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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,

Defendants-Petitioners,

v.

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

Plaintiffs-Respondents.

RESPONDENTS' ANSWERING BRIEF

Jeremiah Miller, WSBA No. 40949
jmiller@fairworkcenter.org
Emily Grove, WSBA No. 52876
egrove@fairworkcenter.org
Janae Choquette, WSBA No. 58701
jchoquette@fairworkcenter.org
Fair Work Center
2100 24th Ave. S., Ste. 270
Seattle, WA 98144
Attorneys for Plaintiffs-Respondents

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I. INTRODUCTION

Plaintiffs worked around-the-clock as Adult Family Home caregivers, protecting and caring for people with disabilities and elders. They provided services that are the cornerstone of a just and humane society, caring for their charges and enabling residents to live their lives with dignity. But those services come at a cost. Plaintiffs' jobs were physically demanding and dangerous, exposing them to serious workplace injuries and illnesses. Despite the fundamental importance of their work, and its inherent danger, Plaintiffs were paid just a few dollars per hour, regardless of the number of hours worked, and had no access to paid sick leave.

These substandard working conditions were enabled by Washington's Minimum Wage Requirements and Labor Standards Act, which wholly exempts "[a]ny individual whose duties require that [they] reside or sleep at the place of [their]

employment...” from its protections.¹ This exemption, the result of structural racism and sexism, excludes predominantly non-white, non-male workers from the basic labor standards that protect their safety and health. The exemption provides a corresponding significant benefit to Adult Family Home employers, allowing them to underpay for live-in caregivers’ labor.

As the Superior Court below correctly found, this Court’s decision in *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*,² requires striking the “live-in” exemption for caregivers like Plaintiffs from Washington law. The Washington Constitution’s Privileges and Immunities clause³ renders the live-in exemption unconstitutional for caregivers at Adult Family Homes as it

¹ RCW 49.46.010(3)(j).

² 196 Wn.2d 506, 475 P.3d 164 (2020).

³ Wash. Const. art. I, § 12 (prohibiting laws “granting to any citizen, class of citizens, or corporation... privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”).

grants those employers immunity from labor standards and a corresponding privilege of lower labor costs, impairing the fundamental rights of Washington workers⁴ without any legislative justification.

Defendants now ask this Court to ignore its own interpretation of these important constitutional interests; either by mis-applying these constitutional principles to the facts of this case, or by limiting the scope of relief for affected workers. Given the undeniable commands of the Washington Constitution, and Washington's commitment to protecting working people, this Court should decline that request and confirm that the live-in exemption is unconstitutional, applying the ruling retroactively.

⁴ Workers in dangerous occupations have a fundamental right to statutory protections at work. Wash. Const. art. II, § 35 (“[t]he legislature shall pass necessary laws for the protection of persons working in mines, factories and other employments dangerous to life or deleterious to health....”).

II. STATEMENT OF THE ISSUES

The primary issue before this Court is whether the Superior Court properly concluded that RCW 49.46.010(3)(j), excluding any employees who “reside or sleep at the place of [their] employment” from the protections of the Washington Minimum Wage Requirements and Labor Standards Act, violates the Washington Constitution’s Privileges and Immunities clause for live-in caregivers at Adult Family Homes.

Defendants also seek a ruling from this Court that, contrary to the normal course of judgments in Washington, the unconstitutional nature of the live-in exemption should only be recognized prospectively, depriving Plaintiffs of the full measure of their damages.

III. STATEMENT OF THE CASE

Plaintiffