as
6 little as four dollars per hour for whole-day shifts, up to seven days per week, and had no access
7 to state sick leave mandates. These substandard working conditions were enabled by
8 Washington’s Minimum Wage Requirements and Labor Standards Act wholly exempting “[a]ny
9 individual whose duties require that [they] reside or sleep at the place of [their] employment...”
10 from coverage.¹ This exemption, the result of structural racism and sexism, excludes non-white,
11 non-male workers from legal protections, and deprives live-in caregivers of the right to basic
12 labor standards that protect their safety and health. Binding precedent from the Washington
13 Supreme Court in *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*², requires the removal of the
14 “live-in” exemption for caregivers like Plaintiffs from the law. The Washington Constitution’s
15 prohibition on laws “granting to any citizen, class of citizens, or corporation..., privileges or
16 immunities which upon the same terms shall not equally belong to all citizens, or corporations”³
17 will not abide unfounded exemptions from the Minimum Wage Requirements and Labor
18 Standards Act for workers engaged in dangerous work. Because employment in an Adult Family
19 Home is highly dangerous for employees like Plaintiffs, and the “live-in” exemption lacks any
20 reasonable ground, this Court must strike it from the law.

21
22
23 ¹ RCW 49.46.010(3)(j).

² 196 Wn.2d 506, 475 P.3d 164 (2020).

³ Wash. Const. art. I, § 12.

1 **A. Background.**

2 The entrenchment of racist and sexist motives into modern labor law like Washington's
3 Minimum Wage Requirements and Labor Standards Act (MWA) traces back as far as the 1930s.
4 During the New Deal Era, exclusions of Black and female labor forces were codified into
5 groundbreaking labor legislation that formed the foundation for our country's (and Washington
6 State's) existing workplace protections.⁴ A critical element of this statutory scheme, the Fair
7 Labor Standards Act of 1938 (FLSA) established national minimum labor standards, including
8 the minimum wage.⁵ In its initial enactment, the FLSA excluded domestic workers, like live-in
9 caregivers, completely.⁶ The goal of lawmakers was simple: maintain the existing social

10
11 ⁴ *Martinez-Cuevas*, 196 Wn.2d at 528-529 (C.J. Gonzales, concurring); Declaration of Emily
12 Grove (Grove Decl.) ¶ 2, Ex. 1 at p. 11 (Juan F. Perea, *The Echoes of Slavery: Recognizing the
13 Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor
14 Relations Act*, 72 OHIO ST. L.J., 95, 100 (2011)).

15 ⁵ 29 U.S.C. §§ 201 *et seq.*

16 ⁶ Declaration of Jeremiah Miller (Miller Decl.) ¶ 2, Ex. 1 (Harmony Goldberg, *The Long
17 Journey Home: The Contested Exclusion and Inclusion of Domestic Workers from Federal
18 Wage and Hour Protections in the United States*, International Labor Organization, Conditions
19 of Work Series No. 58 (Aug. 27, 2015)); the exclusion of domestic workers from workplace
20 protections is widespread, *see, e.g.*, 29 U.S.C. § 152(3) (domestic workers are excluded from
21 the National Labor Relations Act: "[t]he term 'employee' ... shall not include any individual
22 employed as an agricultural laborer, or in the domestic service of any family or person at his
23 home...."); *see also* 29 C.F.R. 1975.6 (the federal government interprets the Occupational
Safety and Health Act to exempt individuals from the definition of employer who "in their own
residences, privately employ persons for the purpose of performing... what are commonly
regarded as ordinary domestic household tasks, such as house cleaning, cooking and caring for
children."); 42 U.S.C. § 2000e(b) (under Title VII, "[t]he term 'employee' ... shall not include
any individual employed as an agricultural laborer, or in the domestic service of any family or
person at his home...."). Further, the FLSA, in its original enactment, excluded domestic
workers completely (as not affecting interstate commerce) but the law was later amended to
bring domestic work within its scope. 29 C.F.R. 552.99. However, the FLSA still contains a
live-in or companionship services exclusion (29 U.S.C. § 213(a)(15)) affecting domestic
workers. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339 (2007).

1 hierarchy and prevent Black and female workers from gaining political power.⁷ Indeed, in the
2 case of caregivers, their exclusion from minimum labor standards is a continuation of the long-
3 term devaluation of that work.⁸ These tendencies are incorporated into Washington laws,
4 including the MWA which is fundamentally “based on the Fair Labor Standards Act of 1938”
5 with “functionally identical” coverage of employers and employees.⁹

6 This historical trend continues to harm live-in caregivers today. Live-in caregiving work
7 is under- or un-compensated and often performed under dangerous conditions.¹⁰ This is no
8 surprise, as this work is still the province of women and people of color. In the United States,
9 83% of home care aides are women, and 60% of home care aides are people of color.¹¹ These
10 trends are reflected in Washington as well; 83% of the more than 97,000 home care workers in
11 Washington are female, nearly half are non-white, and one third are foreign born.¹² Black,

13 ⁷ Grove Decl. ¶ 2, Ex. 1 at pp. 9-11 (Perea, *supra*); Miller Decl. ¶ 3, Ex. 2 (Evelyn Nakano
14 Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid*
15 *Reproductive Labor*, Signs Vol. 18, Chicago Journals (Autumn 1992)); *see id.* at p.30
16 (“[w]hatever the setting, aide work continues to be a specialty of racial- ethnic women. The
17 work is seen as unskilled and subordinate and thus appropriate to their qualifications and
18 status.”).

19 ⁸ Miller Decl. ¶ 3, Ex. 2 (Glenn, *supra*).

20 ⁹ *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 867, 281 P.3d 289 (2012)
21 (cleaned up).

22 ¹⁰ Miller Decl. ¶ 4, Ex. 3 at pp.16-17 (*Direct Care Workers in the United States: Key Facts*,
23 (Sept. 6, 2022) Paraprofessional Healthcare Institute,
<https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-3/>).
Further, it is estimated that 80% of the long-term care needs in Washington are still performed
as unpaid labor, translating into billions of dollars of free work. Paige Cornwell, *Need for home*
care rising, but caregivers are hard to find in rural WA, Seattle Times (Aug. 21, 2022),
accessed at [https://www.seattletimes.com/seattle-news/health/as-the-need-for-home-care-rises-](https://www.seattletimes.com/seattle-news/health/as-the-need-for-home-care-rises-caregivers-are-getting-harder-to-find-in-rural-wa/)
caregivers-are-getting-harder-to-find-in-rural-wa/ on December 22, 2023.

¹¹ Miller Decl. ¶ 4, Ex. 3 at pp. 16-17 (*Direct Care Workers in the United States: Key Facts*,
supra).

¹² Declaration of David C. Grabowski, Ph.D. (Dr. Grabowski Decl.) ¶ 3, Ex. 1 at ¶ 14 (expert
report of Dr. Grabowski); <https://www.phinational.org/policy-research/workforce-data-center/>.
Dr. Grabowski has been a faculty member at Harvard since 2004 and is professor of health care

1 Hispanic, Asian American/Pacific Islander women are vastly overrepresented in the caregiving
2 workforce compared with their numbers in the general workforce, and face discrimination across
3 multiple dimensions.¹³ The very idea that “living-in” somehow makes a worker less deserving of
4 protection cannot be separated from the social, cultural, and political contexts that have informed
5 the way society devalues labor performed in the “domestic” sphere.

6 **B. Relief requested.**

7 Plaintiffs seek an order from the Court declaring that RCW 49.46.010(3)(j) is
8 unconstitutional because it violates Article I, Section 12 of the Washington Constitution, and
9 therefore must be struck from the law.

10 In the alternative, Plaintiffs seek an order from the Court that the duties of at least
11 Plaintiffs Bolina, Payag, Robles, and Villalobos did not require them to sleep at Defendants’
12 Adult Family Homes (AFHs), and they are therefore not exempt from the protections of the
13 Washington Minimum Wage Requirements and Labor Standards Act under RCW
14 49.46.010(3)(j).

15 **II. Statement of Facts.**

16 **A. Procedural posture.**

17 Plaintiffs Bolina, Payag, Ocampo, Robles, Castillo, and Villalobos worked as caregivers
18 in AFHs owned and operated by the Defendants. On April 11, 2023, Plaintiffs filed the operative
19 complaint in this matter, alleging uncompensated work hours, failure to provide meal or rest

20 _____
21 policy in the Department of Health Care Policy at Harvard Medical School. Dr. Grabowski’s
22 professional work is focused on the economics of aging, including long-term care, and post-
acute care, with an emphasis on labor market conditions in long-term care; he has published
extensively on these topics.

23 ¹³ Grove Decl. ¶ 3, Ex. 2 (Cassandra Robertson, Marokey Sawo, David Cooper, *All States Must
Set Higher Wage Benchmarks for Home Health Care Workers*, Economic Policy Institute (June
2, 2022) <https://www.epi.org/publication/state-home-health-care-wages/>).

breaks, failure to pay the minimum wage for all hours worked, failure to pay overtime premiums on hours worked in excess of 40 in a workweek, and challenging the constitutionality of the “live-in” exemption to the MWA.¹⁴ Defendants answered on June 14, 2023, admitting many factual allegations, but denying Plaintiffs’ entitlement to relief.¹⁵ On January 5, 2024, Plaintiffs submitted a Motion for Partial Summary Judgment. After briefing and argument, the motion was denied by Judge Wyman Yip on February 5, 2024.

B. Material facts.

The material facts in this case cannot be disputed. Plaintiffs are caregivers who lived at Defendants’ AFHs, providing care for the residents of those homes. Caregivers in AFHs work long hours under highly dangerous conditions. Those long hours are also a matter of choice as to at least Plaintiffs Bolina, Payag, Robles, and Villalobos.¹⁶

1. Plaintiffs provided residential care in Defendants’ Adult Family Homes.

Defendants own and operate multiple AFHs. In Washington, AFHs are “an essential component of a long-term [care] system” serving vulnerable members of our community, including “persons with developmental disabilities and elderly persons....”¹⁷ AFHs provide care for up to six unrelated residents in home-like settings, including room, board, laundry, necessary supervision, and help with activities of daily living, personal care, and social services.¹⁸ AFHs

¹⁴ First Amended Complaint.

¹⁵ Answer.

¹⁶ Plaintiffs do not concede that Plaintiffs Castillo and Ocampo had jobs whose duties required them to live or sleep where they worked.

¹⁷ RCW 70.128.005(1)(b).

¹⁸ RCW 70.128.010(1).

1 operate round-the-clock, serving residents 24 hours per day, seven days per week.¹⁹ Residents
2 are dependent on their caregivers to ensure their overall health and wellbeing while living in the
3 homes.²⁰

4 Plaintiffs worked as caregivers in Defendants' AFHs under the direction of the
5 Defendants, performing the regular functions of caregivers in long term care settings.²¹
6 Plaintiffs assisted residents with personal care and hygiene, followed healthcare plans
7 prescribed by residents' doctors, assisted patients with eating, exercising and other routine
8 tasks, provided emotional support and mobility assistance, and administered medications.²²

9 Plaintiffs also followed a rotation schedule which required checking on rooms and
10 patients, rotating and shifting sleeping patients to ensure they did not get bed sores, and
11 assisting patients going to the bathroom and other similar tasks throughout the day and night.²³
12 In addition to direct patient care, Plaintiffs performed administrative tasks, janitorial services,
13 and the general upkeep of the home.²⁴ And they shopped for groceries and cleaning supplies and
14

15 ¹⁹ Miller Decl. ¶ 5, Ex. 4 (Declaration of Defendant Marcelina Macandog ("1st Macandog
Decl.") in support of Defendants' opposition to the first motion for summary judgment, ¶ 7).

16 ²⁰ RCW 70.128.005(3).

17 ²¹ First Amended Complaint (Complaint) ¶¶ 1, 25, 29, 32, 36, 39, 43, 50; Answer at ¶¶ 1, 25,
18 29, 32, 36, 39, 43, 50; *see* Declaration of Jocylin Bolina (Bolina Decl.) ¶ 2; Declaration of
Hollie Castillo (Castillo Decl.) ¶ 2; Declaration of Madonna Ocampo (Ocampo Decl.) ¶ 2;
19 Declaration of Adolfo Payag (Payag Decl.) ¶ 2; Declaration of Honorina Robles (Robles Decl.)
¶ 2; Declaration of Reginald Villalobos (Villalobos Decl.) ¶ 2; *see also* Miller Decl. ¶ 5, Ex. 4
(1st Macandog Decl. ¶ 4).

20 ²² Bolina Decl. ¶ 5; Castillo Decl. ¶ 10; Ocampo Decl. ¶¶ 7-8; Payag Decl. ¶ 7; Robles Decl. ¶
5; Villalobos Decl. ¶ 7; *see* Miller Decl. ¶ 6, Ex. 5 (Declaration of John Ficker ("1st Ficker
Decl.") in support of Defendants' opposition to the first motion for summary judgment, ¶ 13).

21 ²³ Complaint, ¶ 50; Answer, ¶ 50; *see* Bolina Decl. ¶ 6; Castillo Decl. ¶ 10; Ocampo Decl. ¶ 8;
Payag Decl. ¶¶ 8, 11-15; Robles Decl. ¶¶ 9-10; Villalobos Decl. ¶¶ 9-10.

22 ²⁴ Complaint ¶¶ 51, 52; Answer ¶¶ 51, 52; *see* Bolina Decl. ¶ 7; Castillo Decl. ¶¶ 11-16;
23 Ocampo Decl. ¶ 7; Payag Decl. ¶ 9; Robles Decl. ¶ 6; *see also* Miller Decl. ¶ 5, Ex. 4 (1st
Macandog Decl. ¶ 4).

1 cooked meals for patients.²⁵ To maintain their licensing, Defendants had to ensure that each
2 home provided twenty-four-hour care and was able to respond to resident needs at all times.²⁶
3 Plaintiffs provided the necessary staffing to meet this requirement.

4 Defendants chose to schedule at least the shifts of Plaintiffs Bolina, Payag, Robles, and
5 Villalobos such that they worked throughout the day and night, necessarily residing at
6 Defendants' AFHs. Defendants employed other caregivers who did not live at the AFHs, doing
7 the same job duties as Plaintiffs Bolina, Payag, Robles, and Villalobos.²⁷ This is wholly
8 understandable, as similar caregiving settings, providing the same kinds of services, are
9 operated on a shift basis and do not require caregivers to live where they work.²⁸

10 These demanding jobs meant that Plaintiffs worked long hours. As admitted by
11 Defendants in their Answer, Plaintiffs worked more than 40 hours per week, were required to
12 respond to patients' "call buttons" during the day and night, and Defendants did not have
13 systems in place to allow Plaintiffs to take uninterrupted meal or rest breaks.²⁹

14 *2. Plaintiffs' caregiving work is the same as caregiving work provided in*
15 *other long term care settings.*

16
17 ²⁵ *Id.*

18 ²⁶ WAC 388-76-10040; *see* Miller Decl. ¶ 5, Ex. 4 (1st Macandog Decl. ¶ 7); Miller Decl. ¶ 6,
19 Ex. 5 (1st Ficker Decl. ¶ 20).

20 ²⁷ Grove Decl. ¶ 6, Ex. 3 (Plaintiffs' First Set of Requests for Admission to Defendants and
21 Defendants' Responses Thereto ("Defs.' Resp. to Pls.' First RFAs")) (admitting that Defendants
22 do not require all caregivers to live on site.); Bolina Decl. at ¶¶ 10-12; Payag Decl. ¶ 6; Robles
23 Decl. ¶ 9.

²⁸ Dr. Grabowski Decl. ¶ 3, Ex. 1, ¶¶ 27-28.

²⁹ Complaint ¶¶ 54-55, 57, 60; Answer ¶¶ 54-55, 57, 60; Bolina Decl. ¶¶ 13-18; Ocampo Decl. ¶
8; Payag Decl. ¶¶ 6, 10-11, 15; Robles Decl. ¶¶ 11, 13, 15, 17; Villalobos Decl. ¶ 9; *see also*
Grove Decl. ¶ 5, Ex. 3, (Defs.' Resp. to Pls.' First RFAs) (admitting that caregivers were on call
to respond to residents' needs regardless of the time of day); Miller Decl. ¶ 5, Ex. 4 (1st
Macandog Decl. ¶ 8) (acknowledging that breaks were interrupted).

1 The work done by Plaintiffs for Defendants at their businesses is caregiving work.
2 Caregiving work, comprised of assistance to the elderly and disabled with the daily tasks of
3 living, is the same across long-term care settings. Regardless of title or institution, caregivers
4 have very similar duties at AFHs, assisted living facilities, and nursing homes.³⁰ Indeed,
5 Defendants’ own witnesses recognize the similarity of work across caregiving settings,
6 acknowledging that the “type of work” done by AFH employees “is largely the same” as work
7 done by “residential care aides, nursing assistants in nursing homes, and direct care workers in
8 other industries.”³¹

9 Further, Washington State recognizes that the work of AFH employees is similar to that
10 of other caregivers. Washington has a comprehensive Industrial Insurance Act (a workers’
11 compensation system) intended to support workers who become injured or ill at work.³² That
12 system “provides workers injured on the job with timely monetary relief from funds collected
13 annually from employers according to calculation formulae and experience ratings set by” the
14 Washington Department of Labor and Industries (L&I).³³ Washington’s workers’ compensation
15 system is state run, so L&I is charged with ensuring the solvency of the fund used to
16 compensate injured workers.³⁴

17 Therefore, L&I sets employer premiums by “risk class,” varying the premium payment
18 amount by the relative risk that employees of those employers will be injured or become ill.

20 ³⁰ Dr. Grabowski Decl. ¶ 3, Exhibit 1, ¶¶ 13, 28.

21 ³¹ Miller Decl. ¶ 6, Ex. 5 (1st Ficker Decl. ¶ 4); *see id.* ¶ 6, Ex. 5 (1st Ficker Decl. ¶ 10) (“both
22 AFHs and Assisted Living Facilities provide personal care and assistance with activities of daily
23 living...” differing only in that “AFHs are usually smaller and offer a homier ambiance....”).

³² Title 51 RCW.

³³ *Di Pietro Trucking Co. v. Dep't of Labor & Indus.*, 135 Wn. App. 693, 701, 145 P.3d 419, 422
(2006).

³⁴ *Id.*

1 Risk classes “group industries that share similar risks together” because “[e]mployers with
2 similar risks tend to have workplace injuries with similar frequency, severity, and cause.”³⁵
3 Accordingly, after “analyzing the history of injuries and costs”³⁶ for caregivers, L&I has
4 grouped AFHs with “group homes, treatment centers, safe houses, shelters, halfway houses,”
5 and other businesses that operate facilities with residents that “need some degree of medical
6 monitoring and oversight, personal care, treatment, training, or supervision” into Risk Class
7 6509-4.³⁷ The working conditions, and related hazards, are the same for caregivers in all of
8 these settings.

9 *3. Caregiving work is incredibly dangerous.*

10 The essential work performed by caregivers, like Plaintiffs in this case, is highly
11 deleterious to their health and dangerous to their lives. Caregiving exposes workers to serious
12 risks of physical injury, including musculoskeletal injuries associated with assisting elderly and
13 disabled residents in their daily living and injuries arising from physical attacks by residents.
14 And this work creates grave risks of illness due to caregivers’ exposure to residents and their
15 attendant illnesses.

16 Caregivers are at high risk of injury due to the physical strain involved in transferring
17 residents to and from their beds, chairs, wheelchairs or other conveyances.³⁸ Plaintiffs’ work
18 included manual lifting of patients, repositioning them in bed, and catching them when they fall,

19
20 ³⁵ WAC 296-17-31011.

21 ³⁶ *Id.*

22 ³⁷ WAC 296-17A-6509; see Miller Decl. ¶ 7, Ex. 6 (Margaret M. Quinn, *et al.*, *Healthy Aging*
23 *Requires a Healthy Home Care Workforce: the Occupational Safety and Health of Home Care*
Aides, Current Environmental Health Reports, 235, 238 (May 12, 2021)) (Washington state
workers’ compensation data for home caregivers in different settings is comparable because
“many of the injury risks are the same” and injuries and illnesses “did not vary importantly
among different types of” home caregiving services).

³⁸ Dr. Grabowski Decl. ¶ 3, Ex. 1, ¶16.

1 all activities that are standard for caregivers, and lead to musculoskeletal injuries.³⁹ Caregivers
2 are also exposed to physical injury from residents when they become confused or combative. In
3 fact, when caregivers provide care for longer than 40 hours in a workweek, they are more likely
4 to be assaulted by a resident.⁴⁰ And where the workers who provide care do not have nursing
5 degrees, like Plaintiffs in this case, those workers have the highest rate of intentional injury
6 among all health care workers, experiencing 44.07 intentional injuries per 10,000 workers,
7 compared to 5.59 intentional injuries per 10,000 workers in hospitals, or 10.64 intentional
8 injuries per 10,000 workers in nursing homes.⁴¹

9 Caregivers like Plaintiffs are exposed to serious illnesses at work as well, including
10 blood-borne and respiratory diseases.⁴² For example, during the pandemic, over 1.85 million
11 COVID-19 infections were documented in nursing homes, resulting in deaths for caregiving
12 workers that would have more than doubled the 2019 rates for the previous years' deadliest
13 occupations like logging and commercial fishing.⁴³ Indeed, Plaintiffs were frequently exposed
14 to infectious diseases at work.⁴⁴

15
16 ³⁹ Dr. Grabowski Decl. ¶ 3, Ex. 1, ¶¶ 16-18, 24; *see* Occupational Safety and Health
17 Administration, Nursing Homes and Personal Care Facilities, Overview (2023)
18 <https://www.osha.gov/nursing-home> (identifying “lifting and repositioning patients” as an
19 occupational hazard); *see also* *Home Health Care Aides: Occupational Health and Safety
Challenges and Opportunities*, American Industrial Hygiene Association (Aug. 5, 2021)
[https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/White-Papers/Home-Health-
Care-Aides-Occupational-Health-and-Safety-Challenges-and-Opportunities-White-Paper.pdf](https://aiha-assets.sfo2.digitaloceanspaces.com/AIHA/resources/White-Papers/Home-Health-Care-Aides-Occupational-Health-and-Safety-Challenges-and-Opportunities-White-Paper.pdf)
(caregivers suffer severe shoulder, back, and knee injuries due to moving residents).

20 ⁴⁰ Dr. Grabowski Decl. ¶ 3, Ex. 1, ¶ 19.

21 ⁴¹ *Id.*; *id.* at ¶ 3, Ex. 1, ¶ 25.

22 ⁴² *See* Miller Decl. ¶ 7, Ex. 6 (Quinn, *supra*, at pp. 238-39); *see also* WAC 388-76-10255
(requiring Adult Family Homes to have infection control measures in place, including hand
washing and a process for safely dealing with sharps).

23 ⁴³ *Id.* at ¶ 3, Ex. 1, ¶ 20.

⁴⁴ *Id.* at ¶ 3, Ex. 1, ¶ 26 (Plaintiffs were exposed to MRSA and Hepatitis C; Plaintiff Robles
contracted COVID-19 while working for Defendants and was hospitalized).

1 These threats to worker health and safety are further exacerbated by the lack of sleep
2 experienced by caregivers, like Plaintiffs, who are assigned to work around the clock. It is well
3 understood that interrupted sleep causes a variety of health consequences for workers, including
4 depression and increased risk of workplace injuries.⁴⁵ The grueling, “always on” nature of AFH
5 work for live-in caregivers contributes to their significant injuries and illnesses.

6 Publicly available data sources illustrate these risks. Nationally, nonfatal injury and
7 illness rates for workers providing care for elderly and disabled persons at continuing care or
8 assisted living facilities is 8.1 per 100 full time equivalent workers.⁴⁶ This is the ninth highest
9 injury and illness rate of all employment tracked by the Bureau of Labor Statistics, exceeding
10 the injury and illness rates for aluminum and steel foundries, mobile home manufacturing, and
11 light truck manufacturing.⁴⁷ For comparison, the “all industry” nonfatal injury and illness rate is
12 3.0 per 100 full time equivalent workers,⁴⁸ making injury and illness rates for caregivers 270%
13 higher than the “all industry” rates. And in 2017, miners had a nonfatal injury and illness rate of

14
15 ⁴⁵ *Id.* ¶ 3, Ex. 1, ¶¶ 31-32.

16 ⁴⁶ Miller Decl. ¶ 8, Ex. 7 (United States Department of Labor, Bureau of Labor Statistics,
17 *Survey of Occupational Injuries and Illnesses Data*, Table SNR01 (2022)
18 [https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/highest-rates-for-total-cases-2022-](https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/highest-rates-for-total-cases-2022-national.xlsx)
19 [national.xlsx](https://www.bls.gov/iif/nonfatal-injuries-and-illnesses-tables/highest-rates-for-total-cases-2022-national.xlsx)). North American Industry Classification System (NAICS) code 6233
20 (continuing care retirement communities and assisted living facilities for the elderly) has an
21 injury and illness rate of 8.1 per 100 full time equivalent workers. *Id.* That group includes
22 workers at businesses who are “primarily engaged in providing residential and personal care
23 services for (1) the elderly and other persons who are unable to fully care for themselves and/or
(2) the elderly and other persons who do not desire to live independently....”
https://data.bls.gov/cew/apps/bls_naics/v3/bls_naics_app.htm#tab=search&naics=2022&keyword=623&searchType=titles&fromHier=true&filter=nothing&sort=text_asc&resultIndex=1. The
care provided “typically includes room, board, supervision, and assistance in daily living, such
as housekeeping services.” *Id.*

⁴⁷ Miller Decl. ¶ 8, Ex. 7; workers at nursing and residential care facilities as a whole (NAICS
code 623, which includes workers in NAICS 6233) have an illness and injury rate of 11.8 per
100 full time equivalent workers in 2022, making it the *third most dangerous profession*
nationally.

⁴⁸ *Id.*

1 0.015 per 100 full time equivalent workers, nationally.⁴⁹

2 The injury and illness data from Washington’s workers’ compensation system is in line
3 with the national data on occupational safety and health risks for caregivers. This data is the
4 most comprehensive available as to workplace safety, covering the nature and source of injuries,
5 body part injured, severity of the injury, and lost work time for the covered occupations.⁵⁰
6 Workers’ compensation system data features in published studies of workplace injuries for
7 caregivers, including in Minnesota, Ohio,⁵¹ and Washington.⁵²

8 Over the period from 2017 to 2021, Washington’s data shows an injury rate for the risk
9 class including AFHs of 8.2 per 100 full time equivalent workers, more than 70% higher than
10 the rate for the healthcare industry as a whole, and about 78% higher than the rate for “all
11 industry” covered by Washington’s workers’ compensation system over the same period.⁵³ The
12 injuries and illnesses suffered by caregivers were serious; they qualified for wage replacement
13 or disability benefits at a rate that was one third higher than the compensable claim rate for all
14 industries statewide, and one fourth higher than the compensable claim rate for the healthcare
15 industry in Washington as a whole.⁵⁴ Those compensable illnesses and injuries were dominated
16 by claims for musculoskeletal disorders (like knee, shoulder, and back injuries), traumatic
17 injury, and viral illnesses.⁵⁵

19 ⁴⁹ United States Department of Labor, Bureau of Labor Statistics, *Mining, quarrying, and oil
20 and gas extraction Fact Sheet* (May 2019) [https://www.bls.gov/iif/factsheets/mining-fact-sheet-
2017.htm#_edn2](https://www.bls.gov/iif/factsheets/mining-fact-sheet-2017.htm#_edn2).

21 ⁵⁰ Dr. Grabowski Decl. ¶ 3, Ex. 1, ¶ 21.

22 ⁵¹ *Id.*

23 ⁵² Miller Decl. ¶ 7, Ex. 6 (Quinn, *supra*).

⁵³ Declaration of Margaret Leland (Leland Decl.) ¶ 3, Ex. 1 (Workers’ Compensation Claim Data,
Washington State Risk Class 6509, January 1, 2017 – December 31, 2021).

⁵⁴ *Id.* ¶ 3, Ex. 1; Dr. Grabowski Decl. ¶ 3, Ex. 1, ¶ 23.

⁵⁵ *Id.*

1 The data above is borne out in Plaintiffs’ experience. Plaintiffs worked as caregivers in
2 AFHs operated by the Defendants, performing duties that correspond to the injuries, illnesses,
3 and hazardous working conditions faced by caregivers across long-term care settings.⁵⁶

4 **III. Statement of the Issues.**

5 Whether the “live-in” exemption to the Minimum Wage Requirements and Labor
6 Standards Act, RCW 49.46.010(3)(j), violates the Washington Constitution’s Privileges and
7 Immunities Clause, Wash. Const. art. I, § 12, and so must be declared unconstitutional.

8 Alternatively, whether the job duties of Plaintiffs Bolina, Payag, Robles, and Villalobos
9 did not “require that [they] reside or sleep at the place of [their] employment”⁵⁷ and so the “live-
10 in” exemption does not apply to those Plaintiffs.

11 **IV. Evidence Relied Upon.**

12 This motion is supported by the pleadings in this matter and the declarations and
13 evidence referenced in the motion.

14 **V. Authority and Argument.**

15 As the Washington Supreme Court made clear in *Martinez-Cuevas*, the Washington
16 Constitution requires that labor standards established by the MWA must cover workers in
17 dangerous occupations. Live-in caregivers, like Plaintiffs, are undeniably engaged in dangerous
18 occupations; however, the MWA explicitly exempts them from *all* its protections. This
19 exclusion privileges the AFH industry over other businesses that must comply with the MWA.
20 Because there is no reasonable ground for the “live-in” exemption, it violates the Washington
21 Constitution’s Privileges and Immunities Clause and must be struck from the law.

22
23 ⁵⁶ Bolina Decl.; Castillo Decl.; Ocampo Decl.; Payag Decl.; Robles Decl.; Villalobos Decl.
⁵⁷ RCW 49.46.010(3)(j).

1 Even if the “live-in” exemption were not unconstitutional, it would not apply to at least
2 Plaintiffs Bolina, Payag, Robles, and Villalobos because their job duties did not “require” that
3 they live where they work; indeed, caregiving work is routinely done on a shift basis, including
4 at Defendants’ own AFHs. Accordingly, at a minimum, Plaintiffs Bolina, Payag, Robles, and
5 Villalobos are not covered by the exemption, and so must be afforded the protections of the
6 MWA.

7 **A. Standard for summary judgment.**

8 Summary judgment is warranted when there is no genuine issue as to the facts material to
9 a claim and the moving party is entitled to judgment on that claim as a matter of law.⁵⁸
10 Washington courts may adjudicate constitutional challenges to a statute, such as those raised by
11 Plaintiffs here, on summary judgment.⁵⁹ And whether a law violates the Washington State
12 Constitution’s Privileges and Immunities Clause is, independently, a proper subject of summary
13 judgment.⁶⁰

14 In deciding a motion for summary judgment, courts may consider a wide range of factual
15 material, including admissions by the parties and declarations.⁶¹ That factual material may also

17 ⁵⁸ Wash. Sup. Ct. Civ. R. 56; *see also Hontz v. State*, 105 Wn.2d 302, 305, 714 P.2d 1176 (1986)
18 (resolving a constitutional challenge under the Uniform Declaratory Judgment Act on summary
19 judgment); *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791,
805-12, 83 P.3d 419 (2004) (*Grant County II*) (same); *Martinez-Cuevas*, 196 Wn.2d at 518
(same).

20 ⁵⁹ *Hontz*, 105 Wn.2d at 305; *Grant County II*, 150 Wn.2d at 805-12; *Martinez-Cuevas*, 196
Wn.2d at 518.

21 ⁶⁰ *Martinez-Cuevas*, 196 Wn.2d at 522-523.

22 ⁶¹ *See, e.g., Bernal v. Am. Honda Motor Co., Inc.*, 11 Wn. App. 903, 906, 527 P.2d 273 (1974)
23 *overruled on other grounds* 87 Wn.2d 406 (1976) (in moving for summary judgment, “[t]he
parties may present evidence from a wide range of sources in making their showing. In addition
to affidavits, pleadings, depositions, and admissions on file, which are specifically permitted by
statute, judicial notice and the use of presumptions are also matters which may be considered.”).

1 include expert opinions.⁶² Courts may take judicial notice of key facts, including “legislative
2 facts” where the constitutionality of a law is challenged.⁶³ Legislative facts include scholarly
3 articles and published research.⁶⁴ And courts consider the legislative history of a law where, as
4 here, the law is challenged on summary judgment under the declaratory judgment statute.⁶⁵

5 **B. The “live-in” exemption to the Minimum Wage Act violates the**
6 **Washington Constitution’s Privileges and Immunities Clause for**
7 **caregivers in Adult Family Homes.**

8 The Washington State Constitution mandates that “[n]o law shall be passed granting to
9 any citizen, class of citizens, or corporation other than municipal, privileges or immunities
10 which upon the same term shall not equally belong to all citizens, or corporations.”⁶⁶ This
11 section is the source of two distinct bodies of jurisprudence establishing constitutional
12 protections for Washingtonians against the granting of privileges or immunities (the Privileges
13 and Immunities Clause) and ensuring equal protection under the law (the Equal Protection
14 Clause).⁶⁷ For the purposes of this motion, the relevant set of rights are those that fall under the
15 Privileges and Immunities Clause.

16 ⁶² See, e.g., *Volk v. DeMeerleer*, 187 Wn.2d 241, 276, 386 P.3d 254 (2016) (approving a trial
17 court’s use of an expert opinion in deciding summary judgment).

18 ⁶³ *Bernal*, 11 Wn. App. at 906.

19 ⁶⁴ *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 14 Wn. App. 2d 945, 963, 474 P.3d
20 1107 (2020) (“we may take judicial notice of facts outside the record... if they are considered
21 legislative facts. Legislative facts are background information a court may take into account
22 when determining the constitutionality or proper interpretation of a statute, or when extending or
23 restricting common law rule. . . Legislative facts include scholarly works, scientific studies, and
social facts.”) (cleaned up) (citing, *inter alia*, *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452
(1980)).

⁶⁵ *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 512, 919 P.2d 62 (1996).

⁶⁶ Wash. Const. art. I, § 12.

⁶⁷ *Schroeder v. Weighall*, 179 Wn.2d 566, 577, 316 P.3d 482 (2014) (acknowledging that the
Washington Supreme Court has long interpreted Article I, Section 12 to prevent both
discrimination and special interest favoritism).

1 The Washington Constitution’s Privileges and Immunities Clause has unique
2 requirements.⁶⁸ In analyzing the constitutionality of legal favoritism, Washington courts apply a
3 two-part test. First, the court determines whether the challenged law grants a “privilege” or
4 “immunity” related to a fundamental right.⁶⁹ Fundamental rights may derive from a variety of
5 sources; among the fundamental rights protected by the Washington Constitution is “the
6 fundamental right to statutory protection for people working in extremely dangerous
7 conditions.”⁷⁰

8 Second, if the challenged law does grant a privilege or immunity related to a fundamental
9 right, then the legislature must have had a “reasonable ground” for granting the privilege or
10 immunity.⁷¹ A “reasonable ground” requires more than a “rational basis”—a court will not
11 hypothesize facts to justify a legislative choice.⁷² Rather, the legislature must have had a
12 contemporaneous justification for the privilege or immunity “that *in fact* serves the legislature’s
13 stated goal”⁷³ for the underlying law. Reasonable grounds for a privilege “must rest on real and
14 substantial differences bearing a natural, reasonable, and just relation to the subject matter of the
15 act.”⁷⁴

16 AFH employers are not required to pay minimum wages or the overtime premium, and
17 they do not have to provide paid sick leave to exempt live-in AFH employees. Because AFH
18 caregivers, like Plaintiffs, are engaged in a highly dangerous occupation, this can only be

20 ⁶⁸ *Martinez-Cuevas*, 196 Wn.2d at 518; *Grant County II*, 150 Wn.2d at 805-12; *Schroeder*, 179
Wn.2d at 572.

21 ⁶⁹ *Id.*

22 ⁷⁰ *Bennett v. United States*, 2 Wn.3d 430, 444, 539 P.3d 361 (2023) (citing, *inter alia*, *Martinez-
Cuevas*, 196 Wn.2d at 519).

23 ⁷¹ *Martinez-Cuevas*, 196 Wn.2d at 518.

⁷² *Id.* at 523.

⁷³ *Schroeder*, 179 Wn.2d at 574 (emphasis in the original).

⁷⁴ *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 783, 317 P.3d 1009 (2014) (cleaned up).

1 constitutional if the legislature has provided a reasonable ground for the privilege. Here, there is
2 no such reasonable ground; in fact, the Washington legislature failed to articulate any reason *at*
3 *all* for exempting live-in caregivers from the MWA’s protections. *Martinez-Cuevas*, controlling
4 Washington Supreme Court precedent, therefore requires this Court to find the “live-in”
5 exemption to the MWA unconstitutional.

6 *1. RCW 49.46.010(3)(j) grants Adult Family Home employers a*
7 *privilege or immunity from providing Minimum Wage Act protections*
guaranteed to live-in caregivers under article II, section 35.

8 Article II, Section 35 of the Washington Constitution contains a clear directive: “[t]he
9 legislature shall pass necessary laws for the protection of persons working in mines, factories,
10 and other employments dangerous to life or deleterious to health; and fix pains and penalties for
11 the enforcement of the same.”⁷⁵ In *Martinez-Cuevas*, the Washington Supreme Court held that
12 this Constitutional provision establishes a fundamental right to health and safety protections for
13 Washington workers in dangerous industries.⁷⁶

14 By its own terms, a central purpose of the MWA is to protect and promote the health and
15 safety of workers.⁷⁷ And courts have repeatedly reaffirmed this purpose.⁷⁸ Accordingly, as the
16

17 ⁷⁵ Wash. Const. art. II, § 35.

18 ⁷⁶ *Martinez-Cuevas*, 196 Wn.2d at 520.

19 ⁷⁷ RCW 49.46.005. Washington has a long-standing commitment to protecting working people.
20 In the early part of the 20th Century, Washington’s minimum wage law (predating the MWA)
21 was upheld as a valid attempt by the state to protect the health, safety, and general welfare of its
22 people. Nearly one hundred years ago, Washington courts (and the United States Supreme
23 Court) recognized that low wages and long hours are deeply harmful to the physical health and
well-being of workers. *Parrish v. W. Coast Hotel Co.*, 185 Wn. 581, 587, 55 P.2d 1083 (1936),
aff’d, 300 U.S. 379, 57 S. Ct. 578 (1937) (overturning, *inter alia*, *Lochner v. New York*, 198
U.S. 45, 25 S. Ct. 539 (1905)).

⁷⁸ See *Anfinson*, 174 Wn.2d at 870 (noting that the MWA serves “a remedial purpose of
protecting against the evils and dangers resulting from wages too low to buy the bare necessities
of life and from long hours of work injurious to health....”) (cleaned up); see also *Drinkwitz v.*
Alliant Techsystems, Inc., 140 Wn.2d 291, 300, 996 P.2d 582 (2000) (discussing Washington’s

1 *Martinez-Cuevas* Court explicitly held, the MWA is “the very protection” envisioned by Article
2 II, Section 35 of the Washington Constitution.⁷⁹ Workers engaged in dangerous employment
3 have the “fundamental right to [the] health and safety protections of the Minimum Wage Act.”⁸⁰
4 The *Martinez-Cuevas* Court further determined that dairy workers belong to the class of
5 workers entitled to this fundamental right “because they worked long hours in conditions
6 dangerous to life and deleterious to health.”⁸¹

7 Challenges to an exemption to the MWA as violating the Privileges and Immunities
8 Clause are “facial” challenges, and thus do not require that this Court determine the individual
9 workplace conditions for Plaintiffs in this matter. Rather, the Court may conclude that Plaintiffs
10 are unconstitutionally denied the protections of the MWA based on the text of the law and
11 undisputed dangers of work at AFHs.⁸²

12 Plaintiffs’ case is identical to *Martinez-Cuevas*. Like the dairy at issue in *Martinez-*
13 *Cuevas*, Defendants’ AFHs operate 24 hours per day, seven days per week.⁸³ And, like the dairy
14 workers, live-in caregivers work those long hours in conditions deleterious to their health and

15
16 history of labor standards enactments, including the state’s 1913 minimum wage law identifying
17 substandard wages with health risks); *Pellino v. Brink’s Inc.*, 164 Wn. App. 668, 267 P.3d 383
(2011) (noting that meal and rest breaks protect employee health and safety, and that when they
18 are missed, employees are owed compensation for those missed breaks under the MWA).

⁷⁹ *Martinez-Cuevas*, 196 Wn.2d at 521.

⁸⁰ *Id.* at 522.

⁸¹ *Id.*

⁸² See *id.* at 525 (affirming the trial court’s grant of summary judgment to the *Martinez-Cuevas*
19 plaintiffs on a facial challenge to the constitutionality of the overtime exemption to the MWA for
20 dairy workers); see also *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004)
21 (discussing the difference between an “as-applied” and “facial” constitutional challenge to a
22 law). Any other treatment of this challenge to the law would create an untenable situation where
a worker’s entitlement to minimum wage and sick leave standards would turn on proving that
their individual workplace was dangerous.

⁸³ *Id.* at 524; see Miller Decl. ¶ 5, Ex. 4 (1st Macandog Decl., ¶ 7) (noting the “requirement
23 for 24 hour per day staffing”); see also Miller Decl. ¶ 6, Ex. 2 (1st Ficker Decl., ¶ 20)
(acknowledging the “24/7” nature of AFH work).

1 dangerous to their lives. It is undisputed that Plaintiffs worked overtime without uninterrupted
2 breaks and were required to respond to residents' needs day or night. And there is
3 overwhelming evidence that caregivers in residential settings are exposed to extreme threats to
4 their health and safety.

5 Lifting, moving, transferring, and otherwise handling residents with reduced mobility
6 results in serious injury to caregivers in the form of neck, back, shoulder, elbow, knee, or hip
7 injuries. Caregivers are also subject to physical violence in their workplace from residents,
8 suffering significant intentional injuries; indeed, caregivers in settings without certified nursing
9 assistants or registered nurses suffer a rate of intentional injury that is more than *eight times* the
10 rate of intentional injuries of regular hospital workers. And bloodborne and respiratory illnesses
11 are widespread in these care settings. The COVID-19 Pandemic made caregiving for the elderly
12 and disabled incredibly dangerous, with a fatality rate exceeding the rate for extremely
13 dangerous occupations like logging and commercial fishing. Of course, these risks to caregiver
14 safety and health are only heightened by the 24-hour nature of the work. Always operating on
15 the verge of exhaustion, live-in caregivers at AFHs are significantly more susceptible to
16 workplace illnesses and injuries.

17 The extent of these injuries and illnesses is reflected in the available statistical data.
18 Caregiving work, like the work performed by Plaintiffs, is the ninth most dangerous occupation
19 in the United States, with injury and illness rates that exceed heavy manufacturing and mining.
20 And this trend is confirmed in Washington state; caregivers at AFHs have incredibly high rates
21 of illness and injury (nearly 80% above the "all industry" rate), and those illnesses and injuries
22 are significant, resulting in lost work time and payouts. Based on these metrics, residential
23 caregiving is more dangerous than mining and factory work, the industries expressly

1 enumerated in Washington’s Constitution as highly dangerous and requiring labor protections.⁸⁴

2 As such, live-in caregivers are unequivocally entitled to the same statutory protections as
3 workers in “other employments dangerous to life or deleterious to health.”⁸⁵

4 The MWA excludes live-in caregivers like Plaintiffs from the definition of “employee”
5 and thus exempts those workers from the right to minimum wages, overtime premiums, and
6 paid sick leave.⁸⁶ As a corollary, the exemption grants a privilege to the residential care
7 industry, including AFHs, which otherwise would have to comply with the same requirements
8 the MWA imposes on the vast majority of employers, including those in much less perilous
9 industries.⁸⁷

10 *2. The legislature had no “reasonable ground” for exempting live-in*
11 *workers from the critical protections provided by the Minimum Wage*
Act.

12 Review of the MWA’s legislative history reveals a total lack of rationale for the “live-in”
13 exemption. The Washington legislature enacted the MWA in 1959, originally without excluding
14 live-in workers from its entitlements to a minimum wage and overtime pay.⁸⁸ In 1961, the
15 legislature amended the MWA, excluding groups of workers from coverage, including those
16 whose duties require that they live at their place of employment.⁸⁹ But the legislative history is

17 _____
18 ⁸⁴ Wash. Const. art. II, § 35.

19 ⁸⁵ *Id.*

20 ⁸⁶ RCW 49.46.010(3)(j); *see* RCW 49.46.020 (“every employer shall pay to each of [their]
21 employees” at least the minimum wage); RCW 49.46.130 (1)-(2) (requiring an overtime
22 payment for hours in excess of 40 in a workweek, except for “[a]ny person exempted pursuant
23 to RCW 49.46.010(3)...”); RCW 49.46.210 (“every employer shall provide each of its
employees paid sick leave....”).

⁸⁷ *See* Miller Decl. at ¶ 6, Ex. 5 (1st Ficker Decl. at ¶ 32) (acknowledging that being excused
from the requirements of the MWA grants an enormous financial benefit to AFH owners).

⁸⁸ Washington Minimum Wage and Hour Act, 1959, Wash. Laws Chapter 294. The legislature
added sick leave requirements to the law in 2017.

⁸⁹ Washington Minimum Wage and Hour Act, 1961, Wash. Laws Chapter 18; codified at RCW
49.46.010(3)(j).

1 silent as to the purpose behind the “live-in” exemption.⁹⁰ The legislature provided no reason or
2 rationale whatsoever for depriving live-in workers of the MWA’s vital protections.⁹¹ And the
3 legislature did not revisit this exemption during subsequent amendments to the MWA; it remains
4 substantially intact to date.⁹²

5 Accordingly, the “live-in” exemption has *no stated legislative justification*, much less a
6 justification bearing “a natural, reasonable, and just relation to the subject matter”⁹³ of the
7 MWA. In the absence of any other explanation, the long discriminatory history of excluding
8 domestic workers from labor standards suggests the basis for this exclusion.⁹⁴ The work of
9 caregivers or other domestic workers was categorized as “women’s work” or otherwise devalued
10 on discriminatory grounds, resulting in its exclusion from labor protections.⁹⁵

11 Without “any convincing legislative history that illustrates a reasonable ground for
12 granting the challenged... exemption” to the MWA, Washington courts must look to the
13 legislature’s stated reason for the MWA as a whole.⁹⁶ The MWA’s purpose “is to protect the
14 health and safety of Washington workers, as required by article II, section 35”; and “[t]his
15 purpose underlies the entirety of the [MWA],” including its exemptions.⁹⁷ Exempting live-in
16 workers, employed in dangerous industries, from the law’s health and safety protections is

17
18 ⁹⁰ Declaration of Janae Choquette (Choquette Decl.).

19 ⁹¹ *Id.*

20 ⁹² The exemption was updated to include female pronouns in 1989 by voter initiative. Minimum
21 Wage—Rates and Coverage Revised, 1989 Wash. Laws Chapter 1.

22 ⁹³ *Ockletree*, 179 Wn.2d at 783.

23 ⁹⁴ *See, e.g.*, Grove Decl. at ¶ 2, Ex. 1 (Perea, *supra*).

⁹⁵ Miller Decl. ¶ 3, Ex. 2 (Glenn, *supra*).

⁹⁶ *Martinez-Cuevas*, 296 Wn.2d at 524-525.

⁹⁷ *Id.* at 525.

1 patently inconsistent with protecting the health and safety of workers—“the principle for which
2 the statute really stands.”⁹⁸

3 Given the MWA’s “clear purpose and constitutionally mandated protection,” the deeply
4 dangerous work performed by caregivers like Plaintiffs, the benefit conferred on AFH
5 employers, and the absence of justification in the legislative history, the “live-in” exemption is
6 indistinguishable from the overtime exemption for agricultural workers struck down in *Martinez-*
7 *Cuevas*.⁹⁹ The “live-in” exemption must be declared unconstitutional and struck from the law.

8 **C. Alternatively, Plaintiffs Bolina, Payag, Robles and Villalobos are not**
9 **subject to the “live-in” exemption because their job duties did not require**
 them to live where they worked.

10 It is undisputed that Plaintiffs lived where they worked. However, the “live-in”
11 exemption does not exclude every worker who may reside or sleep at their place of employment.
12 Rather, it excludes only those workers *whose duties require* that they reside or sleep at their
13 place of employment.¹⁰⁰ The Washington Supreme Court has recently reaffirmed that workers
14 may in fact live or sleep where they work, but not be subject to the live-in exemption, when their
15 job duties do not require that residence.¹⁰¹

16 In *Nwauzor*, the Court held that a group of detainees at a private, for-profit detention
17 center who were paid as little as one dollar per day to work as kitchen and janitorial staff during
18 their detention were not exempt. The Court reached this conclusion because, although they lived
19 and worked at the detention center, *the nature of the work itself* did not require that they live

21 ⁹⁸ *Bennett*, 2 Wn.3d at 449.

22 ⁹⁹ *Martinez-Cuevas*, 196 Wn.2d at 525.

23 ¹⁰⁰ *See, e.g., Berrocal v. Fernandez*, 155 Wash.2d 585, 595, 121 P.3d 82 (2005); *see also id.* at 497 (“[w]hether the RCW 49.46.010(3)(j) exclusion applies is a question of worker categorization.... That is, courts must inquire whether a particular worker falls into a class that... resides or sleeps at the place of his or her employment.”).

¹⁰¹ *Nwauzor v. The Geo Group, Inc.*, 2 Wn.3d 505, 540 P.3d 93 (2023).

1 there.¹⁰² Quoting L&I guidance with approval, the Court found that an “agreement between the
2 employee and employer for the employee to reside or sleep at the place of employment for
3 convenience, or merely because housing is available at the place of their employment” is
4 insufficient for the purposes of the live-in exemption.¹⁰³

5 Here, at least Plaintiffs Bolina, Payag, Robles, and Villalobos¹⁰⁴ do not “fall into a class”
6 of workers whose duties require them to live or sleep where they work. In fact, nationally, most
7 long-term care facilities do not rely on live-in caregivers to provide 24-hour care to their
8 residents. Rather, they schedule workers in shifts, where staff rotate to provide care during
9 specific periods of the day, ensuring 24 hours of continuous care is available to residents.¹⁰⁵ As
10 other models have proven to be effective in providing access to the same level of round-the-
11 clock care expected of AFHs, Defendants’ reliance on live-in caregivers appears to be driven by
12 minimizing costs or convenience rather than by job necessity.¹⁰⁶ In the specific case of AFHs in
13 Washington, though regulations require that 24-hour care be available to residents, nothing in
14 those regulations requires that caregivers live or sleep on site.¹⁰⁷ Plaintiff Bolina has worked at
15 other AFHs on a shift basis,¹⁰⁸ and *Defendants’ own AFHs* employed other caregivers, doing the
16 same work as Plaintiffs, on a non-residential shift basis.¹⁰⁹

17
18 ¹⁰² *Id.*

19 ¹⁰³ *Id.* at 518 (relying on agency guidance, L&I, Admin. Pol’y ES.A.1 (revised Dec. 29, 2020)
(MWA Applicability)).

20 ¹⁰⁴ Plaintiffs do not concede that Plaintiffs Castillo and Ocampo had job duties that required
them to live or sleep where they worked.

21 ¹⁰⁵ Dr. Grabowski Decl. at ¶ 3, Ex. 1 at ¶ 27.

22 ¹⁰⁶ *Id.* at ¶ 29.

23 ¹⁰⁷ WAC 388-76-10040.

¹⁰⁸ Bolina Decl. at ¶ 9.

¹⁰⁹ Grove Decl. ¶ 6, Ex. 3, (Defs.’ Resp. to Pls.’ First RFAs) (admitting that Defendants do not
require all caregivers to live on-site.); Bolina Decl. at ¶ 10; Payag Decl. at ¶ 6; Robles Decl. at ¶
9.

1 Whether a departure from the reliance on live-in caregivers would impact the feasibility
2 of Defendants' current business model, or increase the cost of care for residents, is not relevant
3 to the issue before the Court. MWA exemptions must be narrowly construed and applied only to
4 situations that are "plainly and unmistakably consistent with the terms and spirit of the
5 legislation."¹¹⁰ In light of the recent clarifications of the law in *Nwauzor* and the undisputed facts
6 in this case, there can be no question that at least Plaintiffs Bolina, Payag, Robles, and Villalobos
7 are not exempt from the protections of the MWA. Because their caregiving duties do not
8 necessitate that they live where they work, the exception does not apply. This Court should
9 adhere to the plain terms of the MWA and hold that the statute and the protections provided
10 within apply to Plaintiffs Bolina, Payag, Robles, and Villalobos.

11 **VI. Conclusion.**

12 RCW 49.46.010(3)(j) *wholly excludes* live-in caregivers from the most fundamental
13 worker protections available in Washington. Live-in caregiver jobs are highly dangerous, even
14 exceeding the risks posed by steel mills and mines. In the absence of any legislative justification,
15 and in the context of the deeply discriminatory history of modern labor standards, this exclusion
16 offends the Washington Constitution's Privileges and Immunities Clause at Article I, Section 12.
17 Alternatively, at least Plaintiffs Bolina, Payag, Robles, and Villalobos had job duties that did not
18 require them to live or sleep where they worked, and so are not subject to the exemption at RCW
19 49.46.010(3)(j). Accordingly, this Court must strike the live-in exemption, entitling Plaintiffs to
20 Washington's Constitutionally mandated labor standards; or, at a minimum, hold that Plaintiffs
21 Bolina, Payag, Robles, and Villalobos are not exempt from the protections of the MWA.

22
23

¹¹⁰ See *Drinkwitz*, 140 Wn.2d at 301.

1 This motion contains 7,824 words in compliance with the Local Civil Rules.

2
3 DATED this 17th day of June 2024.

4 Respectfully submitted,

5 FAIR WORK CENTER LEGAL CLINIC

6 /s/ Jeremiah Miller
JEREMIAH E. MILLER, WSBA #40949

7 /s/ Emily Grove
8 EMILY E. GROVE, WSBA #52867

9 /s/ Janae Choquette
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11 *Attorneys for Plaintiffs*
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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF KING**

8 JOCYLIN BOLINA; ADOLFO PAYAG;
9 MADONNA OCAMPO; HONORINA
10 ROBLES; HOLLEE CASTILLO; and REGINA
11 VILLALOBOS,

12 Plaintiffs,

13 vs.

14 ASSURECARE ADULT HOME LLC, a
15 Washington corporation; ASSURECARE
16 ADULT FAMILY HOME LLC, a Washington
17 corporation; ASSURECARE FAMILY HOME
18 CARE LLC, a Washington corporation;
19 MARCELINA S. MACANDOG, an individual;
20 GERALD MACANDOG, an individual,

No. 23-2-05373-7 SEA

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT**

21 **I. INTRODUCTION AND RELIEF REQUESTED**

22 Adult family homes are a heavily regulated, long-term care option in that permits persons
23 with disabilities and infirmities to live in an intimate, residential home where they can receive

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT – 1

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1 the supportive care they need to maintain their independence within their communities. In these
2 adult family homes, at least one caregiver lives in the home with the residents. Under Washington
3 law, there is a “live in” exemption that exempts such caregivers from the Minimum Wage Act
4 when they are not working on their shifts. Without acknowledging the full impact on the
5 residents of adult family homes, Plaintiffs ask the Court to rule that this “live in” exemption to
6 the Minimum Wage Act is unconstitutional. Moreover, Plaintiffs wish the Court to enforce its
7 ruling retroactively on Defendants despite their reliance on the long-held presumption that all
8 statutes are constitutional. Defendants respectfully request that the Court reject Plaintiffs’
9 arguments and instead rule that the “live-in” exemption is constitutional. Alternatively, if the
10 Court finds the “live-in” exemption is unconstitutional, then Defendants respectfully request that
11 the Court rule that its unconstitutionality cannot be applied retroactively on Defendants with
12 respect to Plaintiffs’ claims in this action.

12 Plaintiffs also briefly argue that the “live in” exemption should not be applied because the
13 Plaintiffs could have lived elsewhere. However, Plaintiffs ignore the benefits to residents that
14 come with having a caregiver sharing their home. Moreover, the authority that Plaintiffs cite for
15 their position is inapplicable. For such reasons, Defendants respectfully request that the Court
16 rule against Plaintiffs on this issue, too.

17 **II. STATEMENT OF FACTS**

18 **A. Plaintiffs’ Employment**

19 Plaintiffs worked at Defendants’ facilities between the dates of October 2014 and
20 December 3, 2021.¹ Defendants do not dispute that Plaintiffs provided residential care and were

21 ¹ Dkt. 1.

1 responsible for up to six residents at a time while working and living at Defendants' AFHs.²
2 Plaintiffs worked as caregivers performing the regular functions of caregivers at AFHs.³ The
3 tasks Plaintiffs were responsible for varied and included direct patient care as well as
4 administrative and janitorial tasks.⁴ The remainder of Plaintiffs' allegations regarding their work
5 are grossly exaggerated and not representative of their experience. For example, the majority of
6 the residents at Defendants homes did not require 24-hour care.⁵ In order to comply with state
7 guidelines, a trained employee simply had to be on site and available 24 hours per day.⁶ Further,
8 shifts were never 24 hours long and to suggest otherwise is simply not true.⁷ During the times
9 that Plaintiffs suggest they were working 24-hour shifts, the Plaintiffs went wherever they wanted:
10 to the gym, the foodbank, transported their children to and from school, attended medical
11 appointments, and used company credit cards to go shopping and out to lunch.⁸ Due to the nature
12 of the work they were performing, there was not constant work and because Plaintiffs lived where
they worked it provided unique opportunities to take breaks.⁹

13 Moreover, Plaintiffs were entitled to sick leave, vacation, rest and meal breaks, and
14 Plaintiffs were able to use these entitlements.¹⁰ At present, there is no evidence before the Court
15 that they did not receive rest or meal breaks or sick leave. While Plaintiffs suggest without
16 justification that they were paid as little as \$4 per day, Plaintiffs failed to note that there were

17 ² Declaration of Marcelina Macandog ("MM Decl.") ¶7.

18 ³ *Id.* ¶10.

19 ⁴ *Id.*

20 ⁵ *Id.* ¶15.

21 ⁶ *Id.* ¶16.

22 ⁷ *Id.*

23 ⁸ *Id.* ¶22-27.

⁹ *Id.* ¶17.

¹⁰ *Id.* ¶17, 29.

occasions when there were more staff than residents and Plaintiffs would get paid the same amount for doing half the work.¹¹ This was not the “back-breaking labor under strenuous or life-threatening conditions” Plaintiffs claim.

By virtue of their employment at Defendants’ AFHs, Plaintiffs lived at the facilities where they worked.¹² In addition to receiving a paycheck based on hours worked, Plaintiffs received free room and board that included food, internet access, utilities, and the use of a car.¹³ Plaintiffs were not the only ones to receive room and board.¹⁴ Plaintiff Madonna Ocampo lived in one of Defendants’ AFHs with her husband, daughter, and mother.¹⁵ They did not have to pay additional rent.¹⁶ Plaintiff Hollee Castillo was also living at one of Defendants’ AFHs with his girlfriend and she was not required to contribute to household expenses and lived rent free.¹⁷ These additional benefits Plaintiffs received greatly increases the “wage” Plaintiffs received. The fact that workers at AFHs are provided room and board is an added benefit they received and allows workers at AFHs to save money or pursue other interests as they are not burdened with housing costs like workers in similar industries.

B. Plaintiffs Fail to Establish that Home Caregiving is Extremely Dangerous

In their declarations, some Plaintiffs assert that they experienced injuries and ailments that they conclude were caused by their work at the AFHs. Plaintiffs offer no medical expert to substantiate Plaintiffs’ conclusions that their sore backs, poorer eyesight, and such ailments could

¹¹ *Id.* ¶14.

¹² *Id.* ¶7.

¹³ *Id.* ¶20-22.

¹⁴ *Id.* ¶23-24.

¹⁵ *Id.* ¶24.

¹⁶ *Id.*

¹⁷ *Id.* ¶23.

1 be distinguished as more serious than similar ailments that many people experience as a common
2 consequence of aging. Nevertheless, Plaintiffs' testimony is belied by the facts that they did not
3 report these ailments, they did not miss work to treat these ailments, and they did not make a
4 workers' compensation claim for these ailments.¹⁸

5 Additionally, even if the Court assumes the truth of Plaintiffs' testimony, Plaintiffs make
6 no contention that they suffered a grievous or life-threatening injury from their working as
7 caregivers for the AFHs disabled and infirm residents. This is because caregiving in AFHs is not
8 extremely dangerous.¹⁹ This is reflected by the fact that the historical workers' compensation
claim costs for Defendants' AFHs are officially rated as lower than average.²⁰

9 **C. Background Regarding Adult Family Homes**

10 Plaintiffs are quick to generalize and provide commentary on all the negatives associated
11 with AFHs yet fail to recognize all the benefits AFHs provide to workers and communities of
12 color. Adult family homes are quickly becoming the premier option for long-term care in the
13 state of Washington.²¹ AFHs are homes in residential districts that have been modified to
14 accommodate those who are wheelchair bound.²² While the type of work is largely the same,
15 there are significantly more people working at AFHs than as residential care aides, nursing
16 assistants in nursing homes ("NH"), and direct care workers in other industries.²³ Over the last
several years, AFHs represent the only sector of long-term care that is growing.²⁴ While

17 ¹⁸ MM Decl. ¶¶11-12.

18 ¹⁹ McKee Decl. ¶ 2, Ex. 1 at 8:2-18.

19 ²⁰ *Id.*, ¶13, Exhibit 1.

20 ²¹ Dkt. 37, Declaration of John Ficker ("JF Decl.") ¶4.

21 ²² Declaration of Mariann McKee ¶ 2 at Exhibit 1 ("McKee Decl."), p. 3:7-9.

22 ²³ JF Decl. ¶4.

23 ²⁴ JF Decl. ¶ 5.

1 Washington has lost many NHs and assisted living beds across the state, the number of AFHs
2 continue to grow.²⁵ This is due in part to the unmistakable need for beds as the population of
3 elderly individuals in Washington is growing.²⁶ Even with the rate of growth, there is still a need
4 to grow the long-term care workforce and resources.²⁷ Hospitals and NHs report increasing
5 challenges finding placement for someone trying to find community-based care and housing.²⁸

6 Another reason Washington is seeing an increase in the number of AFHs is the type of
7 care that an AFH can offer.²⁹ In contrast to NHs and assisted living facilities (“ALF”), AFHs
8 offer a low staff-to-resident ratio.³⁰ In most cases, it is likely a 1:3 ratio.³¹ The level of
9 individualized, compassionate care offered at an AFH provides truly personalized care planning
10 that cannot be replicated in a large facility or institution.³² While both AFHs and ALFs provide
11 personal care and assistance with activities of daily living, there are a few key differences.³³
12 AFHs are usually smaller and offer a homier ambiance, whereas ALFs may feel more clinical or
13 institutional.³⁴ Living in an AFH can bring many benefits to seniors and individuals with
14 disabilities.³⁵ These homes offer a more intimate and homelike atmosphere compared to larger
15 assisted living facilities, and their smaller size allows for more personalized care and attention.³⁶

16 ²⁵ JF Decl. ¶5.

17 ²⁶ JF Decl. ¶ 6.

18 ²⁷ JF Decl. ¶6

19 ²⁸ JF Decl. ¶ 7.

20 ²⁹ JF Decl. ¶ 8-11; Mckee Decl. ¶ 2, Ex. 1 at 4:15-5:2.

21 ³⁰ JF Decl.. ¶ 8.

22 ³¹ JF Decl. ¶8.

23 ³² JF Decl. ¶ 9.

³³ JF Decl. ¶10.

³⁴ JF Decl. ¶10; McKee Decl. ¶ 2, Ex. 1 at 5:4-6:16..

³⁵ JF Decl. ¶11.

³⁶ JF Decl.¶11.

1 In addition, many AFHs provide transportation and other services that help residents stay active
2 and maintain their independence within the community.³⁷

3 AFHs in Washington State are regulated by DSHS, which ensures that they meet specific
4 health and safety standards.³⁸ To obtain and maintain their license, these homes and their staff
5 must pass regular inspections to ensure that they are providing appropriate care to residents.³⁹
6 At AFHs, the services provided can vary depending on the needs of the residents, but they
7 typically include assistance with essential activities of daily living like bathing, dressing, and
8 toileting.⁴⁰ In addition to this, some homes may offer medication management, transportation
to appointments, and help with meals.⁴¹

9 In order to start an AFH, a homeowner must obtain a license from DSHS, go through a
10 thorough licensing process, which includes a background check, an inspection of the home, and
11 a review of the proposed care plan.⁴² DSHS requires that the licensee have a minimum of 1000
12 hours of training in adult family home care, which must be completed before the license is issued
and renewed every two years.⁴³

13 Conversely to be qualified to work at an AFH, the prospective employee must get
14 certified as a home care aide.⁴⁴ This requires 75 hours of basic training, an exam, and a state
15 and federal background check.⁴⁵

17 ³⁷ JF Decl. ¶11.

18 ³⁸ JF Decl. ¶12.

19 ³⁹ JF Decl. ¶12.

20 ⁴⁰ JF Decl. ¶13.

21 ⁴¹ JF Decl. ¶13.

22 ⁴² JF Decl. ¶17; WAC 388-76 et. seq.

23 ⁴³ JF Decl. ¶18; WAC 388-76 et. seq.

⁴⁴ JF Decl. ¶19. WAC 388-76 et. seq.

⁴⁵ JF Decl. ¶19.

1 Even though the requirements for owning/running an AFH and working at an AFH are
2 highly regulated and can appear complicated, running a successful AFH is a great opportunity
3 for many women, people of color and immigrants to achieve economic independence as small
4 business owners.⁴⁶ Caregiving is often seen as an entry level, low wage position with no career
5 ladder, but AFH ownership provides a unique opportunity for caregivers to grow as
6 entrepreneurs.⁴⁷

7 **1. Owners of AFHs**

8 AFHs as a rule are not big businesses and many of the owners are not earning large
9 amounts of money as the cost of a shared or private room is not substantial.⁴⁸ While there may
10 be some individuals who own multiple homes that only take private pay residents, the majority
11 of AFH owners have one residence and the residents are on Medicaid.⁴⁹ Based on recent
12 payment reports, more than 65% of contracted AFH beds are currently occupied by a Medicaid
13 funded resident.⁵⁰ Over 75% of homes serve at least one Medicaid funded resident.⁵¹ The state
14 determines each residents' classification level for Medicaid services.⁵² Many of the AFH owners
15 were barely breaking even and operate on thin margins.⁵³

17 ⁴⁶ JF Decl. ¶21.

18 ⁴⁷ JF Decl. ¶21.

19 ⁴⁸ JF Decl. ¶16, 23.

20 ⁴⁹ JF Decl. ¶ 23.

21 ⁵⁰ JF Decl. ¶23.

22 ⁵¹ JF Decl. ¶23.

23 ⁵² JF Decl. ¶24.

⁵³ JF Decl. ¶25-26.

1 **2. Payment of workers employed in AFHs**

2 Workers in Washington are paid between \$16-24 per hour, which is well over national
3 averages.⁵⁴ Further, workers employed by AFHs are not required to pay for room and board.⁵⁵
4 Working at an AFH is often more desirable for employees despite the “live in” exclusion because
5 of the promise of room and board. This live-in aspect of AFH’s distinguishes AFHs from NHs
6 and ALFs and allows some workers who may not be able to afford housing especially in King
County to live in low or rent-free housing and also earn an income.⁵⁶

7 **3. Purpose for the Exclusion**

8 As demonstrated by the material cited, Plaintiffs have a limited understanding of the AFH
9 industry and the effect changing the law would have on AFH owners and Washington as a whole.
10 The system is designed around having someone available 24/7, which benefits with someone
11 living on-site.⁵⁷ Workers at AFHs who are required to live where they work have a unique
12 occupation that does not comport with standard shift work contemplated by the MWA.⁵⁸ It would
13 be cost prohibitive for owners of AFHs who employ live-in employees to comply with MWA due
14 to the expense.⁵⁹ This is especially true because more than 65% of contracted AFH beds are
15 currently occupied by a Medicaid funded resident.⁶⁰ If the live in employee exemption is ruled
16 unconstitutional, and AFH owners are required to comply with the MWA, it would upend the
entire AFH industry and likely result in the closure of AFHs. This would mean fewer available

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18 ⁵⁴ JF Decl. ¶ 27

⁵⁵ JF Decl.; MM Decl. ¶20.

⁵⁶ JF Decl. ¶28, Mckee Decl. ¶ 2, Ex. 1 at 7:3-23.

⁵⁷ JF Decl. ¶20.

⁵⁸ JF Decl. ¶31.

⁵⁹ JF Decl. ¶32.

⁶⁰ JF Decl. ¶33.

1 beds for the growing population of aging Washingtonians.⁶¹ A change in the law like Plaintiffs
2 are requesting would have far reaching economic impacts that would trigger bargaining under
3 RCW 41.56.029 and would require changes to the amounts that AFH owners receive for Medicaid
4 funded residents per classification level among other things⁶²

5 The Legislature has an interest in ensuring that there are enough available beds for
6 vulnerable and elderly Washingtonians. The live-in exclusions enables small business owners to
7 create spaces that offer a safe place to live for this growing population. It also allows for the
8 creation of jobs and opportunities within communities of color for both the owners of AFHs and
9 those employed in AFHs. To rule that the statute is unconstitutional would do more harm than
10 good, and the legislature has an interest in ensuring that AFHs stay open to provide beds for
elderly and vulnerable adults.

11 **D. STATEMENT OF ISSUES**

12 Whether the “live-in” employee exemption violates the privileges and immunities clause
13 of the Washington State Constitution? No.

14 If the “live-in” employee exemption is ruled unconstitutional, should the ruling be applied
15 retroactively as to Plaintiffs’ claims against Defendants? No.

16 If the “live-in” employee exemption is ruled constitutional, does the “live-in” exemption
17 apply to Plaintiffs’ claims against Defendants? Yes.

18 **III. EVIDENCE RELIED UPON**

19 Defendants rely on the declarations of Marcelina Macandog, John Ficker, Mariann
Mckee, the exhibits attached thereto, and the pleadings and records on file herein.

20 ⁶¹ JF Decl. ¶33.

21 ⁶² JF Decl. ¶34.

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IV. AUTHORITY AND ARGUMENT

A. Summary Judgment Standard

Summary Judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁶³ “A summary judgment is appropriate if reasonable persons could reach only one conclusion from all the evidence, together with all the reasonable inferences there from, viewed most favorably toward the non-moving party.”⁶⁴

As the party with the burden of proof, the plaintiff is required to present admissible evidence that creates a genuine issue of material fact.⁶⁵ “Bare assertions that a genuine material (factual) issue exists will not defeat a summary judgment motion in the absence of actual evidence.”⁶⁶ CR 56(e) states that when a “motion for summary judgment is made and supported...an adverse party may not rest upon mere allegations in the pleading, but a response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.”⁶⁷

Plaintiffs have failed to attach a declaration or provide any evidence regarding the Plaintiffs at issue here aside from what is included in the Complaint. As such, any facts regarding the specific Plaintiffs at issue are unsupported and Plaintiffs have not met their burden. Plaintiffs’

⁶³ CR 56(c).

⁶⁴ *Kesinger v. Logan*, 118 Wn.2d 451, 824 P.2d 1207 (1992).

⁶⁵ CR 56(c).

⁶⁶ *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93 (2000).

⁶⁷ CR 56(e)

1 remaining support is unconvincing and a reasonable juror could reach different conclusions
2 regarding the inferences Plaintiffs reach from the misleading material.

3 **B. The Live-In Employee Exemption (RCW 49.46.010(3)(j)) Does Not Violate**
4 **Article I Section 12 of the Washington Constitution**

5 Plaintiffs ask the Court to invalidate RCW 49.46.010(3)(j), which exempts live-in
6 employees from the MWA. Specifically, Plaintiffs contend that the exemption is unconstitutional
7 under Article I, Section 12 of the Washington Constitution provides, “No law shall be passed
8 granting to any citizen, class of citizens, or corporation other than municipal, privileges or
9 immunities which upon the same terms shall not equally belong to all citizens, or corporations.”
10 The Washington Supreme Court has long approached the review of legislative enactments with
11 great care, emphasizing that the wisdom of legislation is not justiciable and that the Court should
12 not second-guess the legislature.⁶⁸ Furthermore, in matters of economic legislation such as
13 minimum wage and overtime laws, the Washington Supreme Court has consistently followed “the
14 rule giving every reasonable presumption in favor of the constitutionality of the law or ordinance
15 ... to avoid substituting our judgment for the judgment of the Legislature.”⁶⁹ Finally, because the
16 statute is presumed to be valid, Plaintiffs bear the burden of proving that it is unconstitutional
17 beyond a reasonable doubt.⁷⁰ Plaintiffs do not satisfy that burden.

18
19 ⁶⁸ *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 151, 459 P.2d 937 (1969).

20 ⁶⁹ *Shea v. Olson*, 185 Wash. 143, 152, 53 P.2d 615 (1936); *Sofie v. Fibreboard*, 112 Wn.2d 636, 642-43,
21 771 P.2d 711 (1989).

22 ⁷⁰ *Madison v. State*, 161 Wn.2d 85, 92, 163 P.3d 757 (2007)

1 **1. RCW 49.46.010(3)(j) does not violate Article 1 Section 12 because the**
2 **exemption does not involve a fundamental right nor does it benefit one class**
3 **of live-in workers to the detriment of another.**

4 For a violation of Article I, Section 12 to occur, the law or its application must confer a
5 privilege to a class of citizens.⁷¹ Courts apply a two-step analysis to determine whether a law
6 implicates a privilege or immunity.⁷² In this context, “privileges” and “immunities” “pertain
7 alone to those fundamental rights which belong to the citizens of the state by reason of such
8 citizenship.”⁷³

9 The first step is to analyze whether the law in question actually involves a privilege or
10 immunity within the scope of the constitutional prohibition” by granting benefits to one group,
11 to the disadvantage of another, with respect to a "fundamental right of citizenship." If there
12 is no privilege or immunity involved, then Article I, Section 12 is not implicated.⁷⁴ Conversely,
13 if the law involves a privilege or immunity, and the statute does advantage one group to the
14 detriment of another regarding a fundamental right, the Court must then determine whether the
15 legislature had a reasonable ground for granting the privilege.⁷⁵

16 Applying these rules, the Court should conclude that Plaintiffs' claim fails both because
17 the statute does not involve a fundamental right, and because it does not grant an advantage to
18 one group to the disadvantage of another. Even assuming that the statute grants AFH owners a
19 “privilege,” the Legislature has reasonable grounds for providing the exemption in the context of
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21 ⁷¹ *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004).

22 ⁷² *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 518-19, 475 P.3d 164 (2020).

23 ⁷³ *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902).

⁷⁴ *Grant II*, 150 Wn.2d at 812, 83 P.3d 419.

⁷⁵ *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775–76, P.3d 1009 (2014).

1 the subsequent statutes authorizing the creation and development of AFHs, and the statute must
2 be upheld.

3 *i. The exemption of live-in employees from the MWA is a creature of statute*
4 *and does not implicate a fundamental right.*

5 RCW 49.046.010(3)(j) does not involve a fundamental right. While it exempts workers
6 “whose duties require that he or she reside or sleep at the place of his or her employment or who
7 otherwise spends a substantial portion of his or her work time subject to call, and not engaged in
8 the performance of active duties,” the obligation to pay a minimum wage and overtime was
9 created by statute and did not exist when the Washington Constitution was drafted. Washington
10 Courts are clear that not every statute authorizing a particular class to do or obtain something
11 constitutes a “privilege” within the meaning of Article I, Section 12 but only those where it is, “in
12 its very nature, such a fundamental right of a citizen that it may be said to come within the
13 prohibition of the constitution, or to have been had in mind by the framers of that organic
14 law.”⁷⁶ Washington jurisprudence defines those fundamental rights narrowly.⁷⁷

15 Apart from the departure of *Martinez-Cuevas* which creatively manufactured a
16 fundamental right under Article II Section 35, applying this limited list of “fundamental rights,”
17 established by Article 1, Section 12, the Washington Supreme Court has repeatedly held that mere
18 statutory rights are not "fundamental rights" within the ambit of Article I, Section 12. For
19 example, in *Ass’n of Washington Spirits*, the Court observed that “[t]his court has explicitly
20 recognized the distinction between privileges and **rights granted only at the discretion of the**
21 **legislature**” and rejected the plaintiffs privileges and immunities claim, because the only right

22 ⁷⁶ *Vance*, 29 Wash. at 458–59, 70 P. 34.

23 ⁷⁷ *Am. Legion Post #149 v. Wash. State Dep’t of Health*, 164 Wn.2d 570, 607, 192 P.3d 306 (2008)(citation omitted).

1 asserted here is not a "constitutional privilege."⁷⁸ Justice Stephens' dissent in *Martinez-Cuevas*
2 underscores this point when he declared that the overtime statute at issue "does not involve a
3 fundamental attribute of an individual's national or state citizenship" under Article I, Section 12.⁷⁹

4 That is the case in this action. A live-in employee's entitlement to MWA protections is
5 purely a creature of statutory enactment, not a fundamental right under the privileges and
6 immunities clause. Consequently, RCW 49.46.010(3)(j) does not create a privilege or
7 immunity for live-in employees within the scope of Article I, Section 12.

8 *ii. RCW 49.46.010(3)(j) does not benefit one class to the detriment of another.*

9 Plaintiffs' Article I, Section 12 challenge also fails because RCW 49.46.010(3)(j) does
10 not grant an advantage to a group to the detriment of another. This is an important requirement
11 because the aim and purpose of the special privileges and immunities provision of Article I,
12 Section 12, of the state constitution is to secure equality of treatment of all persons, without undue
13 favor on the one hand.⁸⁰

14 Thus, the Washington Supreme Court has held that the fundamental right to carry on
15 business" is unconstitutionally implicated "by a municipal ordinance that attempted to insulate
16 resident photographers from out-of-state competition by imposing restrictions on itinerant
17 photographers."⁸¹ The Court concluded that the fee at issue "[did] not unfairly discriminate against
18 a class of businesses to the benefit of another class of the same businesses."⁸²

19 ⁷⁸ *Ass'n of Wash. Spirits & Wine Distribs. v. Wash. State Liquor Control Bd.* 182 Wn.2d 342, 340 P.3d
20 849 (2015).

21 ⁷⁹ *Martinez-Cuevas*, 196 Wn.2d at 547 (Stephens, J, dissenting) (quoting *Grant II*, 150 Wn.2d at 813-14.)

22 ⁸⁰ *Grant County II*, 150 Wn.2d at 810 (citation omitted).

23 ⁸¹ *Ass 'n of Wash. Spirits*, 182 Wn.2d at 360.

⁸² *Id.*

1 Plaintiffs make no attempt to show that the law advantages AFHs to the detriment of other
2 businesses. This exemption does not treat classes of the same business differently. AFHs provide
3 a different service and are built around the availability of 24-hour care. AFH workers work under
4 different circumstances than employees who are not required to live onsite. In this case, the statute
5 exempts all employers who employ individuals who are required to live onsite. The statute applies
6 equally if a person is employed by an AFH or if they are employed directly by an individual, a
7 NH, or ALF, as long as the employee is required to live on site. Plaintiffs have not explained how
8 this the law exempts or benefits some to the detriment of others. Consequently, even if it did
implicate a fundamental right (which it does not), it would not violate Article I, Section 12.

9 **2. RCW 49.46.010(3)(j) does not violate Article I Section 12 with respect to any**
10 **alleged “fundamental right” to worker health and safety.**

11 Because the live-in exemption does not implicate a fundamental right under Article 1
12 Section 12, Plaintiffs divert the Court’s attention from the straightforward analysis that requires
13 denial of their claim. In order to reach the holding in *Martinez-Cuevas* and *Bennett v. United*
14 *States*, Plaintiffs pretend that the right or obligation at issue is worker health or safety, rather than
15 entitlement to MWA benefits under the statute. Plaintiffs have not shown that these Plaintiffs or
16 workers at AFHs work long hours in extremely dangerous conditions. Plaintiffs’ case is not about
worker safety, but they realize the only hook they have to hang their hat on is *Martinez-Cuevas*,
which is distinguishable.

17 Article II, Section 35 provides for the protection of employees and states that the
18 “legislature shall pass necessary laws for the protection of persons working in mines, factories
19 and other employments dangerous to life or deleterious to health; and fix pains and penalties for
20 the enforcement of the same.” The plain language of the statute gives the legislature broad

1 discretion to enact, amend, and repeal necessary laws; however, as the dissent correctly points
2 out, Article II, Section 35 does not grant workers in dangerous jobs particular rights under any
3 particular statutory enactment.⁸³ In keeping with these mandates, the Washington State
4 legislature enacted Washington Industrial Safety and Health Act (WISHA), which aims to
5 “assure, insofar as may reasonably be possible, safe and healthful working conditions for every
6 man and woman working in the state of Washington, [and] the legislature in the exercise of its
7 police power ... declares its purpose ... to create, maintain, continue, and enhance the industrial
8 safety and health program of the state.”⁸⁴ In furtherance of this mission, the legislature has
9 enacted laws that directly impact safety at AFHs.⁸⁵ The AFH industry is heavily regulated and
10 DSHS has also established laws regarding the health and safety of its workers.⁸⁶ With these
11 enactments, the legislature has met its Article II, Section 35 duty to “pass necessary laws” to
12 protect worker safety.

13 As pointed out by the dissent, aside from the departure in *Martinez-Cuevas*, Washington
14 case law has confirmed that Article II, Section 35 does not create a fundamental right of state
15 citizenship, given the discretion the legislature has on worker health and safety.⁸⁷ Notably, the
16 Supreme Court decided *Vance* only 11 years after the Constitution was ratified but made no
17 mention of any fundamental right to “protection of workers in dangerous employments,” or
18 “worker health and safety,” or anything of the sort. Until *Martinez-Cuevas*, no other case in the
19 over 110 years since *Vance* recognized this alleged fundamental right. The implied assertion that

20 ⁸³ *Martinez-Cuevas*, 196 Wn.2d at 544-545 (Stephens, J, dissenting).

21 ⁸⁴ RCW 49.17.010.

22 ⁸⁵ RCW 70.128 et. seq.

23 ⁸⁶ WAC 388-76-10255.

⁸⁷ *Martinez-Cuevas*, 196 Wn.2d at 545.

1 the framers of the Constitution would have contemplated worker health and safety as a
2 fundamental right of state citizenship ignores 120 years of history and jurisprudence.

3 Unlike Article I, Article II, governs the legislative department, recognizing, guiding, or
4 restraining its plenary power to enact laws.⁸⁸ The placement of the directive for employee
5 protection legislation in Article II, rather than Article I, provides added evidence of the intent to
6 grant the legislature full discretion over worker health and safety laws.⁸⁹ As pointed out at length,
7 until *Martinez-Cuevas*, Courts have not considered statutory benefits granted only at the
8 discretion of the legislature to be fundamental.⁹⁰ To rule RCW 49.46.010(3)(j) is unconstitutional
9 based on a fundamental right that did not exist at the time the framers drafted the constitution,
10 would constitutionalize all protective legislation and wrongly suggest that anytime the legislature
11 limits the scope of protective legislation in employment, it implicates Article I, Section 12. This
would lead to absurd results.

12 *i. Plaintiffs Have Not Shown that AFHs are Extremely Dangerous.*

13 Even if the Court is convinced Plaintiffs' disingenuous argument that this case is about
14 "worker safety" Plaintiffs have failed to prove that the work Plaintiffs did was extremely
15 dangerous. Plaintiffs have not shown that working at AFHs is extremely dangerous to warrant
16 special protections under the law. The data actually shows it is more dangerous to work at ALFs
17 and NHs.⁹¹ The final DSHS report on Covid Outbreaks in Long Term Care Facilities shows that
18 AFHs had the smallest percentage of COVID outbreaks compared to ALFs and NHs.⁹²
Moreover, the Washington Workers Compensation claim data for Risk Class 6509 Plaintiffs

19 ⁸⁸ *Id.* at 548.

⁸⁹ *Id.*

⁹⁰ *Grant County*, 150 Wn.2d at 814, 83 P.3d 419.

⁹¹ See Exhibit A to JF Decl.

⁹² *Id.*

provided does not distinguish AFHs from the rest of subclass 6509-04.⁹³ Considering that AFHs are not separated from these other similar facilities, Plaintiffs' argument that AFHs are inherently dangerous is unconvincing. The other data Plaintiffs present is misleading and makes sweeping generalizations the dangers of residential care without distinguishing AFHs.

Plaintiffs also offer no evidence to prove any causal link between the live-in employee exemption and injury rates at AFHs; they simply invite the Court to infer such a causal relationship. Similarly, they offer no evidence to prove that removing RCW 49.46.010(3)(j) would reduce the rate of workplace injuries or accidents. The Court cannot draw the speculative causal inference that Plaintiffs claim depends upon, at trial or on summary judgment. The speculative nature of Plaintiffs' claim is made clear by the undisputed fact that there has been only one work-place injury at Defendants' AFHs in their sixteen years of business, and the injury was minor.⁹⁴ Moreover, the only reported work-place injury required only one doctor's visit to resolve.⁹⁵ Because Plaintiffs have not shown that working in AFHs is extremely dangerous or that these workers were required to work long hours in conditions dangerous to life and deleterious to health, the comparison to the dairy workers in *Martinez-Cuevas* is inapposite.

3. The Legislature has reasonable grounds for exempting live-in workers from the MWA.

As explained above, Plaintiffs' claim fails the first step of the review under the privileges and immunities clause. However, if the Court is convinced otherwise, Plaintiffs' challenge fails at the second step of the required analysis.

⁹³ Exhibit 1 to Leland Decl.

⁹⁴ MM Dec. ¶ 12.

⁹⁵ *Id.*

1 Even though Plaintiff have not demonstrated that the RCW 49.46.010(3)(j) conveys a
2 benefit to AFH employers, the second step in the privileges and immunities analysis requires a
3 showing of a reasonable ground for granting a privilege. The Article 1, Section 12 reasonable
4 grounds test is more exacting than rational basis review.⁹⁶ Under the test, a court will not
5 hypothesize facts to justify a legislative decision.⁹⁷ “Rather, the court will scrutinize the
6 legislative distinction to determine whether it in fact serves the legislature's stated goal.”⁹⁸
7 Speculation will not suffice.⁹⁹

8 While the Court may scrutinize the facts to determine whether they establish
9 reasonable grounds for the overtime exemption, it cannot second guess the legislature's policy
10 decisions.¹⁰⁰ Moreover, in matters of economic legislation such as minimum wage and
11 overtime laws, there is a reasonable presumption in favor of the constitutionality of the law
12 or ordinance, which avoids substituting the court’s judgment for the judgment of the
13 legislature.”¹⁰¹

14 Here, Plaintiffs’ claim that the exemption is wholly baseless reflects a clear lack of
15 understanding of AFHs. The facts readily establish that the exemption from overtime pay reflects
16 a legislative recognition that employment that requires live-in care does not fit into a traditional
17 “nine to five” schedule. While someone must be available 24 hours a day, Plaintiffs certainly
18 were not working 24 hours per day, and because they lived where they worked, the MWA
19 protections were built in. There were periods of idle time and complete freedom from job duties.

20 ⁹⁶ *Martinez-Cuevas*, 196 Wn.2d at 523.

21 ⁹⁷ *Schroeder v. Weighall*, 179 Wn.2d 566, 574, 316 P.3d 482 (2014).

22 ⁹⁸ *Id.*

23 ⁹⁹ *Id.*

¹⁰⁰ *Petstel Inc.*, 77 Wn.2d at 151.

¹⁰¹ *Sofie*, 112 Wn.2d at 642-43.

1 The evidence also reflects an understanding of the benefits that live-in employees receive in the
2 form of room, board, and food. Further, the evidence establishes a legislative recognition of the
3 importance of AFHs to the state and that it would be cost prohibitive for owners of AFHs who
4 employ live-in employees to comply with MWA due to the expense.

5 Moreover, the MWA “live in” exemption does not exist in a legislative vacuum. The
6 Plaintiffs do not dispute that AFHs in Washington are heavily regulated.¹⁰² Nonetheless, Plaintiffs
7 would have the Court believe that AFHs are an otherwise unregulated and unsafe workplace
8 environment for workers and thus residents alike. This is not true. Plaintiffs provide speculation
9 rather than evidence that removing the “live in” exemption for caregiving workers at AFHs would
10 make them safer. In contrast, there is ample evidence that a Court ruling removing the “live in”
11 exemption that would undermine AFH model of care that is providing for the well-being many
12 of Washington’s disabled and infirm who have no other option to live in a real home where they
13 can receive the care and support they need to live their lives as best they can on their own terms.

14 There are approximately 2,800 adult family home operations in Washington.¹⁰³ This is
15 not nearly enough to keep up with the residential and care needs of Washington’s aging
16 population.¹⁰⁴ The AFH system in Washington is designed to rely on having someone living in
17 the AFH.¹⁰⁵ AFHs typically operate on very thin margins given that most provide residential care
18 paid for by Medicaid.¹⁰⁶ Yet, Plaintiffs ask the Court to upend how adult family homes are able
19 to recruit quality caregivers and provide residential care to their residents.

20 ¹⁰² McKee Dec. ¶ 2, Ex. 1 at 3:23 – 4:9; JF Dec. ¶¶ 12, 21.

21 ¹⁰³ McKee Dec., ¶ 2, Ex. 1 at 4:10-11.

22 ¹⁰⁴ McKee Dec., ¶ 2, Ex. 1 at 4:10-11.

23 ¹⁰⁵ JF Dec. ¶ 20.

¹⁰⁶ JF Dec. ¶¶ 25-26.

1 This case is not about whether the price of milk might need to go up a few cents because
2 dairy workers working on remote locations on industrial dairy farms need to be paid more due to
3 their squalid living conditions and extremely hazardous work. Rather, this case is about whether
4 a Court should supplant the Legislature in making policy decisions as to how best to ensure that
5 there are enough residential long-term care homes that can enable disabled and infirm
6 Washingtonians to live their best lives as active members of their communities rather than force
7 them to live in an institutional setting or, worse, on the street. Balancing the reasonable interests
8 of residents receiving care and the workers providing care implicates policy-making decisions
9 that the Legislature is entrusted to make. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d
10 1014, 1019 (2001) (“[T]he Legislature is the fundamental source for the definition of this state's
11 public policy and we must avoid stepping into the role of the Legislature by actively creating the
12 public policy of Washington.”). With this context, it cannot be unreasonable for the Legislature
13 to uphold the “live-in” exception to the MWA for AFH caregivers given how the Legislature’s
14 policy-making decisions supporting the development of AFHs have created thousands of
15 residential living opportunities for disabled and infirm Washingtonians who would not have
16 access to them otherwise.¹⁰⁷

15 **C. Any Adverse Holding Against the Validity of RCW 49.46.010(3)(j) Should Only**
16 **Be Applied Prospectively**

17 “When retroactive application causes hardships and inequities, our Supreme Court allows
18 courts to give only prospective effect to its decision to hold a statute unconstitutional.” *In re*
19 *Marriage of Anderson*, 134 Wn. App. 506, 512, 141 P.3d 80, 83 (2006), *citing Bond v. Burrows*,
103 Wash.2d 153, 163–64, 690 P.2d 1168 (1984). A recognized reason to reject retroactive

20 _____
21 ¹⁰⁷ See Mckee Decl. ¶2, Ex. 1 at 8:20-9:18.

1 application is because of “justifiable reliance on a statute which is presumptively constitutional.”
2 *Bond*, 134 Wn. App. at 164.

3 Here, ruling in Plaintiffs favor invalidates the exemption that had been law and relied upon
4 for more than 60 years. The Legislature subsequently created and promoted the development of
5 2,800 AFHs in Washington with the assumption that “live-in” exemption was presumptively
6 constitutional. Retroactive application could produce a substantially inequitable result for AFHs
7 throughout Washington, perhaps bringing them to financial ruin as they learn they are responsible
8 for paying years of backpay simply because they relied on the presumptive constitutionality of
9 the statutory exemption. AFH operators should not be punished for that reliance. Defendants had
10 no reason to foresee the need to change how they were paying their workers. Defendants have
11 not had been given opportunity to negotiate for higher Medicaid reimbursement rates to reflect
12 higher payroll costs either; indeed, why would the State of Washington agree to higher
13 reimbursement rates when the “live-in” exemption to the MWA is presumptively constitutional?
14 For these reasons, creating retroactive liability would be unfair and inequitable.

15 **A. Plaintiffs were Subject to the Live-In Exception to the MWA.**

16 “The plain language of [the MWA] excludes two categories of workers from the MWA's
17 definition of “employee”: (1) those individuals who reside or sleep at their place of employment
18 and (2) those individuals who otherwise spend a substantial portion of work time subject to call,
19 and not engaged in the performance of active duties.” *Berrocal v. Fernandez*, 155 Wn.2d 585,
20 598, 121 P.3d 82, 88 (2005) (cited approvingly in FN 100 of Plaintiffs’ motion). There is no
21 dispute that this exclusion applies because each of Plaintiffs resided at the AFHs where they
22 worked.¹⁰⁸ There is likewise no dispute that the Plaintiffs resided at the AFHs to work there

23 ¹⁰⁸ MM Dec. ¶7.

1 because they accepted employment for that purpose.¹⁰⁹ Therefore, the plain language excludes
2 Plaintiffs from the definition of an employee under the MWA.

3 Avoiding the plain language of the MWA exception, Plaintiffs contend that the exception
4 does not apply because Plaintiffs do not have to reside at the AFHs despite accepting a job on the
5 condition that they did just that. Plaintiffs justify their argument by relying on *Nwauzor v. The*
6 *Geo Group, Inc.*, 2 Wn.3d 505, 540 P.3d 93 (2023). However, *Nwauzor* actually contradicts
7 Plaintiffs' argument.

8 In *Nwauzor*, our Supreme Court held that the MWA exemption did not apply because
9 detainees working at an immigration detention facility were required to reside at the detention
10 facility because they were detained by the federal government, not because of their job duties:

11 Accordingly, we conclude the reside or sleep exemption, RCW 49.46.010(3)(j), does not
12 apply to persons who work in the facility in which they are detained because their duties
do not require them to sleep or reside in the facility. Here, the detained workers are in the
custody of ICE and are not permitted to leave the detention facility until ordered released
or removed. It is their detention that requires them to sleep or reside at the NWIPC, not
their participation in the work program.

13 Thus, the *Nwauzor* plaintiffs were considered employees under the MWA because they had no
14 choice about living at the detention facility where they worked. *Id.* In contrast, here, there is no
15 dispute that Plaintiffs were at-will employees who only lived at the AFHs because they were hired
16 to be live-in caregivers, providing a residential caregiving for disabled and infirm residents who
have great need for such a supportive home.

17 V. CONCLUSION

18 The exemption of live-in employees from the definition of employee under the MWA
19 does not violate the privileges and immunities prohibition of the Washington State Constitution

20 ¹⁰⁹ MM Dec. ¶8.

1 Article I, Section 12. Plaintiffs have not established that this statute burdens a fundamental right
2 as they have not shown that their work or work at AFHs in extremely dangerous to trigger the
3 protection under Article II, Section 35. Moreover, Plaintiffs fail to account for the very reasonable
4 policy-objectives the Legislature has in encouraging the development of AFHs for the purpose of
5 accomplishing all the benefits of residential caregiving homes for disabled and inform
6 Washingtonians who need them.

7 Even if the statute were assumed to be invalid, that decision should be applied purely
8 prospectively. To do otherwise would inequitably upend how AFH have done business for
9 decades in reliance on the presumptive constitutionality of the MWA exemption.

10 Ultimately, the plain language of the MWA holds that the Plaintiffs are not employees
11 under the MWA. Therefore, Defendants respectfully asks the Court to rule that the MWA is
12 constitutional and that Plaintiffs are not employees under the MWA.

13 I certify that this motion contains 6,709 words in accordance with the local rules.

14 DATED this 5th day of July 2024.

15 **SEATTLE LITIGATION GROUP, PLLC**

16
17 s/ Albert H. Kirby

18 Albert H. Kirby, WSBA No. 40187

19 Email: albert@seattlilitigation.com

20 Seth Rosenberg, WSBA No.41660

21 Email: seth@seattlilitigation.com

22 DEFENDANTS' OPPOSITION TO PLAINTIFFS'
23 MOTION FOR PARTIAL SUMMARY JUDGMENT – 25

SEATTLE LITIGATION GROUP, PLLC
1215 4th Ave, Suite 1100
Seattle, Washington 98161
T. (206) 407-3300 | F. (206) 407-3097

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on the date stated below, I caused the foregoing DEFENDANTS' OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT together with a PROPOSED ORDER and the DECLARATIONS OF MARIANN MCKEE and MARCELINA MACANDOG IN SUPPORT OF THE OPPOSITION to be served on the following parties:

Jeremiah Miller, WSBA #40949
Emily Grove, WSBA #52867
Janae Choquette, WSBA #58701
Fair Work Center
116 Warren Avenue North
Seattle, WA 98109
(206) 331-3824
jmiller@fairworkcenter.org
egrover@fairworkcenter.org
jchoquette@fairworkcenter.org

- ☐ Via Legal Messenger
- ☐ Via Facsimile
- ☒ Via Electronic Mail
- ☐ Via U.S. Mail/Commercial Post
- ☒ Via Electronic Filing/E-service
- ☐ Via Hand-Delivery

The foregoing statement is made under the penalty of perjury under the laws of the United States of America and the State of Washington and is true and correct.

DATED this 5th day of July 2024.

SEATTLE LITIGATION GROUP, PLLC

s/ Albert H. Kirby

Albert H. Kirby
WSBA Bar. No. 40187

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7 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
8 **IN AND FOR THE COUNTY OF KING**

9 JOCYLIN BOLINA; ADOLFO PAYAG;
10 MADONNA OCAMPO; HONORINA
11 ROBLES; HOLLEE CASTILLO; and REGINA
12 VILLALOBOS,

11 Plaintiffs,

12 vs.

13 ASSURECARE ADULT HOME LLC, a
14 Washington corporation; ASSURECARE
15 ADULT FAMILY HOME LLC, a Washington
16 corporation; ASSURECARE FAMILY HOME
17 CARE LLC, a Washington corporation;
18 MARCELINA S. MACANDOG, an individual;
19 GERALD MACANDOG, an individual,

No. 23-2-05373-7 SEA

**DECLARATION OF MARCELINA
MACANDOG IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT**

18 I, Marcelina Macandog declare as follows:

19 1. I am the owner and manager of Assurecare Adult Home LLC, Assurecare Adult
20 Family Home LLC, and Assurecare Family Home Care (referenced collectively below as
21 "AFHs"), and I make this declaration based on personal knowledge, and I am competent to testify
22 regarding the following facts.
23

DECLARATION OF MARCELINA MACANDOG IN SUPPORT
OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' SECOND
MOTION FOR PARTIAL SUMMARY JUDGMENT – I

SEATTLE LITIGATION GROUP, PLLC
1215 4th Union Street, Suite 1100
Seattle, Washington 98161
T. (206) 407-3300 | F. (206) 407-3097

1 2. I have owned and operated AFHs since 2008.

2 3. Nearly all the residents at the AFHs qualify for Medicaid. Medicaid pays for them

3 to stay at AFHs.

4 4. Most residents at the AFHs cannot afford any housing option that can provide the

5 supportive caregiving they need except for adult family homes like the AFHs.

6 5. Residents at the AFHs do not need the level of care that a nursing home provides.

7 6. Each AFH has at least one employee who resides there. This helps to maintain a

8 homier, residential environment for residents rather than an institutional long-care facility like a

9 nursing home.

10 7. Jocelyn Bolina, Adolfo Payag, Madonna Ocampo, Honorina Robles, Hollee

11 Castillo, and Regina Villalobos (“Plaintiffs”) lived on site and provided residential care for a

12 maximum of six residents at a time.

13 8. The Plaintiffs only lived on site and provided residential care at the AFHs because

14 they accepted employment for that purpose. They were at-will employees who could quit and

15 leave at any time.

16 9. I am originally from the Philippines and Plaintiffs were also originally from the

17 Philippines.

18 10. Plaintiffs worked as caregivers performing the regular functions of caregivers at

19 AFHs, which included direct patient care, administrative, and janitorial tasks.

20 11. Plaintiffs never reported to me that they were injured while working at the AFHs.

21 12. Only one AFH employee has had a work-place injury in the sixteen years that I

22 have owned and operated the AFHs. This is reflected by the fact that the AFHs collectively have

23

1 had only one workers' compensation claim. It was a minor injury to the employee's elbow that
2 required only one doctor's visit.

3 13. Attached as **Exhibit 1** is a true and correct copy of a screenshot that I took on April
4 26, 2024 of my L&I insurance account webpage. It reflects that my AFHs' experience factor is
5 only 0.64, which the webpage states means that the AFHs' claim costs are lower than the average.

6 14. There were often situations where there were only three residents living at the
7 AFHs, so there was less work for the Plaintiffs to do.

8 15. The majority of residents at my AFHs did not require 24-hour care.

9 16. Plaintiffs were not required to work 24-hour shifts. There is just a requirement for
10 24 hour per day staffing, and shifts were assigned accordingly.

11 17. Plaintiffs were allowed to take meal breaks and rest breaks and they took them. If
12 a break was interrupted to provide care to a resident, Plaintiffs were able to return to their break
13 once the immediate need was taken care of.

14 18. There was not constant work to be done at my AFHs and because Plaintiffs lived
15 where they worked they were able to take more breaks.

16 19. Plaintiffs were paid a flat rate per day and submitted their hours to me for payment.

17 20. Plaintiffs were not required to pay rent or any portion of utilities including internet.

18 21. Plaintiffs were also provided food and access to a vehicle.

19 22. Plaintiffs received credits cards to go shopping for the house and often used the
20 credit card to go out to eat or order Uber Eats.

21 23. Hollee Castillo went to the gym daily and lived with his girlfriend at one of my
22 house for three months. She was not required to contribute to the household expenses and lived
23 rent free.

24. Madonna Ocampo lived with her mother, husband and daughter at one of my houses. Her daughter attends private school in the neighborhood and Madonna drove her to and from school daily.

25. Depending on the space in the AFH, had any of the other Plaintiffs or other employees had a significant other or family who wanted to live with them, they would have been extended the same generosity.

26. Reginald Villalobos went to the gym daily with Hollee Castillo.


27. During her weekly shifts, Honorina Robles went to medical appointments and to the food bank.

28. If not for living at my AFHs Adolfo Payag, Honorina Robles would not have had other housing options.

29. Plaintiffs were provided with vacation and sick leave.

I declare under the penalty of perjury under the laws of the State of Washington and the laws of the United States that the foregoing is true and correct.

Executed and signed this 5th day of July 2024 in the State of Washington.


Marcelina Macandog

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FILED
Hearing: Friday, February 2, 2024 at 9:00 A.M.
2024 JAN 22 03:26 PM
KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE #: 23-2-05373-7 SEA

Honorable Mary Roberts
With Oral Argument

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

JOCYLIN BOLINA; ADOLFO PAYAG;
MADONNA OCAMPO; HONORINA
ROBLES; HOLLEE CASTILLO; and REGINA
VILLALOBOS,

Plaintiffs,

vs.

ASSURECARE ADULT HOME LLC, a
Washington corporation; ASSURECARE
ADULT FAMILY HOME LLC, a Washington
corporation; ASSURECARE FAMILY HOME
CARE LLC, a Washington corporation;
MARCELINA S. MACANDOG, an individual;
GERALD MACANDOG, an individual,

No. 23-2-05373-7 SEA

**DECLARATION OF JOHN FICKER IN
SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I, John Ficker declare as follows:

1. I am the Executive Director of Adult Family Home Council of Washington State
(hereinafter "AFH Council") and I make this declaration based on personal knowledge, and I am
competent to testify regarding the following facts.

DECLARATION OF JOHN FICKER IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT – 1

SEATTLE LITIGATION GROUP, PLLC
500 Union Street, Suite 510
Seattle, Washington 98101
T. (206) 407-3300 | F. (206) 407-3097

1 2. The AFH Council is a mission driven member organization formed in 1993
2 providing adult family home providers with resources and training covering all aspects of their
3 business. The AFH Council also advocates on behalf of AFH providers with the state legislature,
4 the Department of Social and Health Services (“DSHS”), as a member of the Washington State
5 Senior Citizen’s Lobby and is the exclusively recognized representative of adult family homes
6 for purposes of collective bargaining.

7 3. As the exclusive bargaining representative of adult family home providers, the
8 AFH Council engages in contract negotiations with the state every two years to fight for issues
9 related to (i) economic compensation, such as manner and rate of subsidy and reimbursement,
10 including tiered reimbursements; (ii) health and welfare benefits; (iii) professional development
11 and training; (iv) labor-management committees; (v) grievance procedures; and (vi) other
12 economic matters.

13 4. Adult family homes are quickly becoming the premier option for long-term care
14 in the state of Washington. While the type of work is largely the same, there are significantly
15 more people working at AFHs than as residential care aides, nursing assistants in nursing homes,
16 and direct care workers in other industries.

17 5. Over the last several years, AFHs represent the only sector of long-term care that
18 is growing. While Washington has lost many nursing homes and assisted living beds across the
19 state, the number of AFHs continue to grow.

20 6. One of the reasons for the growth in the AFH sector is due to the increase in
21 Washington’s population of elderly individuals. Even with the rate of growth AFHs are
22 experiencing, there is still a need to grow the long-term care workforce and resources.

1 7. Hospitals and nursing homes report increasing challenges finding placement for
2 someone trying to find community-based care and housing.

3 8. AFHs offer a staff-to-resident ratio that never dips below one staff to six residents
4 and, in most cases, it is likely closer to a 1:3 ratio.

5 9. The level of individualized, compassionate care offered at an AFH provides truly
6 personalized care planning that cannot be replicated in a large facility or institution.

7 10. While both AFHs and Assisted Living Facilities provide personal care and
8 assistance with activities of daily living, there are a few key differences. AFHs are usually smaller
9 and offer a homier ambiance, whereas assisted living facilities may feel more clinical or
10 institutional.

11 11. Living in an AFH can bring many benefits to seniors and individuals with
12 disabilities. These homes offer a more intimate and homelike atmosphere compared to larger
13 assisted living facilities, and their smaller size allows for more personalized care and attention. In
14 addition, many AFHs provide transportation and other services that help residents stay active and
15 maintain their independence within the community.

16 12. AFHs in Washington State are regulated by DSHS, which ensures that they meet
17 specific health and safety standards. To obtain and maintain their license, these homes and their
18 staff must pass regular inspections to ensure that they are providing appropriate care to residents.

19 13. At AFHs, the services provided can vary depending on the needs of the residents,
20 but they typically include assistance with essential activities of daily living like bathing, dressing,
21 and toileting. In addition to this, some homes may offer medication management, transportation
22 to appointments, and help with meals.

1 14. The final DSHS report on COVID-19 outbreaks in Long-Term Care Facilities
2 shows that AFHs had the smallest percentage of COVID-19 outbreaks compared to assisted living
3 facilities and nursing homes.

4 15. A true and correct copy of February 8, 2023 email correspondence I received from
5 Jered Gunn with DSHS is attached as **Exhibit A.**

6 16. The cost of living in an AFH may differ based on various factors like location and
7 the level of care needed. In Washington State, the average cost of a shared room is approximately
8 \$4,500 per month, and a private room can cost around \$5,500 per month.

9 17. In order to start an AFH, a homeowner must obtain a license from DSHS, go
10 through a thorough licensing process, which includes a background check, an inspection of the
11 home, and a review of the proposed care plan.

12 18. DSHS requires that the licensee have a minimum of 1000 hours of care experience
13 to apply for an AFH license.

14 19. All Long-Term Care Workers at an AFH, must be certified as a home care aide at
15 minimum. This requires 75 hours of basic training, an exam, and a state and federal background
16 check.

17 20. Employees of AFHs are aware of the 24/7 nature of the work and the system is
18 designed to rely on having someone living in the AFH.

19 21. Even though the requirements for owning/running an AFH and working at an AFH
20 are highly regulated and can appear complicated, running a successful AFH is a great opportunity
21 for many women, people of color and immigrants to achieve economic independence as small
22 business owners. Caregiving is often seen as an entry level, low wage position with no career
23 ladder. AFH ownership provides a unique opportunity for caregivers to grow as entrepreneurs.

1 22. A true and correct copy of a brochure explaining how to start an AFH prepared by
2 the Ethiopian Community in Seattle that I received is attached as Exhibit B.

3 23. AFHs as a rule are not big businesses and many of the owners are not earning large
4 amounts of money. Most adult family homes can be categorized as women or minority owned
5 business. A significant portion of AFH workers and owners are recent immigrants or first
6 generation Americans. While there may be some individuals who own multiple homes that only
7 take private pay residents, the majority of AFH owners have one residence and the residents are
8 on Medicaid. Based on recent payment reports more than 65% of contracted AFH beds are
9 currently occupied by a Medicaid funded resident. Over 75% of homes serve at least one Medicaid
10 funded resident.

11 24. Based on an assessment process outlined in WAC 388-106, the state determines
12 each residents' classification level for Medicaid services. AFH Council negotiates with the Office
13 of Financial Management and DSHS the amount that AFH owners receive for Medicaid funded
14 residents per classification level.

15 25. Because of the rates, many of the AFH owners were barely breaking even.
16 However, through advocacy efforts, a new collective bargaining contract with DSHS was
17 negotiated that increased reimbursement to AFHs with Medicaid funded residents.

18 26. Despite these gains, owners of AFHs are still small businesses operating on thin
19 margins.

20 27. In Washington, AFH workers are typically paid between \$16-24 per hour.
21 However, some AFHs workers live onsite and receive other benefits that do not count as traditional
22 wages such as room and board.

1 28. The live in aspect of AFH's distinguishes AFHs from nursing homes/skilled
2 nursing facilities and assisted living facilities and allows some workers who may not be able to
3 afford housing especially in King County to live in low or rent-free housing and also earn an
4 income.

5 29. While the majority of AFH owners cannot afford to provide their employees with
6 health insurance, thanks to the work of the AFH Council, during the 2023 legislative session, the
7 AFH Council advocated for access to affordable health care coverage for both providers and
8 workers.

9 30. As a result, the legislature awarded the AFH Council's AFH Training Network
10 \$672,000 to create educational resources and training and to employ a healthcare navigator that
11 would be responsible for assisting AFH owners and their employees apply for free or affordable
12 health care coverage on the Washington Health Benefits Exchange.

13 31. Workers at AFHs who are required to live where they work have a unique
14 occupation that does not comport with standard shift work contemplated by the MWA.

15 32. It would be cost prohibitive for owners of AFHs who employ live-in employees to
16 comply with MWA due to the expense. This is especially true because more than 65% of
17 contracted AFH beds are currently occupied by a Medicaid funded resident.

18 33. If the live in employee exemption is ruled unconstitutional, and AFH owners are
19 required to comply with the MWA, it would upend the entire AFH industry and likely result in
20 the closure of AFHs. This would mean fewer available beds for the growing population of aging
21 Washingtonians.

1 34. This would have far reaching economic impacts that would trigger bargaining
2 under RCW 41.56.029 and would require changes to the amounts that AFH owners receive for
3 Medicaid funded residents per classification level among other things.

4 35. I declare under the penalty of perjury under the laws of the State of Washington
5 and the laws of the United States that the foregoing is true and correct.

6 Executed and signed this 22nd of January 2024 at Tumwater, Washington.

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9 John Ficker
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Exhibit A

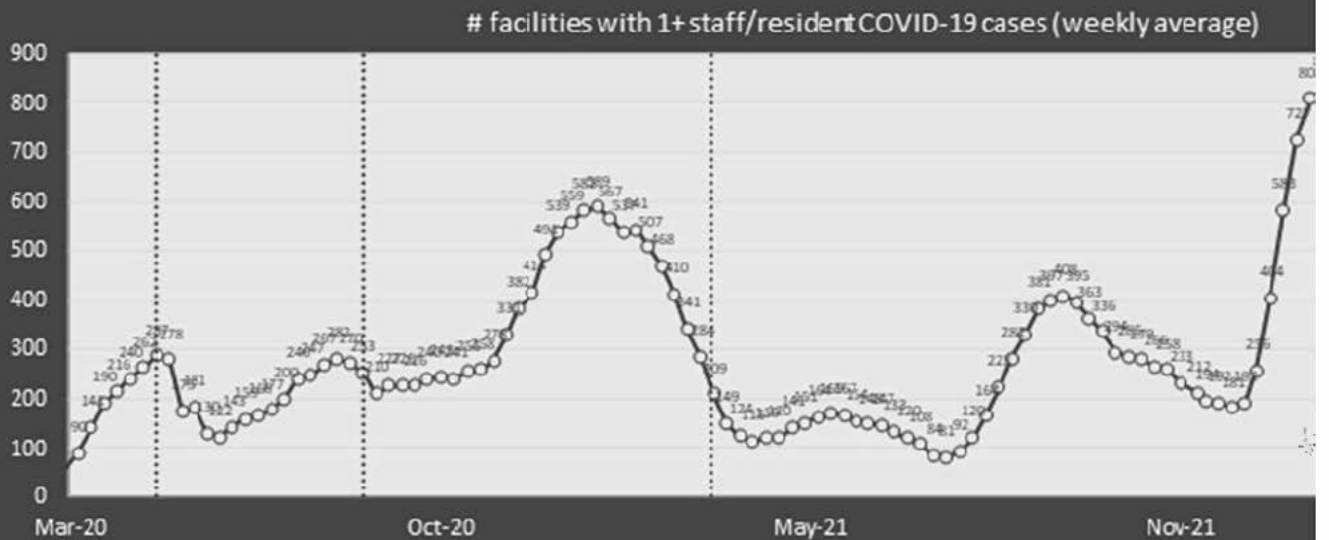
From: Gunn, Jered S (DSHS/ALTSA/RCS) <jered.gunn@dshs.wa.gov>
Sent: Wednesday, February 8, 2023 10:53 AM
To: Carma Matti-Jackson <carmamattijackson@whca.org>; David Carter, LeadingAge Washington <dcarter@LeadingAgeWA.org>; Deb Murphy, LeadingAge Washington <dmurphy@leadingagewa.org>; Elenamadrid@WHCA.ORG; Ficker, John <john@adultfamilyhomecouncil.org>; Laura Hofmann, LeadingAge Washington <lhofmann@LeadingAgeWA.org>; St. Ours, Lauri <lauristours@whca.org>; WHCA - Vicki McNealley, Director of AL <vickimcnealley@whca.org>
Cc: Wellsbury, Frances (DSHS/ALTSA/RCS) <frances.wellsbury@dshs.wa.gov>; Metz, Betty W (DSHS/ALTSA/RCS) <betty.metz@dshs.wa.gov>
Subject: ALTSA COVID-19 LTCF Data: February 08

Hello,

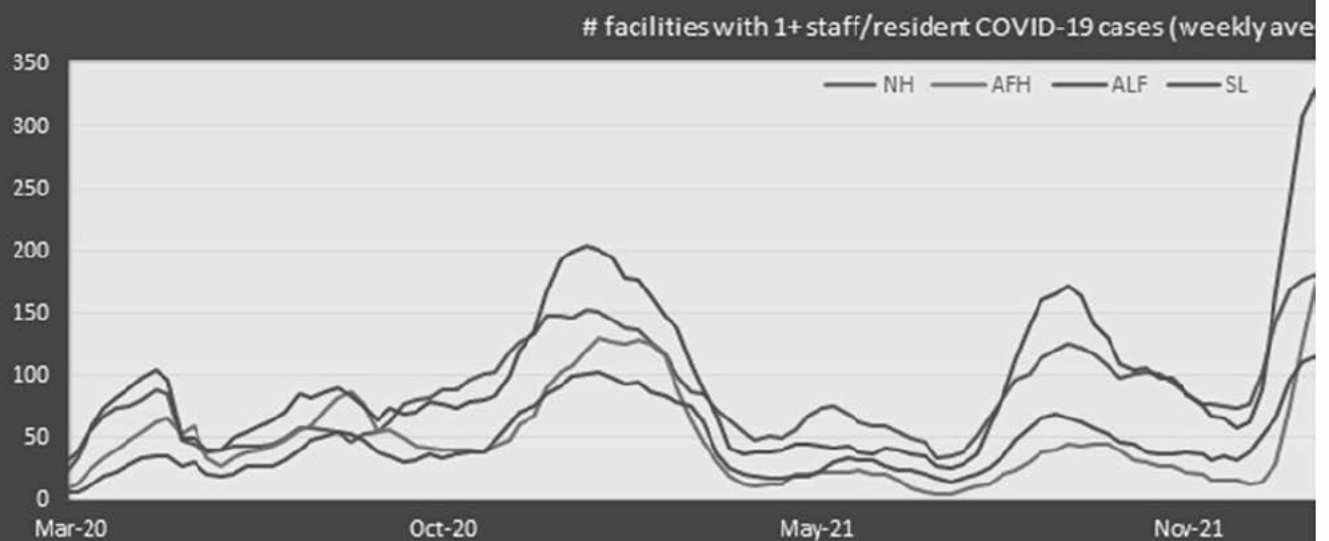
This is a notification that RCS has discontinued our daily virus tracking report as of 2/3/2023. Because this is the primary source of data for the creation of the weekly LTC Virus Tracking report, the attached LTC Virus Tracking report will be our final distribution for the time being. RCS is looking into creating and implementing a less resource intensive method that will serve similar purpose as the Virus Tracking report for tracking reported cases of COVID in the providers we regulate. Once we developed the report, we will communicate as to when we will resume the LTC Virus tracking report again. Thank you for your understanding.

COVID-19 Virus Activity in Long-Term Care Residential Care Services (RCS)						
08-Feb Today's Date			07-Feb Date of Prior Report			
#	COVID Activity in Long-Term Care Facilities (RCS)					Δ
267	long-term care facilities with confirmed COVID activity, current					-9
2330	long-term care facilities with confirmed COVID activity, cumulative					0
0	long-term care facilities with suspected COVID activity, current					0
Stats By Facility Type						
type	current	Δ	# inf, current	cumulative	# inf, cumulative	total
AFH	25	-4	1%	1319	33%	4056
ALF	102	-3	19%	583	106%	550
NH	111	0	55%	242	120%	201
SL	25	-1	13%	170	86%	198
ICF/IID	4	0	100%	4	100%	4
ESF	0	0	0%	8	89%	9
TOTAL	267	-9	5%	2330	46%	5018

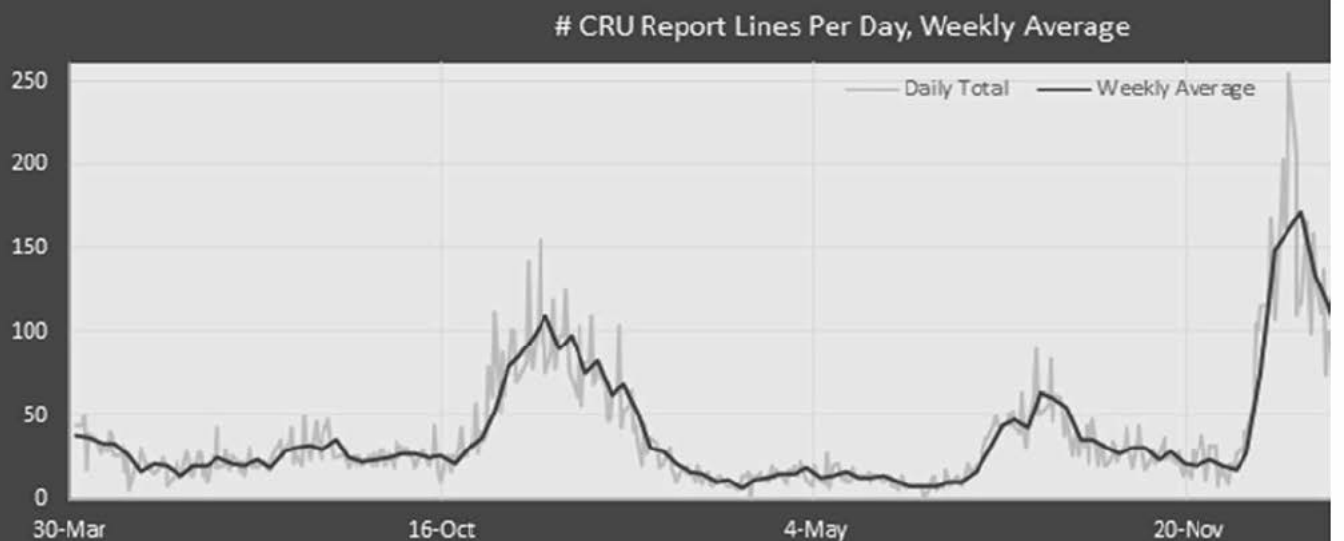
Visualizations



* vertical lines indicate potentially disruptive changes in data rep



In July, CMS announced a requirement of regular point-of-care testing at all



This count tracks unique reports - case counts cannot be inferred from

JERED GUNN / BUSINESS INTELLIGENCE ANALYST / Residential Care Services

Aging and Long-Term Support Administration

Washington State Department of Social and Health Services

(O) 360-725-2491 / (C) 360-742-2849 / Jered.Gunn@dshs.wa.gov

Transforming Lives

Exhibit B



How to Start an Adult Family Home (AFH)

Prepared by
Ethiopian Community in Seattle



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ETHIOPIAN COMMUNITY IN SEATTLE

The mission of the Ethiopian Community in Seattle (ECS) is to facilitate the seamless integration of all persons of Ethiopian origin into the American society. ECS aims to contribute to the social, cultural, and civic life of the Puget Sound area as well as to assist Ethiopians and Ethiopian-Americans in preserving and sharing their ancient and rich cultural heritage.

As member of the Small Business Resiliency Network, ECS provides support to small businesses to successfully manage and grow their business. For those interested to start up a business, ECS also provides a "how to" guideline. This booklet provides a step-by-step guidance on "how to start an Adult Family home".

What is an AFH?

It is a dwelling, licensed by the Washington State Department of Social and Health Services (DSHS), in which someone provides room and “board” and care for up to six adults not related to the person providing the services.

Residential home care offers seniors a degree of freedom, along with the security of 24-hour supervision in a small, safe environment. Adult homes typically offer assistance with day-to-day activities, including cooking, laundering, cleaning, specialty care,

respite care and transportation. RCW 70.128.010: Washington State Legislature’s definition of an AFH.



An adult family home that has an existing permitted use as an adult family home may be expanded to provide services for up to eight adults. RCW 70.128.066: Seven or eight bed adult family home requirements in Washington State.



Licensing Requirements for Adult Family Homes in Washington State

When someone wishes to open an adult family home, the first step in the process is for the prospective owner to attend a two-hour orientation class.



The intention of this class is to help attendees decide if this is a business they truly wish to start. Topics covered within orientation are:

- * A rundown of what is involved in operating an adult family home
- * An overview of the laws and regulations pertaining to adult family homes
- * An outline of the responsibilities of an owner/provider
- * A look into the impact that operating a home may have on the provider's own family
- * A definition of residents' rights and the importance of serving the needs and preferences of residents
- * Hiring, training and supervising staff

Also, before applying for a license, the owner/provider must complete:

- ✓ First aid and CPR training
- ✓ Home Care Aide Certification (HCA)



75 hrs. training (2 hrs. Orientation, 3 hrs. Safety & 70 hrs. Core Basic)

- * RNs, LPNs, NACs, nurse technicians, or advanced registered nurse practitioners are exempt from the 75 Hour Training and Certified HCA requirement
- ✓ 1000 hours of care giving experience
- ✓ Specialty training in areas in which the adult family home wishes to specialize, such as caring for residents with dementia or mental health needs (8 hrs. Dementia Specialty, 8hrs. Mental Health Specialty)
- ✓ AFH Administrator Training
- ✓ Nurse Delegation Core and Special Focus on Diabetes (12 hrs. training)
- ✓ Food Handling and Safety Training
- ✓ Continuing Education (CE).
 - * CE is due by birthday each year beginning one year after home care aide certification (12 hrs. training)
- ✓ Background check
- ✓ Have the home approved by a local building official to ensure that the home meets all safety codes.



In addition to state laws and regulations as well as building and fire codes, homes must also comply with registering their business in the city where the home is located. The owner must furthermore comply with all federal, state and local tax and employment laws.



Adult family homes are licensed by the Department of Social and Health Services once all aspects of training and compliance with regulations are met.



✓ Application Requirements:

- * A \$2,750 non-refundable fee;
- * A \$700 non-refundable fee for a change of ownership (CHOW) of a currently licensed AFH, and a written letter from the current licensee saying that they are willing to give up their license when and if your license is approved;
- * A copy of your AFH Orientation Certificate taken within the last 12 months;
- * A copy of Washington State Business License Number showing the Unified Business Identifier (UBI);
- * A copy of document issued by the Internal Revenue Service (IRS) verifying the Employer Identification Number or EIN (Federal Tax ID Number);
- * Copies of documents showing that the applicant provider, entity representative, and resident manager meet the minimum qualifications for licensure



The department will not process your application if it is not complete.

Steps to Start a Successful Adult Care Home

1. Research

Research is probably the first thing you need to do in order to establish a successful AFH. Research if and where there is a need to start the business. Your research should be geared towards an understanding of the needs of the elderly so as to ascertain whether you are able to meet those needs. Some of the needs of the elderly may include financial, medical and emotional support.



Location of the AFH is a key factor in the success or failure of the business, as is the effort placed into making the home accessible and aesthetically pleasing. Research your competition in the area as well, and determine what they offer in terms of services and prices.

There is always a need for high quality homes which offer quality services and attentive staffing. Some areas, though, have more licensed homes than are needed to meet the demands of consumers, while other areas are severely lacking adult family homes.

New providers should review how many homes already exist in certain geographic locations by visiting the Washington State Department of Social and Health Services web site under *Aging and Long-term Support*.

2. Write a business plan

Write a business plan that details all aspects of operating the home and a proforma statement to define the financial viability of operating a home.



A well-crafted business plan helps you get organized when you start your business. Business plans are used to obtain business funding and help you reach important milestones.

Here are some of the main components of a well-written business plan:

- * **Product Development:** What problem does your business solve? What will set your service apart from the competition?
- * **Sales & Marketing:** Who are your potential customers? How will you get their attention and convert them into your clients?
- * **People & Partnerships:** What roles will you need to hire, and what professional relationships will you need to form in order to succeed?



- * **Financial Planning:** How many clients will you need in order to break-even? How much money will it take to get there, and where will you get the funding?

3. *Get Funding*



The next step needed to start the business is obtaining funding. Begin by estimating total startup costs along with the cost needed for daily operations. Use this information to create a budget and forecast the total cost of running your AFH for the next year.

With your AFH budget now in hand, compare the total cost to the amount of capital you have on hand to determine how much funding you will need. Remember to include the costs of licenses, equipment, building repairs, and staff salaries.

Here are a few ways to secure funding for your new AFH:

- * **Bootstrapping** - This is the do-it-yourself approach to business funding which means you provide the capital for your business through personal savings as well as your current income. Once your business is in operation, profit is reinvested back into the business to continue its growth.
- * **Friends and Family** - Financing your business through friends and family loans can be a great way to get the capital you need to start your small business. When mixing business with family and friends, it's a good idea to establish a written agreement and repayment plan.

- * **Traditional Commercial Loan** - This type of loan is acquired directly through a bank. You will typically see lower interest rates and access to higher amounts of capital with a traditional commercial loan. However, collateral is required, and you must have a high credit score.



- * **Small Business Loan** - While you can get a small business loan directly from a bank, many banks partner with the U.S. Small Business Administration (SBA). You can receive a small business loan even with borderline credit, and the



SBA guidelines are set up to protect both the lender and small business owners. Collateral is required, and it may take some time to get approved.

- * **Find business partner**

4. Choose a Business Structure



Registering your Washington company as a legal business entity — such as an LLC, corporation, or nonprofit — has two major advantages:

- ✓ Increased credibility
- ✓ Protection from personal liability in the event your business is sued

Find out which business structure is right for your new business.

5. Register Your Washington Business

Once you've chosen your business structure, the next step is to form your business. For example, if you choose an LLC for your new business, they are the simplest formal business structure to form and maintain. With less paperwork than other business structures, you can easily form an LLC in five easy steps.

1. Name Your LLC
2. Choose a Registered Agent
3. File Your LLC with the State



4. Create an LLC Operating Agreement
5. Get an EIN

6. Set up Business Banking, Credit Cards, and Accounting

Using dedicated business banking and credit accounts is essential for personal

asset protection. When your personal and business accounts are mixed, your personal assets (your home, car, and other valuables) are at risk in the event your business is sued.



7. Obtain Permits and Licenses



In addition to state laws and regulations as well as building and fire codes, homes must also comply with registering their business in the city where the home is located. The owner must also comply with all federal, state and local tax and employment laws.

One more step a provider must complete is to have the home approved by a local building official to ensure that the home meets all safety codes.

Adult family homes are licensed by the Department of Social and Health Services once all aspects of training and compliance with regulations are met.

8. Hire Employees



Hire professional staff to attend to your clientele. The success of your business will be determined by the kind of staff you employ. Hire staff that will reflect your principles and care for the elderly with respect and dignity.

9. Build Your Business Website

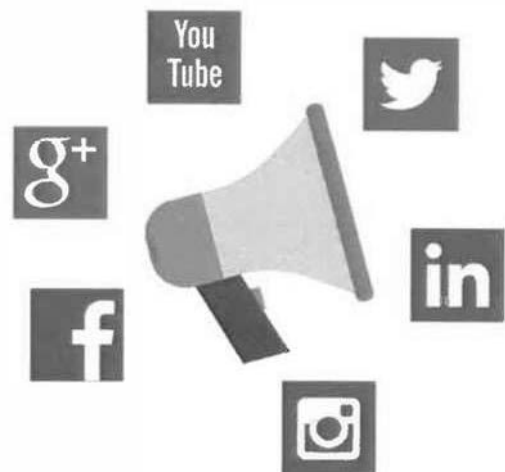


Creating a website is an essential step and makes the lives of small business owners much simpler. Nowadays all legitimate businesses have websites.

10. Promote and Market Your Business

There are many different methods to promote your business but the most effective methods are:

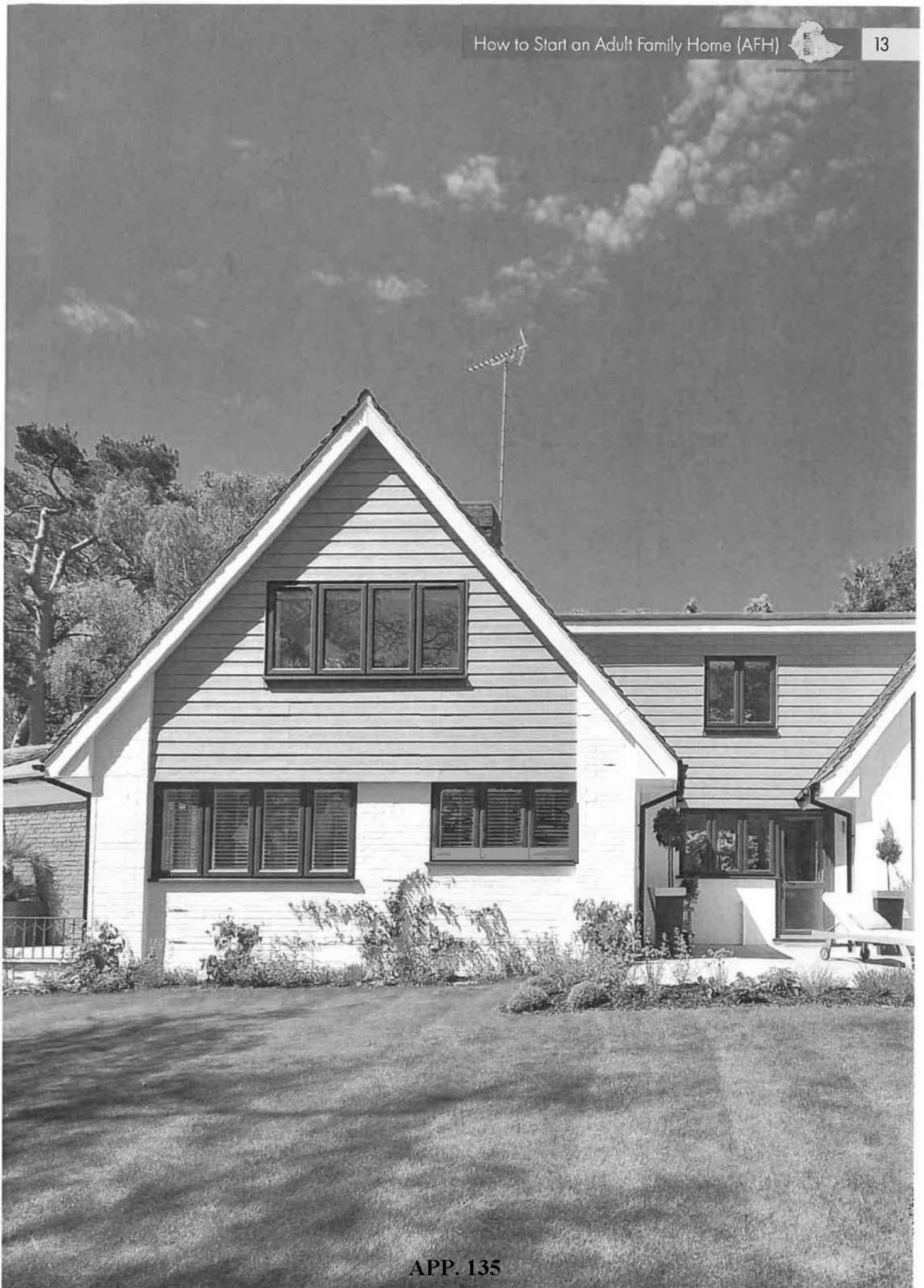
1. Facebook
2. YouTube
3. Google My Business
4. Flyers
5. Word of mouth





Notes

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ETHIOPIAN COMMUNITY IN SEATTLE

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6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR KING COUNTY**

8 JOCYLIN BOLINA; ADOLFO PAYAG;
9 MADONNA OCAMPO; HONORINA
10 ROBLES; HOLLEE CASTILLO; and REGINA
11 VILLALOBOS,

12 Plaintiffs,

13 vs.

14 ASSURECARE ADULT HOME LLC, a
15 Washington corporation; ASSURECARE
16 ADULT FAMILY HOME LLC, a Washington
17 corporation; ASSURECARE FAMILY HOME
18 CARE LLC, a Washington corporation;
19 MARCELINA S. MACANDOG, an individual;
20 GERALD MACANDOG, an individual,

21 Defendants.

CASE NO. 23-2-05373-7 SEA

**DECLARATION OF MARIANN MCKEE
IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFFS' SECOND
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

22 I, Mariann Mckee, declare as follows:

23 1. I am a Registered Nurse, who has spent over 30 years in the long-term care arena.

I started my career early on, as a Certified Nursing Assistant, providing care to Nursing home patients, as I worked my way through nursing school. I am a Pacific Northwest native, with intimate knowledge of the complete Long Term Care continuum. This knowledge comes from direct exposure to all avenues of Long-Term Care. Following graduation from Nursing School,

DECLARATION OF MARIANN MCKEE IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' SECOND
MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

SEATTLE LITIGATION GROUP, PLLC
1215 4th Ave., Suite 1100
Seattle, Washington 98161
T. (206) 407-3300 | F. (206) 407-3097

1 I completed my bachelor's in science in Health Care Administration and completed my requisite
2 6-month training to become a Nursing Home Administrator. I spent over 10 years as a successful
3 Nursing Home Administrator, with 10 years of practice in the Pacific Northwest and 5 years
4 specifically in the state of Washington. Following my time as a Nursing Home Administrator, I
5 opened 2 Adult Family Homes in the State of Washington and operated 1 of them for over 17
6 years. During this time, I also functioned as the Regional Director of Operations for a Northwest
7 Assisted Living company. I did not live in the Adult Family Home(s) and relied upon my staff
8 for provision of day-to-day care of my residents. Through the 17-year tenure of being an Adult
9 Family Home operator, I also began an RN operator group, allowing the exchange of best
10 practice throughout the industry. Most recently, I have spent time working with an Assisted
11 Living company in the capacity of Nurse Consultant and spent more than 5 years as a consultant
12 to the local industry, providing auditing and advice to Nursing Homes, Assisted Livings and Adult
13 Family Homes. In addition, in my current capacity as Chief Clinical Officer for an Electronic
14 Health Record Company, I am exposed to documentation requirements throughout the
15 continuum. Overall, my expertise comes from hands-on experience and direct exposure to the
16 marketplace. I have personally been exposed to the entire WA state long term care continuum. I
17 have physically been in and observed care, audited charts, and provided care, throughout the
18 states of Oregon and Washington. My experience is at a local, grassroots level, with emphasis
19 on assisting providers to maintain compliance. My educational background as a Registered
20 Nurse and my hands on experience as a Care Giver, Nurse, Nursing Home Administrator,
21 Regional Director of Operations, Nurse Consultant and Adult Family Homeowner, uniquely
22 position me to provide not just theoretical knowledge but hands on expertise and clinical
23 understanding of the WA long term care continuum.

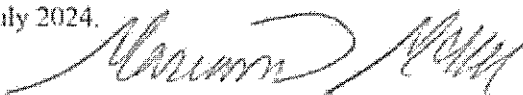
DECLARATION OF MARIANN MCKEE IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' SECOND
MOTION FOR PARTIAL SUMMARY JUDGMENT - 2

SEATTLE LITIGATION GROUP, PLLC
1215 4th Ave., Suite 1100
Seattle, Washington 98161
T. (206) 407-3300 | F. (206) 407-3097

1 2. I have been retained by Defendants to provide expert opinions in this matter. These
2 opinions are summarized in my expert report, a true and correct copy of which is attached to this
3 declaration as Exhibit 1.

4 I declare under the penalty of perjury under the laws of the State of Washington and the
5 laws of the United States that the foregoing is true and correct.

6 Executed and signed this 2nd of July 2024.

7 
8 _____
9 Mariann McKee
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23

DECLARATION OF MARIANN MCKEE IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' SECOND
MOTION FOR PARTIAL SUMMARY JUDGMENT - 3

SEATTLE LITIGATION GROUP, PLLC
1215 4th Ave., Suite 1100
Seattle, Washington 98101
T. (206) 407-3100 | F. (206) 407-3107

EXHIBIT 1

1
2
3
4
5
6 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
7 **IN AND FOR THE COUNTY OF KING**

8 JOCYLIN BOLINA; ADOLFO PAYAG;
9 MADONNA OCAMPO; HONORINA
10 ROBLES; HOLLEE CASTILLO; and
11 REGINA VILLALOBOS,

12 Plaintiffs,

13 vs.

14 ASSURECARE ADULT HOME LLC, a
15 Washington corporation; ASSURECARE
16 ADULT FAMILY HOME LLC, a Washington
17 corporation; ASSURECARE FAMILY HOME
18 CARE LLC, a Washington corporation;
19 MARCELINA S. MACANDOG, an
20 individual; GERALD MACANDOG, an
21 individual,

22 Defendants.

No. 23-2-05373-7 SEA

**EXPERT REPORT OF MARIANN
MCKEE, RN**

23 **Qualifications**

I am a Registered Nurse, who has spent over 30 years in the long-term care arena. I started my career early on, as a Certified Nursing Assistant, providing care to Nursing home patients, as I worked my way through nursing school. I am a Pacific Northwest native, with intimate knowledge of the complete Long Term Care continuum. This knowledge comes from

EXPERT REPORT OF MARIANN MCKEE, RN

– 1

SEATTLE LITIGATION GROUP, PLLC
500 Union Street, Suite 510
Seattle, Washington 98101
T. (206) 407-3300 | F. (206) 407-3097

1 direct exposure to all avenues of Long-Term Care. Following graduation from Nursing School,
2 I completed my bachelor's in science in Health Care Administration and completed my
3 requisite 6-month training to become a Nursing Home Administrator. I spent over 10 years as a
4 successful Nursing Home Administrator, with 10 years of practice in the Pacific Northwest and
5 5 years specifically in the state of Washington. Following my time as a Nursing Home
6 Administrator, I opened 2 Adult Family Homes in the State of Washington and operated 1 of
7 them for over 17 years. During this time, I also functioned as the Regional Director of
8 Operations for a Northwest Assisted Living company. I did not live in the Adult Family
9 Home(s) and relied upon my staff for provision of day-to-day care of my residents. Through the
10 17-year tenure of being an Adult Family Home operator, I also began an RN operator group,
11 allowing the exchange of best practice throughout the industry. Most recently, I have spent time
12 working with an Assisted Living company in the capacity of Nurse Consultant and spent more
13 than 5 years as a consultant to the local industry, providing auditing and advice to Nursing
14 Homes, Assisted Livings and Adult Family Homes. In addition, in my current capacity as Chief
15 Clinical Officer for an Electronic Health Record Company, I am exposed to documentation
16 requirements throughout the continuum. Overall, my expertise comes from hands-on experience
17 and direct exposure to the marketplace. I have personally been exposed to the entire WA state
18 long term care continuum. I have physically been in and observed care, audited charts, and
19 provided care, throughout the states of Oregon and Washington. My experience is at a local,
20 grassroots level, with emphasis on assisting providers to maintain compliance. My educational
21 background as a Registered Nurse and my hands on experience as a Care Giver, Nurse, Nursing
22 Home Administrator, Regional Director of Operations, Nurse Consultant and Adult Family
23

1 Homeowner, uniquely position me to provide not just theoretical knowledge but hands on
2 expertise and clinical understanding of the WA long term care continuum.

3 My CV is attached.

4 **Adult Family Homes**

5 To understand the allegations, it is important to understand the Adult Family Home
6 model. The Adult Family Home is incomparable to other models of long-term care in the state
7 of Washington, as Adult Family Homes are residentially based. They are within residential
8 districts, in homes that have been modified to accommodate those that are wheelchair bound but
9 not required to be ADA compliant. There is no requirement for nurses to be on staff. Until most
10 recently, they allowed care for only 2-6 residents, with a few now allowed to take 8 residents.
11 The model is intended to be a substitute for family, with provision of care by someone also
12 living in the home, just as a child caring for an aging parent would be. The model is intended to
13 be personalized care, through dining alongside the resident, eating and preparing homecooked
14 meals and incorporating residents into the household. It is not uncommon to find an Adult
15 Family Home resident assisting to prepare a meal, getting the mail or watering the plants. Doing
16 useful and meaningful activities, which are part of everyday routines, assists in making Adult
17 Family Home residents feel useful, valued and part of a family. A resident in an Adult Family
18 Home has a surrogate home and family, allowing their care needs to be met in a noninstitutional
19 manner, unlike that of a nursing home. In a Nursing Home, resident to staff ratios are anywhere
20 from 1 caregiver to 20 residents. In Adult Family Homes, the maximum would be 1 Care Giver
21 for 6 residents. In the case of the defendant, her staffing ratios exceeded that, with a minimum
22 of a 2 to 6 ratio. Residential Care Services regulates these homes and conducts licensing visits
23 every 9 to 18 months. Homes are required to meet the minimum licensing standards as

1 stipulated in Chapter 388-76 Washington Administrative Code (WAC) and Chapter 70.128
2 Revised Code of Washington (RCW). Adult family homes must also comply with the following
3 WAC and RCW chapters:

- 4 1. CHAPTER 70.129 RCW - RESIDENT RIGHTS
- 5 2. CHAPTER 51.51 WAC - STATE BUILDING CODE
- 6 3. TITLE 42 §441.530 HOME AND COMMUNITY-BASED SETTING
- 7 4. CHAPTER 74.34 RCW – ABUSE OF VULNERABLE ADULTS
- 8 5. CHAPTER 388-113 WAC – DISQUALIFYING CRIMES AND NEGATIVE ACTIONS
- 9 6. CHAPTER 388-112A WAC – RESIDENTIAL LONG-TERM CARE SERVICES

10 Per the WA state residential care council, there are more than 2,800 Adult Family Homes across
11 the state, which is not enough to keep pace with our aging population. As a home and not an
12 institution, the staff are considered domestic service employees covered under the Fair Labor
13 Standards Act. This is not the case with a Nursing Home or Assisted Living Facility as they are
14 not considered a single-family residence and do not provide our frail seniors with surrogate
15 family. The important role of these homes within Washington State communities cannot be
16 understated, as the population continues to age, and housing and care alternatives become
17 increasingly scarce. The estimated number of adults aged sixty and over in Washington state
18 is **1,883,911**, representing over **23%** of the state’s population. By the year 2030, the baby
19 boomer generation (those born between 1946 and 1964) will be 65 or older and make up 1 in
20 every 5 individuals in Washington.ⁱ As the population continues to age, the need for care
21 options such as Adult Family Homes continues to rise. It is estimated that over 18,000 seniors
22 across the State of WA will need community-based care by 2030. Adult Family Homes are a
23

1 crucial mechanism for provision of care in a home-like environment, as our population
2 continues to age.

3 **Benefits to the Resident**

4 The Adult Family Home model is advantageous to the residents they serve in many
5 ways. The first of which is the availability of a homelike atmosphere in a cost-effective manner.
6 According to payingforseniorcare.com, the average price of Nursing Home Care in WA is
7 285.00 dollars per day, with a range from 191.00-564.00 dollars per day. In contrast, care needs
8 can be met in the homelike environment of an Adult Family Home for 150.00 dollars per day.
9 The ability to individualize care or have care provision in a noninstitutional manner, within a
10 Nursing Home is also exceedingly difficult. With high staff turnover, estimated to be at over 50
11 percent in WA nursing homes, it is impossible to maintain continuity of care or a consistent
12 “face.” Nationally, more than half of nursing staff in nursing homes leave their job within a year
13 (53.9% turnover rate). In Washington, the rate is above the average, at 54.9%.ⁱⁱ Using the
14 average of 54.9 percent turnover and the need to have 1.4 FTEs to cover each 8-hour shift,
15 which means a nursing home resident would have a bare minimum of 9.6 different Care Giving
16 staff each year. When you factor in coverage for staff vacancies for call ins and vacations, the
17 average nursing home resident would have more than twelve different Care Givers per year.
18 This aids in ensuring that care is institutional, task focused and lacking in the formation of
19 relationships. Unlike Adult Family Homes, which are typically owner operated, residents are
20 exposed to only 1-3 staff per week. While WA state turnover statistics are not readily available,
21 if you applied the nursing home ratio of turnover to an Adult Family Home, the resident would
22 still only be faced with 4.64 staff per year. As most of the Adult Family Homes are owner
23 operated, the turnover is much less, allowing the resident to form relationships and experience a

1 higher level of continuity of care, with expanded socialization opportunities. The lack of
2 consistent Care Giving contributes to social isolation.” Social isolation is caused or exacerbated
3 by social, economic, and environmental conditions. Isolation is an underappreciated health
4 concern that is associated with an increased risk for premature mortality that is comparable to
5 that of smoking, obesity, and physical inactivity.”ⁱⁱⁱ Adult Family Homes are personalized and
6 follow an individualized Service Plan for each resident. This plan allows emphasis on what is
7 most important to each individual and sets forth a plan for ensuring those things are realized.
8 The residents are treated as family, as they spend their days around the kitchen table with the
9 familiar faces of other family members. Everyone is on a first name basis and the faces are
10 familiar. The ability to improve socialization and continuity of care results in fewer instances of
11 depression and fewer hospitalizations. The World Health Organization lists social inclusion as a
12 Social Determinant of health and definitively links it to health outcomes. Adult Family Homes
13 have more opportunity for inclusion based upon size, decreased turnover and individualized
14 service plans. They have been inherently set up for inclusion, socialization, and quality of life.
15 They are person driven and offer a community-based level of care that is vital to the Long-Term
16 Care continuum across the state.

17 **The Adult Family Home Care Giver**

18 The changes in the US population are not only affecting the number of seniors who
19 require care, but it is also affecting the number of Care Givers available proportionately to
20 provide care. “We aren’t having enough children to take care of us in our old age. “Look at my
21 family: my in-law was one of six children, my husband and I were one of two, and we don’t
22 have kids. Extrapolate that out, and that is what’s happening nationwide.”^{iv} Care Givers or
23 CNAs who are required for provision of care in WA state Adult Family Homes, are aging

1 themselves. The average age of a Certified Nursing Assistant (CNA) or Home Health Aid
2 (HHA) is estimated to be 41 years of age. In Washington, CNAs earn a median income of
3 34,817 per year or 2,901.41 per month, which is more than the median national pay for CNAs.
4 Per DSHS, the Median income for 1 person in January of 2024 was 5,271.00 dollars per month.
5 The rewards of Care Giving in an Adult Family Home are not in the pay. The rewards come
6 from giving and serving an underserved population. The Care Giver in a Family Home not only
7 provides care, but they make a home. They assist in planning activities, decorating, playing
8 games, and creating a sense of family. They cook, clean and are in charge, in the absence of
9 ownership. They are able to coordinate care, interface with Home Health and provide input to
10 physicians. They function at an autonomous level not realized in other Long Term Care
11 situations, which most find rewarding.

12 **Benefits of a Live In position**

13 A Care Giver, living at 55% beneath the median income, is able to appreciate a standard
14 of living that they would not otherwise be able to afford, when they choose to take a live in
15 position. These positions create surrogate family for the Care Giver, while allowing them to live
16 well beyond their means. If you look at the benefits of living in a home, where you pay no rent,
17 you do not have to produce money for rising utility costs or food, your standard of living
18 increases substantially. While this is not for everyone, it is a choice that makes sense for many.
19 There is a Face Book page for Adult Family Homes. On the page, you will frequently find Care
20 Givers looking for live- in positions. They want to realize the autonomy of an Adult Family
21 Home position, without the hassle of day-to-day bills. With thousands of CNA and HHA
22 openings throughout the state, there are many choices available. A live in position in an Adult
23 Family Home offers a unique opportunity for those that choose to take advantage of it.

Dangers of the Job


It is no secret that the Health Care industry, is prone to injuries. The industry, largely led by women, who are tasked with bending, stooping, transferring, and managing patients with Dementia and physical impairments are going to get hurt. As a CNA, I had my first back injury my senior year of nursing school, while maneuvering a patient in a wheelchair, I herniated a disk. My story is not atypical. Each year, there are injuries to those who are providing care. If you look at the statistics overall you find in Fiscal year 2022, there were 126 injuries to WA Home Health Aids reported to Labor and Industries, with approved claims. In contrast, there were 206 injuries reported by Childcare workers, in the same time frame. In looking at the specific claims for the defendant, there was only one claim, which was in March of 2024, which involved no time loss and was associated with a prior injury. Their experience rating was below the average and the staff were not reporting illness or injuries to the provider or Labor and Industries, by way of claim. Each of these workers, rather they are CNAs, HHAs or childcare workers, can be domestic in nature, spending time in the home, with 24-hour responsibility for care of our nation's most vulnerable. Each of these positions is primarily women, each making approximately the same annual salary and each making a choice rather or not they want to work in a home like environment or in a facility and each making an important choice to support our communities most vulnerable.

Summary

Washington state started licensing Adult Family Homes in 1989, in an ongoing effort to find alternatives to Nursing Home Care. Today, they are a forerunner in the creation of a model that brings dignity to Long Term Care, while preserving resources. Medicaid is the primary payer for Long Term Care across the Nation, with a spend of over 179.28 billion in 2020. It

1 continues to be the responsibility of each state to limit Medicaid spending, while improving
2 quality of care for our nation's seniors. Washington state was able to formulate a model that
3 promotes dignity and quality of life, while being cost conscious. They continue to invest in the
4 program, by taking fines and penalties paid by Adult Family Homes and using them for grant
5 funds, for ongoing improvement in the quality of life of Adult Family Home residents. The
6 model is closely monitored by DSHS, who responds to complaints, investigates allegations of
7 abuse, and reported facility failures, such as failure to provide PPE. They are inspected
8 routinely and held to fixing found citations. The local legislature recently allowed the number of
9 residents in an Adult Family Home to be expanded to 8, as an ongoing mechanism to address
10 the growing need for senior housing options. Ongoing decisions about this model of care should
11 continue to be in the hands of legislators, so progress in this model of community-based care is
12 not jeopardized. In Oregon, the model for small home like residential care is called Adult Foster
13 Care, drawing parallel to the long-standing preferred model of giving youth a home like
14 environment, instead of putting them in an institution. The families that choose to take on these
15 often-troubled youth do so tirelessly, 24/7, to give them a semblance of surrogate family. Our
16 nation's seniors deserve to be surrounded by family as they live out the last of their days. When
17 living with your family is not an option, living in an Adult Family Home is as close to living
18 with family as you can get.

19 DATED this 20th day of May 2024.

20
21 
22 Mariann McKee, RN
23

EXPERT REPORT OF MARIANN MCKEE, RN
- 9

SEATTLE LITIGATION GROUP, PLLC
500 Union Street, Suite 510
Seattle, Washington 98101
T. (206) 407-3300 | F. (206) 407-3097

- i *Population Characteristics Ages 65 and Older Population Characteristics Ages 85 and Older*. (1990). <https://www.whca.org/wp-content/uploads/2024/04/WA-State-Plan-on-Aging-Demographic-Charts.pdf>
- ii *New AARP Scorecard: Washington Ranks #2 in the Country for Long-Term Care Services and Supports for Older Americans, Including Family Caregivers*. (2023, September 28). Washington. <https://states.aarp.org/washington/ltss-2023-scorecard#:~:text=In%20Washington%2C%20wages%20are%20%242.48%20lower%20than%20other>
- iii Fulmer, T., Reuben, D. B., Auerbach, J., Fick, D. M., Galambos, C., & Johnson, K. S. (2021). Actualizing Better Health And Health Care For Older Adults. *Health Affairs*, 40(2), 10.1377/hlthaff. <https://doi.org/10.1377/hlthaff.2020.01470>
- iv US Census Bureau. (2023, June 22). *America Is Getting Older*. Census.gov. <https://www.census.gov/newsroom/press-releases/2023/population-estimates-characteristics.html>

EXHIBIT A

Mariann McKee, RN

711 N. Parkway

Battle Ground, WA

(360) 607-8232 • mariannmckee@gmail.com

SENIOR LEVEL HEALTH CARE PROFESSIONAL

An accomplished senior-level health care executive, with exceptional critical thinking skills, seeking a position that allows for application of diverse knowledge base, in a people centered organization.

Key Proficiencies

Combined clinical and operational experience and expertise throughout the LTC continuum • Leadership • Dealing with people • System Analysis • Financial Management • Team Development • Continuous Quality Improvement • Regulatory Compliance • Teaching and training for end users • Worker's Compensation • Litigation prevention.

PROFESSIONAL EXPERIENCE

Medicalistics, LLC. Dallas, TX

May 2023- Current

Chief Clinical Officer

Provide clinical expertise to technical operations of an Electronic Health Record Company. Act as a Clinical Resource, assist with RFP reviews, outlining best practice to avoid litigation and promote efficiencies, assist with marketing, conduct presentations as needed. Interface with clinical leadership through out our book of business to maximize return on investment and assist with problem solving.

Sapphire Health Services, Portland, OR
(PRN after March 2023)

March 2021- Current

Regional Nurse Consultant

Clinical oversight, compliance management and staff training for 7 ALF facilities in OR and WA. COVID management, auditing, mock surveys, overall clinical support for the 7 assigned communities.

Key Highlights:

- Set up and maintained tracking mechanism for all lawsuits.
 - Reached substantial compliance in all assigned communities.
 - Trained all new H.S.A.s and DHS on state requirements
-

Haffenreffer and Associates

June 2017 – March 2021

Senior RN Consultant

Provide consulting services for Long Term Care Facilities, including SNF, CCRC, Memory Care, AFH and ALF. Assisted with litigation reviews as assigned. Training of Staff in operations, systems, MDS, accident and incident investigations, nurse assessments, systems analysis, and implementation. Monitoring of compliance to WACs and OARs, completion of mock surveys.

Mariann McKee, RN

711 N. Parkway

Battle Ground, WA

(360) 607-8232 • mariannmckee@gmail.com

Key Highlights:

- Repeatedly requested by Client base
- Successfully completed substantial compliance for all SNF, CBC and AFH surveys

Wexford Health Sources

April 2019- March 2021

Director of Operations

Managed the Jail portfolio, inclusive of staff hiring, infection control surveillance, NCCHC preparation, budgetary oversight, compliance management, Infection Control Surveillance, staff supervision, supply management, workmen's compensation management, litigation reviews.

Wexford Health Sources, Inc. Columbia • MD

January 2007- June 2017

Director of Operations

July 2012 – April 2017

Oversight and management of a 112-million-dollar health care contract, comprised of 26 sites, with duties including global oversight, goal establishment, physician and staff management/recruitment, benchmarking, budgeting, workmen's comp and labor review, forecasting, compliance management, client relationships, CQI, business development, expense control, litigation management

Key Highlights:

- Exceptional client and physician relationships
- Exceeding budget year over year

Business Affairs Analyst

April 2010-July 2012

Responsible for Financial Review and Recommendation for improvement in Margin. Assisted in implementation of pharmacy, lab and supply saving initiatives. Assisted Business Development with site tours, RFPs and Marketing.

Key Highlights:

- Labor control and overtime initiative with cost savings companywide in excess of 1.2 million.
- Development of Contract compliance tools with evidentiary increase in compliance nationwide
- Assistance with litigation management and expert testimony

Director of Operations - Ohio

May 2008- April 2010

Oversight and management of OH contract with duties including; global oversight, goal establishment, benchmarking, budgeting, forecasting, compliance management, business development, expense management and control.

Key Highlights:

- Maintained excellent relationships with Department of Corrections
- Maintained sites within regulatory and budgetary compliance

Quality Management & Business Analyst

December 2007-May 2008

Augmented Quality Management Team, prepared sites for ACA and NCCHC across the United States. Worked with Troubled sites to develop action plans. Managed Sites that were not achieving objectives across the Wexford Health Book

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of Business. Trained new H.S.A.s, and Regional Administrators. Developed training materials on labor Management and clinical initiatives. Conducted Quality Management Audits as needed.

Key Highlights:

- 100 percent pass rate for each ACA and NCCHC audit
- Development of Training tools for Health Service Administrators (H.S.A.'s)

Health Services Administrator

January 2007-December 2007

Clark County Jail- Managed operations for 800 bed jail.

Mountain West Retirement Center (Bonaventure) • Salem, OR

December 2002 – January 2007

Regional Director of Operations

Oversight of 8-12 Assisted Living Communities, in a start up company. Responsibilities for census development, regulatory compliance, Human Resource Management and Workmen's Compensation. Developed Service Plan program for company.

Key Highlights:

- Developed New Service Plan Program
- Assisted with Startup of 4 New Assisted Living Complexes

Evergreen Healthcare • Vancouver, WA

November 2001-December 2002

Director of Medicaid and Medicare Services

Oversight of Western division Medicare and Medicaid programs. Increase of Medicaid revenue through Case Mix of 80,000 per mo. Increase of Medicare length of stay by 14 days region wide.

Key Highlights:

- Training and Instruction for Directors of Nursing and Administrators on Case Mix
- Development of Case Mix tools

ADDITIONAL EXPERIENCE

(Details available upon request)

Adult Family Home owner, Country Haven AFH, Vancouver, WA; 2000-2017. LNHA 1996-2000

EDUCATION

Bachelor of Science – Healthcare Administration

Concordia University • Portland, OR

ASN - Nursing

Portland Community College • Portland, OR

Licenses & Certifications

Washington Registered Nursing License – RN00121287 – Maryland Temporary RN License T20170402 •

Certification in Health Care Quality, CPHQ, 2012 • Correctional Healthcare Professional (CCHP) OR Assisted Living Administrator License

Affiliations:

Mariann McKee, RN

711 N. Parkway

Battle Ground, WA

(360) 607-8232 • mariannmckee@gmail.com

American Nurses Association • National Commission on Correctional Healthcare • American Correctional Association
• NAFE (National Association for Female Executives)

**SUPERIOR COURT IN THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

JOCYLIN BOLINA; ADOLFO PAYAG;
MADONNA OCAMPO; HONORINA
ROBLES; HOLLEE CASTILLO; and
REGINALD VILLALOBOS

Plaintiffs,

vs.

ASSURECARE ADULT HOME LLC, a
Washington Corporation; ASSURECARE
ADULT FAMILY HOME LLC, a Washington
Corporation; ASSURECARE FAMILY HOME
CARE LLC, a Washington Corporation;
MARCELINA S. MACANDOG, an individual;
and GERALD MACANDOG, an individual

Defendants.

Case No.: 23-2-05373-7 SEA

REPLY IN SUPPORT OF PLAINTIFFS'
SECOND MOTION FOR PARTIAL
SUMMARY JUDGMENT

REPLY ISO PLAINTIFFS' SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT

FAIR WORK CENTER
2100 24TH AVE S., STE 270
SEATTLE, WA 98144
(206) 331-3824

1 **I. INTRODUCTION**

2 Following the binding precedent of *Martinez-Cuevas et al. v. DeRuyter Bros. Dairy,*
3 *Inc.*,¹ Plaintiffs’ constitutional challenge asserts that the fundamental right to health and safety
4 for workers in hazardous jobs, as guaranteed by Article II, Section 35 of the Washington State
5 Constitution, is violated by the “live-in” exemption from the Minimum Wage Act (“MWA”) at
6 RCW 49.46.010(3)(j). This exemption infringes upon the privileges or immunities clause of
7 Washington’s Constitution by undermining this fundamental right, and there is no justification
8 that can comport with the health and safety objectives outlined in the Declaration of Necessity
9 for the MWA, RCW 49.46.005.²

10 No genuine issues of material fact exist as to whether the “live-in” exemption is
11 unconstitutional with respect to caregivers in Adult Family Homes (“AFHs”). Defendants resist
12 the conclusion that caregiving is extremely dangerous, and yet, have admitted to the inherent
13 dangers. As such, *Martinez-Cuevas* requires a finding that the “live-in” exemption violates the
14 Washington State Constitution.

15 **II. CAREGIVING IN ADULT FAMILY HOMES IS EXTREMELY DANGEROUS WORK**

16 Defendants’ opposition attempts to sow confusion by presenting irrelevant facts.³ Though
17 Defendants make meritless assertions to the contrary, they concede each fact necessary to
18 conclude the AFH industry is dangerous for caregivers.

19 _____
20 ¹ 196 Wn.2d 506, 475 P.3d 164 (2020).

21 ² Judicial decisions repeatedly affirm this purpose. *See* Motion, p.17, fn. 78 (cases citing health
22 and safety objectives of the MWA).

23 ³ Defendants focus on the lack of evidence of Plaintiffs’ specific injuries or illnesses, which is
irrelevant. *Martinez-Cuevas* requires a facial analysis of conditions industry-wide, not
individual experiences; *See Martinez-Cuevas*, 196 Wn.2d at 525. Any other understanding
renders entitlement to basic labor standards dependent on actual illness or injury, an untenable
result. Second, Plaintiffs submitted factual declarations outlining illnesses and injuries suffered,

1 Defendants' own expert bluntly acknowledges that caregivers are inherently at risk of
2 injury due to the nature of their work.⁴ Both Plaintiffs' and Defendants'⁵ proposed experts agree
3 that caregiving tasks pose significant injury risks.⁶ It is undisputed that Plaintiffs both lived and
4 worked in Defendants' AFHs, providing care for up to six residents at a time.⁷ Plaintiffs
5 performed diverse job responsibilities consistent with standard caregiving in AFHs, such as
6 patient care, janitorial tasks, and administrative duties.⁸ Defendants do not contest that the
7 Plaintiffs assisted residents with personal care, hygiene, meals, exercise, mobility, adherence to
8 healthcare plans, medication administration, and emotional support.⁹ They acknowledge that
9 Plaintiffs moved sleeping residents and helped them use the bathroom, providing 24-hour care to
10 at least some residents.¹⁰ Defendants concede that the "type of work" performed by AFH
11 employees is "largely the same" as that done by "residential care aides, nursing assistants in

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13 consistent with the industry data. Defendants' failure to contradict this evidence establishes
14 those facts. *See Washington Osteopathic Medical Assoc. v. King County Medical Service Corp.*,
15 78 Wn.2d 577, 579, 478 P.2d 228 (1970) ("factual data contained in affidavits and exhibits filed
16 with motion for summary judgment will be considered as established" if not controverted).

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18 largely led by women, who are tasked with bending, stooping, transferring, and managing
19 patients with Dementia and physical impairments are going to get hurt").

20 ⁵ Defendants submitted declarations of potential expert witnesses, Mariann McKee and John
21 Ficker. While McKee's opinion, based on experience, about the dangers of AFH caregiving,
22 appears well founded (*see* McKee Decl., Exhibit 1, p. 8) other aspects of the declarations, such
23 as statements about AFH caregiver wages and statistical aspects of occupational hazards, lack
foundation. As such, the Court should not consider this testimony. CR 56(e); *Dunlap v. Wayne*,
105 Wn.2d 529, 535, 716 P.2d 842 (1986); *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 177,
817 P.2d 861 (1991) ("It is well established that conclusory or speculative expert opinions
lacking an adequate foundation will not be admitted.") (cleaned up), *review denied*, 118 Wn.2d
1010 (1992).

⁶ *See* Motion, p.9, Declaration of Dr. Grabowski (Dr. Grabowski Decl.) ¶ 3, Ex. 1, ¶ 16;
Opposition, McKee Decl. ¶2, Ex. 1, p.8.

⁷ Opposition, p.3, Declaration of Marcelina S. Macandog (Macandog Decl.) ¶7.

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⁹ Motion, p. 6, fn. 21.

¹⁰ Motion, p. 6, fn. 23; Opposition, p. 7, fn. 40-41, Declaration of John Ficker (Ficker Decl.) ¶13.

1 nursing homes, and direct care workers in other industries.”¹¹ Washington’s AFHs are legally
2 required to provide 24-hour care for residents and Defendants required at least one caregiver to
3 be onsite at all times.¹² Defendants further admit that Plaintiffs regularly worked long hours and
4 more than 40 hours in a workweek and did not have uninterrupted meal or rest breaks.¹³

5 Defendants claim that because AFHs are not differentiated from the rest of Risk Class
6 6509-04, they are not inherently dangerous, suggesting other long-term care settings are more
7 hazardous. However, this defies the logic used by the Department of Labor and Industries to set
8 risk classes, which group jobs together precisely because of shared hazards and injury risks.¹⁴
9 Comparing injury rates across settings within the same risk class does not indicate that one setting
10 is more dangerous than another. There is no limit on the number of jobs that can be deemed
11 extremely dangerous, and the existence of other hazardous jobs does not negate the risks of
12 caregiving. The evidence shows that the core tasks of caregiving, regardless of the setting, are
13 inherently dangerous.

14 Further, Defendants’ assertion that there is no causal link between the “live-in” exemption
15 and the injury rates for AFH caregivers is fundamentally flawed. This overlooks the well-
16 established connection between working conditions, overtime, and worker safety.¹⁵ Just as
17 *Martinez-Cuevas* found that the agricultural workers’ exemption resulted in increased physical
18 strain and higher injury rates, the same applies for the “live-in” exemption for caregivers. The
19 constant vigilance required of “live-in” caregivers without adequate wages not only fails to meet

21 ¹¹ Opposition, p. 5, fn. 23, Ficker Decl. ¶4.

22 ¹² Opposition, p. 3, fn. 6, Macandog Decl. ¶16.

23 ¹³ Motion, p. 7, fn. 29.

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¹⁵ *Martinez-Cuevas*, 196 Wn.2d at 520.

1 the constitutional standards set by the MWA but also endangers the health and safety of these
2 workers.

3 Plaintiffs’ work, like that of all AFH caregivers, was caregiving work with all its attendant
4 risks, and Defendants’ attempts to claim otherwise are unconvincing.

5 **III. MARTINEZ-CUEVAS CONTROLS¹⁶**

6 *Martinez-Cuevas* definitively established that workers in hazardous occupations have a
7 fundamental right to MWA protections.¹⁷ Contrary to Defendants’ incorrect assessment,
8 Plaintiffs’ challenge is not based on a simple statutory right, but on a constitutional mandate to
9 protect workers in dangerous jobs arising out of Article II, Section 35. Defendants’ argument
10 that MWA protections are legislative rather than constitutional in nature has been settled by
11 *Martinez-Cuevas*, and should not be reconsidered here.¹⁸ Exempting certain workers from
12 MWA protections grants employers a privilege that is only constitutionally valid if supported by
13 non-hypothetical “reasonable grounds” that align with the MWA’s legislative purpose.¹⁹
14 Without “convincing legislative history” to justify the exemption, such a privilege is
15 unconstitutional.²⁰

16 **A. The exemption provides a benefit to AFH employers.**

17
18 ¹⁶ Defendants’ opposition to Plaintiffs’ alternative basis for MWA coverage is wrong.
19 Defendants rely on a statement of the law from *Berrocal v. Fernandez*, 155 Wn.2d 585, 121
20 P.3d 82 (2005) that has been disclaimed and clarified by the Washington Supreme Court. *See*
21 *Nwauzor v. The Geo Grp., Inc.*, 2 Wn.3d 505, 519, 540 P.3d 93 (2023) (rejecting *Berrocal*’s
22 “paraphrase [quoted by Defendants at Opposition, p. 23] cannot be read as a holding that we
23 eliminated RCW 49.46.010(3)(j)’s express language. Our analysis and conclusion in *Berrocal*
have no relevance to the interpretation of the subsection (j) exemption’s phrase ‘whose duties
require,’ and we reject” the idea that a worker merely residing where they work satisfies that
prong of the exemption).

¹⁷ *Martinez-Cuevas*, 196 Wn.2d at 521.

¹⁸ *Id.* at 520.

¹⁹ *Id.* at 523-525.

²⁰ *Id.*

1 Defendants' argument that no privilege is conferred by the exemption is incorrect. The
2 MWA does not treat all workers in dangerous jobs equally because it provides protections to
3 workers in dangerous jobs only if they do not live at their workplace. The "live-in" exemption
4 benefits AFHs by exempting them from minimum wage, overtime, and sick leave
5 requirements.²¹ Moreover, Defendants' claims about the costs of MWA compliance—that
6 meeting these standards could drive AFHs out of business—undermine their argument,
7 revealing that the "live-in" exemption offers a significant benefit to AFH employers by
8 relieving them from the obligation to pay a fair wage.

9 **B. The legislature provided no reason for the exemption.**

10 The legislature did not provide *any* reasoning for the exemption, much less reasoning
11 that aligns with the legislative intent of the MWA.²² Defendants concede that the "reasonable
12 grounds" test for granting a privilege does not permit conjecture or *post hoc* reconstruction of
13 legislative purpose.²³ Nonetheless, Defendants replace the inquiry into the legislature's actual
14 motives with their own speculation that the legislature must have understood "live-in" care as
15 inconsistent with traditional work schedules,²⁴ as if this were the genuine legislative intent
16 behind the exemption. Such conjecture is inappropriate. There is no evidence whatsoever that
17 the legislature intended to exempt "live-in" caregivers for the reasons cited by Defendants.
18 Given the MWA's clear purpose and constitutionally mandated protection, combined with the
19 perilous nature of the work performed by caregivers like Plaintiffs, the substantial benefit to
20

21 ²¹ Motion, p. 20.

22 ²² Motion, p.21, fn.90, Declaration of Janae Choquette (Choquette Decl.).

23 ²³ Opposition, p. 20.

24 ²⁴ Defendants admit they employed some caregivers working a traditional shift basis. Motion, p.
23.

1 AFH employers, and the glaring absence of any justification in the legislative history, it is
2 evident that the “live-in” exemption mirrors the overtime exemption invalidated in *Martinez-*
3 *Cuevas*. Therefore, this exemption must be declared unconstitutional and removed from the law.

4 **IV. RETROACTIVITY IS IRRELEVANT**

5 The instant motion concerns only the constitutionality of the “live-in” exemption;
6 retroactivity is a matter of the appropriate remedy *if* the exemption is ruled unconstitutional. The
7 Court should delay ruling and allow all parties to brief remedies once the constitutionality of the
8 exemption is determined.

9 Notwithstanding, “[r]etroactive application” of a ruling “is overwhelmingly the norm.”²⁵
10 Defendants have not established any of the three required elements to depart from that norm.
11 *Martinez-Cuevas* foreshadowed challenges to MWA exemptions; expanding protections to
12 Washington workers by striking the “live-in” exemption is promoted by retroactivity; and it
13 would be inequitable to deprive workers of their rights.

14 **V. CONCLUSION**

15 Plaintiffs respectfully request that this Court grant partial summary judgment and declare
16 that RCW 49.46.010(3)(j) is unconstitutional.

17
18
19 ²⁵ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009).

1 I certify that this memorandum contains 1,734 words, in compliance with the Local Civil
2 Rules.

3
4 DATED this 12th day of July 2024.

5 Respectfully submitted,

6 FAIR WORK CENTER LEGAL CLINIC

7 /s/ Emily E. Grove

8 EMILY E. GROVE, WSBA #52867

9 JEREMIAH E. MILLER, WSBA #40949

10 JANA E. CHOQUETTE, WSBA #58701

11 *Attorneys for Plaintiffs*
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Further, Defendants’ assertion that there is no causal link between the “live-in” exemption and the injury rates for AFH caregivers is fundamentally flawed. This overlooks the well-established connection between working conditions, overtime, and worker safety.¹⁵ Just as *Martinez-Cuevas* found that the agricultural workers’ exemption resulted in increased physical strain and higher injury rates, the same applies for the “live-in” exemption for caregivers. The constant vigilance required of “live-in” caregivers without adequate wages not only fails to meet

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9 **B. The legislature provided no reason for the exemption.**

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8 exemption is determined.

9 Notwithstanding, “[r]etroactive application” of a ruling “is overwhelmingly the norm.”²⁵
10 Defendants have not established any of the three required elements to depart from that norm.
11 *Martinez-Cuevas* foreshadowed challenges to MWA exemptions; expanding protections to
12 Washington workers by striking the “live-in” exemption is promoted by retroactivity; and it
13 would be inequitable to deprive workers of their rights.

14 **V. CONCLUSION**

15 Plaintiffs respectfully request that this Court grant partial summary judgment and declare
16 that RCW 49.46.010(3)(j) is unconstitutional.

17
18
19 ²⁵ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009).

1 I certify that this memorandum contains 1,734 words, in compliance with the Local Civil
2 Rules.

3
4 DATED this 12th day of July 2024.

5 Respectfully submitted,

6 FAIR WORK CENTER LEGAL CLINIC

7 /s/ Emily E. Grove

8 EMILY E. GROVE, WSBA #52867

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10 JANA E. CHOQUETTE, WSBA #58701

11 *Attorneys for Plaintiffs*
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KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON

JOCYLIN BOLINA; ADOLFO)	King County Cause No.
PAYAG; MADONNA OCAMPO;)	23-2-05373-7 SEA
HOLLEE CASTILLO; REGINALD)	
VILLALOBOS; and HONORINA)	
ROBLES,)	
)	
Plaintiffs,)	
vs.)	
)	
ASSURECARE ADULT HOME;)	
ASSURECARE FAMILY HOME CARE;)	
MARCELINA S MACANDOG; and)	
GERALD MACANDOG,)	
)	
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE NICHOLAS STRALEY

August 2, 2024

King County Courthouse, Room W928
Seattle, Washington

APPEARANCES:

For the Plaintiff:
JEREMIAH MILLER

For the Defendant:
ALBERT H. KIRBY

Also Present:
ULYSSES MANGUNE, Interpreter

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I N D E X

MOTION FOR SUMMARY JUDGMENT

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1 NOTE: Unless otherwise noted, proceedings were
2 translated from English to Tagalog by the interpreter.

3
4 (Proceeding commenced at 10:19 a.m.)

5 THE COURT: Good morning, everyone. We are on
6 the record in the matter of Bolina v AssureCare, Cause
7 Number 23-2-05373-7. Will counsel make your appearances
8 for the record.

9 MR. MILLER: Good morning, Your Honor. This is
10 Jeremiah Miller appearing on behalf of plaintiffs.

11 THE INTERPRETER: Your Honor, the interpreter
12 would like to request a repetition for the last word.
13 Representing who?

14 THE COURT: Mr. Miller, you said you're
15 representing the plaintiffs, correct?

16 MR. MILLER: Yes, Your Honor.

17 MR. KIRBY: And Albert Kirby representing
18 defendants.

19 THE COURT: And Mr. Kirby is here in court
20 with -- he's appearing in court today.

21 Will the interpreter please put your
22 qualifications on the record.

23 THE INTERPRETER: Yes, Your Honor. For the
24 record, Ulysses Mangune, registered Tagalog court
25 interpreter. I am permanently sworn in, and my AOC

1 number is 10684.

2 THE COURT: So good morning. I know we are
3 here on plaintiff's motion for partial summary judgment.
4 We're getting a late start, and we have simultaneous
5 translation happening. I anticipate that -- and I have
6 another matter at 11 o'clock that I must get to. I
7 don't want to rush or limit folks' ability to argue as
8 you would like, but at this point I would have to limit
9 each side to 15 minutes. Is that acceptable to both
10 parties?

11 MR. MILLER: That's fine with plaintiff, Your
12 Honor.

13 MR. KIRBY: Your Honor, I have some concerns
14 because that 15 minutes, half of that or over half of
15 that will likely involve some translation. I'm
16 concerned that we might not be able to go to the depth
17 of what's necessary when trying to address whether this
18 Court should rule that a law that's been in existence
19 for 60 years should be ruled unconstitutional.

20 THE COURT: One moment.

21 All right. So making a decision here. What
22 we're going to do is we're going to ask to move my 11
23 o'clock matter back 15 minutes. So I think that should
24 give us enough time to hear arguments. So what I will
25 say is, I will allow each side 20 minutes for argument.

1 Mr. Miller, if you'd like to reserve some of that for
2 rebuttal, you're obviously welcome to do that.

3 THE INTERPRETER: Your Honor, this is the
4 interpreter. I would like to request a pause so I can
5 interpret.

6 THE COURT: Okay.

7 So Mr. Miller, would you like to reserve some
8 time?

9 MR. MILLER: Yes, Your Honor. I would like to
10 reserve 8 minutes of the 20 for rebuttal.

11 THE COURT: Okay. All right. In that case you
12 have 12 minutes. Why don't you begin.

13 MR. MILLER: Thank you, Your Honor. We are
14 here today because despite *Martinez-Cuevas v. DeRuyter*
15 *Brothers Dairy, Inc.*, Washington State law
16 unconstitutionally excludes live-in adult family home
17 caregivers.

18 THE INTERPRETER: Sorry, Your Honor. I would
19 like to request a pause because these are names. Please
20 repeat what you said, counsel.

21 MR. MILLER: Yeah, absolutely. The name of the
22 case is *Martinez-Cuevas v. DeRuyter Brothers Dairy, Inc.*

23 MR. MILLER: Are you ready for me to resume,
24 Mr. Interpreter?

25 THE INTERPRETER: Yes. Yes, Your Honor. Yes,

1 sir.

2 MR. MILLER: The Washington State law
3 unconstitutionally excludes live-in adult family home
4 caregivers like my clients from the important
5 protections of Washington's minimum wage requirements
6 and Fair Labor Standards Act.

7 These live-in caregivers provide critical care
8 and support for the most vulnerable members of our
9 community, yet they have no right to sick leave and no
10 right to the overtime premium. These caregivers aren't
11 even entitled to the basic minimum wage. Even if this
12 work was easy, this would be an unacceptable departure
13 from Washington's commitment to basic workplace
14 protections for employees.

15 THE COURT: Mr. Miller, I have a question. You
16 have brought a facial challenge to the provision at
17 issue. Is that correct?

18 MR. MILLER: Yes, Your Honor. That's how the
19 Supreme Court characterized it in *Martinez-Cuevas*.

20 THE COURT: So you're asking me to rule that
21 there is no circumstance under which that provision is
22 constitutional?

23 MR. MILLER: Your Honor, I believe that the way
24 the Supreme Court framed this type of facial challenge
25 is much narrower than that. As in *Martinez-Cuevas*, the

1 challenge was to the exemption for dairy workers. And
2 the holding in that case was only that dairy workers
3 could not be excluded from overtime protections. So we
4 are bringing the same challenge here as to live-in adult
5 family home caregivers.

6 THE COURT: I have another question. How would
7 this arrangement be addressed under the Fair Labor
8 Standards Act?

9 MR. MILLER: Your Honor, it's quite complex
10 under the Fair Labor Standards Act. Adult family home
11 workers in Washington have never been addressed directly
12 under the Fair Labor Standards Act. The issue is that
13 initially, the entire category of domestic work was not
14 covered by the Fair Labor Standards Act, more or less on
15 explicitly racist and sexist grounds.

16 Once the initial objection to covering domestic
17 work had gone away to the Fair Labor Standards Act,
18 other exemptions were held to apply to live-in
19 caregiving work under some circumstances. For example,
20 the companionship exemption continues to provide
21 overtime exemption for people who live in a private home
22 and provide services.

23 THE COURT: But isn't there a regulation under
24 FLSA that covers circumstances like this, which are
25 live-in caregivers who are not just seeing one-on-one

1 but are -- and doesn't that basically say that the
2 parties can reach a reasonable agreement as to the wages
3 and hours, and the question is really about whether an
4 agreement is reasonable?

5 MR. MILLER: Your Honor, I believe the current
6 state of the law is there is a regulation that does
7 apply the Fair Labor Standards Act to live-in caregivers
8 like my clients. And I believe the part you're
9 referencing is -- unlike the state Minimum Wage Act,
10 which does not allow lodging or meal credits, the Fair
11 Labor Standards Act does.

12 THE COURT: I know that I'm taking up a lot of
13 your time, so I'm cognizant of that. But I have one
14 other question. If I am inclined to agree here that
15 they are receiving compensation in the form of free rent
16 and it sounds like board, how am I -- that must be
17 considered into the calculation at some level in terms
18 of what an appropriate compensation is for somebody's
19 work. How would that -- if I do find it's
20 unconstitutional, what is an adult family home supposed
21 to do under these circumstances, figure out what's the
22 appropriate wage to pay and how to factor in the fact
23 that somebody's living for free?

24 MR. MILLER: Well, Your Honor, I would say that
25 this is pretty quintessentially a legislative question.

1 As it currently stands, the Minimum Wage Act does not
2 allow credit for room and board. And so the Legislature
3 could fix that, but at this point, without that credit,
4 they're in no different position than any employer. And
5 as is the case in most caregiving settings like this,
6 shift work might be the answer.

7 Did that answer your question, or in this case
8 were you getting more at how would damages be resolved?

9 THE COURT: Well, you know, it seems -- I
10 suppose it answered my question. Continue.

11 MR. MILLER: Thank you, Your Honor. In the
12 interest of time, I'll just give you some highlights
13 about the position we have, and I would be glad to
14 answer any further questions from our point of view.

15 The main thing we want the Court to consider in
16 reaching its decision is how closely this case tracks
17 *Martinez-Cuevas*.

18 THE COURT: With the exception that your
19 clients are receiving additional compensation in the
20 form of housing and board.

21 MR. MILLER: Well, Your Honor, I think that's a
22 question in some sense. Defendants have spent a lot of
23 time framing this as a real benefit to the employees,
24 but honestly, this is primarily for the benefit of the
25 employer. It permits them to staff these houses with

1 far fewer employees than they would need if they did
2 shift work. It also provides a convenient means for
3 ensuring 24-hour care for residents who need it. So
4 plaintiff's position would be, it doesn't really act as
5 compensation.

6 Your Honor, by my clock, it looks like I'm at
7 12 minutes.

8 THE COURT: Yes. What I would say is you've
9 reserved 8 minutes for rebuttal. If you feel as though
10 you have additional things to say and feel like you
11 haven't had an opportunity, I might give you a few more
12 minutes at that time. But at this time I will turn to
13 the defendants and ask if they would present, and then
14 if need be, I may be able to give you a little bit more
15 time at the end.

16 And just to reassure both of you, I have read
17 all the materials, I've read the briefs, I've considered
18 this a lot. I feel like I've got a pretty good handle
19 on the facts and other things at issue, so don't feel
20 the need to go over that if that was going to be part of
21 what you were going to present. So counsel.

22 MR. KIRBY: So, Your Honor, thank you. And I
23 won't belabor what's already been said in the pleadings,
24 but I will add some commentary in depth to some of what
25 we've already gone over that's already incorporated by

1 reference. And in that vein, I would like to just focus
2 on the *Martinez-Cuevas* test. I mean, that is the law as
3 things stand right now.

4 And the first aspect is to -- the ease at which
5 it is to actually distinguish dairy workers working on
6 remote dairy farms, away from communities and amenities
7 and hospitals and theaters and everything you'd
8 associate with community living, with an industry that
9 is not subject to as much oversight as adult family
10 homes and residential care facilities.

11 THE COURT: Counsel, I just have a question
12 about the evidence in the record. Do you believe
13 there's a genuine issue of fact as to whether or not --
14 have you put at issue whether or not this is an unsafe,
15 dangerous profession? Is there any additional
16 information -- if I were inclined to say I see a
17 difference of fact here on that issue, is there any
18 additional information you would seek to introduce above
19 and beyond what you already have introduced on that
20 issue?

21 MR. KIRBY: Beyond the fact that my clients in
22 multiple facilities over 16 years had had only one
23 injury reported to them and -- that required workers'
24 compensation like medical treatments, you know, it was
25 very minor.

1 THE COURT: But in this case, the plaintiffs
2 have put into the evidence a number of declarations
3 attesting to musculoskeletal injuries, attesting to
4 ongoing issues that they believe are linked to their
5 employment.

6 MR. KIRBY: Well, I would address the
7 credibility of those declarations that are attesting to
8 ailments that had not been established by medical
9 professionals, where they are trying to state the causal
10 factors for those beyond just the ordinary rigors of an
11 aging body in the context of actual hard data, that none
12 of their alleged injuries were reported or required
13 medical care while they were employed with my clients.
14 And such anecdotal data is not indicative of an
15 industry-wide hazard of the type that you would find
16 with dairy farmers.

17 THE COURT: I have another question for you
18 related to the standard that I need to look at. So
19 under Article II, Section 35, the constitutional
20 provision says other employments dangerous to health or
21 deleterious to health, meaning -- in *Martinez-Cuevas*,
22 the Court kept saying it's dangerous and
23 life-threatening. It seems to me that provision only
24 requires it to be deleterious to health, meaning it's
25 injurious to health. Is my --

1 MR. KIRBY: Well, the Constitution says what it
2 says. My commentary there and my rebuttal is, there's
3 no established causal factor that because workers
4 happened to have a residence at the facility at which
5 they also work, that that is the causal factor for the
6 injuries.

7 THE INTERPRETER: I'm sorry, Your Honor. This
8 is the interpreter. I would like to request a pause so
9 I can interpret. Okay. First I would like to interpret
10 what the judge said as a constitutional part.

11 MR. KIRBY: And at best, that would be a
12 disputed fact, I believe.

13 That being said, the second part of the test
14 enumerated by *Martinez-Cuevas* requires an evaluation as
15 to whether the legislators had a reasonable intent for
16 allowing that exemption in the context of adult family
17 home caregivers.

18 THE COURT: And that actually leads to me to my
19 other question to you. Is it reasonable to believe that
20 the Legislature would have exempted a group of people
21 from any limitations on the wages that an employer could
22 pay them? Because that -- isn't that the result -- you
23 are essentially saying, and tell me if I'm wrong, that
24 there are no statutory limitations in Washington on the
25 wages that an adult family home that has a live-in

1 caregiver can pay?

2 MR. KIRBY: No, I'm only addressing this one
3 statute that they've put at issue for this case.

4 THE COURT: So there is another statute that
5 would --

6 (Interruption for interpretation.)

7 THE INTERPRETER: Sorry, Your Honor.

8 THE COURT: -- that would guarantee the workers
9 a minimum wage and overtime?

10 MR. KIRBY: Well, federal law still applies.

11 THE COURT: Okay.

12 MR. KIRBY: And that feeds to my broader
13 analysis, is that that statute cannot be looked at in a
14 legislative vacuum.

15 When we were making that argument in our brief,
16 we cited to the declaration of Marian McKee (phonetic)
17 at page 4. And she enumerated three RCW chapters of
18 statutes and four chapters in the WACs. These statutes
19 and regulations were enacted in the context of the home
20 health worker exemption at issue before the Court now.

21 In that vein, I would encourage the Court to
22 look specifically at RCW 70.128.005. In this particular
23 statute of one of the several chapters that the
24 Legislature enacted, the Court enumerated several
25 material findings that should weigh on the Court's

1 decision here and the reasonability analysis that the
2 Court is conducting.

3 THE COURT: And counsel, I'm sorry, I don't
4 recall that directly from that declaration. Do any of
5 those statutes or WACs relate to the wages and overtime
6 of somebody who works in an adult family home?

7 MR. KIRBY: Yes, because the adult family home
8 services in Washington State exist only because of these
9 legislative and administrative enactments. And in so
10 doing, there's particular findings that are relevant
11 here which require -- should inform the Court's analysis
12 to weigh the reasonability of the payment methodology
13 for home health workers and adult family homes with --

14 THE INTERPRETER: Your Honor, this is the
15 interpreter. I would like to request a repetition
16 please, and make a pause because these are technical.
17 Mr. Attorney, could you please repeat what you said?
18 Thank you.

19 MR. KIRBY: It's hard for me to repeat verbatim
20 what I just said. I apologize. And I would like to put
21 on the record that this back-and-forth and these
22 interruptions is difficult for my neurology to present
23 my case in a coherent fashion.

24 THE COURT: I understand.

25 THE INTERPRETER: Your Honor, this is the

1 interpreter. Can I -- what do you call, suggest
2 something? Can I interpret simultaneously?

3 THE COURT: I don't believe that's possible
4 because we would be talking over each other.

5 THE INTERPRETER: If I will lower my voice,
6 Your Honor, I'm sure they will understand me.

7 THE COURT: Yeah. I think -- so I hear you,
8 counsel. Are you asking to continue the hearing until
9 we can fix the technological issue?

10 MR. KIRBY: I'd like to see if we can muddle
11 through it within the time provided.

12 THE COURT: Okay.

13 MR. KIRBY: I just want the Court's
14 understanding that it might not be my most articulate.

15 THE COURT: I appreciate that it's not ideal.

16 MR. KIRBY: Mm-hmm. Okay.

17 THE COURT: And if you would like a little
18 additional time, I imagine I can provide that as well.

19 MR. KIRBY: Thank you.

20 So I kind of lost where we were, but if it
21 pleases the Court, I would like to get a couple points
22 into the record.

23 THE COURT: Of course. Of course.

24 MR. KIRBY: And particularly in RCW 70.128.005,
25 some statements and findings bear iteration on the

1 Court's record. With findings that were first
2 enumerated in 2009 and amended in 2011, the Legislature
3 found that adult family homes are an important part of
4 the state's long-term care system. Adult family homes
5 provide an alternative to institutional care and promote
6 a high degree of independent living for residents.

7 And Section 2 of this enumeration of findings,
8 the Court -- I mean the Legislature also says the
9 development and operation of adult family homes that
10 promote the health, welfare and safety of residents and
11 provide quality personal care and special care services
12 should be encouraged.

13 Then in Section 1, Subsection C, the
14 Legislature also set fines that restrictive covenants
15 which directly or indirectly restrict or prohibit the
16 use of property for adult family homes, one, are
17 contrary to the public interests served by establishing
18 adult family homes; and two, discriminate against
19 individual -- sorry.

20 THE INTERPRETER: I'm sorry, Your Honor. I'm
21 very sorry. I need to have some pause so I can
22 interpret.

23 THE COURT: Mm-hmm.

24 MR. KIRBY: And two, such restrictive covenants
25 are contrary to the public interest served by

1 establishing adult family homes and discriminate against
2 individuals with disabilities in violation of RCW
3 49.600.224.

4 This leads to --

5 (Interpreter interruption.)

6 MR. KIRBY: This leads to the Legislature
7 finding in Section 4 of this statute that the
8 Legislature finds that the State of Washington has a
9 compelling interest in developing and enforcing
10 standards that promote the health, welfare and safety of
11 vulnerable adults residing in adult family homes.

12 THE COURT: And counsel, you have about --
13 we're over time, but I'll give you like three or four
14 more minutes.

15 MR. KIRBY: Okay. So two basic points I'd like
16 to relate to these findings is one -- sorry. That one,
17 the statute enacted in the '60s allowing overtime -- I
18 mean, allowing exemption for home health workers should
19 -- these findings should be imputed upon that
20 application to adult family home workers because
21 legislation is not enacted in a vacuum. There's no
22 court that requires -- sorry.

23 THE INTERPRETER: I'm sorry.

24 MR. KIRBY: And there's no court that I'm aware
25 of that has required the Legislature to reenact

1 exemptions that already exist when enacting new laws
2 that invoke that previous enacted statute.

3 And my final point relates to the fundamental
4 unfairness and arguably due process violation of -- of
5 the ultimate inequity of finding my client, who owns a
6 small business, to be financially and legally
7 responsible for following and adhering to three chapters
8 of legislation enacted by the Legislature and four
9 chapters of WAC regulations. Because my client is not
10 the state of Washington, they're just people trying to
11 make a living, providing a community service to people
12 that otherwise might be homeless.

13 And so if the Court is inclined to further
14 litigate or ultimately find that this exemption is
15 unconstitutional, my clients respectfully ask that any
16 application of that finding be applied prospectively
17 and, if further litigation was required on this issue,
18 bring in the Washington State government, and please
19 excuse my client from further responsibility for
20 something they had absolutely no control over.

21 THE COURT: My recollection is that when a
22 party seeks to invalidate a statute, they have to give
23 notice to the Attorney General.

24 MR. KIRBY: Mm-hmm.

25 THE COURT: Has that occurred in this case?

1 Okay, I see Mr. Miller nodding. Okay, thank you.

2 MR. KIRBY: But that doesn't change the
3 fundamental fairness --

4 THE COURT: No, I understand. I understand.
5 Do you have anything further?

6 MR. KIRBY: I think given circumstances, that's
7 my --

8 (Interpreter interruption.)

9 THE COURT: Mr. Miller?

10 MR. MILLER: Thank you, Your Honor. I'll keep
11 it brief.

12 First, as to whether or not this is a dangerous
13 job, there is no dispute that this kind of caregiving
14 work is dangerous. In this case, defendant's own
15 witness, Ms. McKee, acknowledges the musculoskeletal
16 injuries that people suffer providing this kind of care.

17 THE COURT: Mr. Miller, in terms of the
18 evidence here and the question of whether there's a
19 genuine issue of material fact as to the dangerousness,
20 defense counsel has indicated that they challenged the
21 declarations. And I know that's not on the record, but
22 nonetheless, if I was to move this forward, they would
23 have an opportunity to challenge the declarations. So
24 why shouldn't there be an evidentiary hearing on that
25 issue here?

1 MR. MILLER: Because, Your Honor, it is not
2 material and cannot be material to your decision on the
3 constitutionality of this exemption, whether these
4 specific plaintiffs suffered injuries or illnesses.

5 THE COURT: But then why don't I just affirm
6 Judge Yip?

7 MR. MILLER: Judge Yip found that there had not
8 been proof that the occupation was dangerous. That's
9 what he said from the bench. But what's before the
10 Court now is two expert reports, both of which agree on
11 the dangerousness of the work.

12 Also, the fundamental statistical data that was
13 before the Court in *Martinez-Cuevas* is also before the
14 Court here. And that data indicates that adult family
15 homes are more dangerous than all industry by 80
16 percent, and 60 percent more dangerous than all
17 healthcare industry combined.

18 But, Your Honor, I think the most important
19 aspect to consider as to whether or not the individual
20 plaintiffs in this case suffered illnesses and injuries
21 is that that would wholly subvert the prophylactic
22 nature of the Minimum Wage Act. In essence, a plaintiff
23 would have to prove that they had suffered the injury or
24 illness that the act is intended to prevent in order to
25 get its protections. And that's untenable.

1 Do you have further questions on that point,
2 Your Honor?

3 THE COURT: No.

4 MR. MILLER: So plaintiff's position is the
5 danger of this job is undisputed.

6 The last thing I would say is it is worth
7 spending some energy on the reasonable grounds test.
8 Simply put, that test does not allow post hoc
9 rationalizations of the exemption. And it is wholly
10 undisputed in the record that the Legislature gave no
11 reason at all for enacting this exemption. Set against
12 the undeniable history of discrimination and exclusion
13 that caregivers face, no amount of back-figuring or
14 applying current statutes to previous enactments can
15 overcome the wholly unavailable reasonable grounds.

16 THE COURT: And, Mr. Miller, on this point,
17 unlike *Martinez-Cuevas*, which was directed at
18 agricultural workers, here, the exemption is really
19 broad and isn't just about adult family homes. And I
20 guess this goes back to my original question about
21 facial or as applied. I don't see that the Legislature
22 even considered adult family homes and the implications
23 when it enacted that provision.

24 MR. MILLER: I think that's right, Your Honor.
25 I would say that this is the unique circumstance of

1 *Martinez-Cuevas's* formulation of a facial challenge.

2 THE COURT: And I would just -- just to -- and
3 I know that, but in *Martinez-Cuevas* they say this is as
4 applied to this category of workers under the facts
5 presented here. That's what the Supreme Court ruled, as
6 opposed to dairy workers -- I mean, not agriculture, as
7 opposed to dairy workers.

8 MR. MILLER: That's true, Your Honor. But they
9 also characterized it as a facial challenge, in part to
10 get at this issue of requiring an individual plaintiff
11 to prove an injury or illness. From our perspective,
12 the fact-finding that this court has to engage in is
13 limited to whether live-in adult family home caregivers
14 are in dangerous professions. Because once they're in a
15 dangerous profession, they must be accorded the
16 protections of the minimum paycheck.

17 THE COURT: Do --

18 MR. MILLER: At least -- sorry.

19 THE COURT: No, finish your thought. I
20 apologize.

21 MR. MILLER: At least where there is no
22 reasonable ground for that exemption.

23 THE COURT: Do you have anything additional,
24 Mr. Miller?

25 MR. MILLER: The only thing is I would like to

1 thank the Court, opposing counsel, and the interpreter
2 for working to make this hearing accessible. It is
3 critical that my clients can attend and hear these
4 proceedings.

5 THE COURT: And just for everyone's
6 information, there is a way to be able to do
7 interpretation without -- to do it simultaneously.
8 Unfortunately, this morning we weren't able to do that.

9 Well, thank you both for your arguments, and
10 what I'm going to do is I'm going to take this under
11 consideration. And I anticipate issuing a ruling, I'm
12 hoping by a week from today.

13 Any questions from either of you? Excellent.
14 In that case, we will be in recess.

15 (Proceeding concluded at 11:20 a.m.)
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CERTIFICATE

I, Jack Donley, certified transcriptionist, do hereby certify that the foregoing was transcribed by me, and that the foregoing is a true record of the audio or video recording given to me, to the best of my ability. I further certify that I am in no way related to any party to this matter, nor to any counsel, nor do I have any interest in this matter.

Witness my hand this 24th day of September 2024.

Jack Donley
Jack Donley, CET No. 2687

SEATTLE LITIGATION GROUP, PLLC

May 12, 2025 - 3:34 PM

Transmittal Information

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Appellate Court Case Title: Jocylin Bolina, et al. v. Assurecare Adult Home LLC, et al.

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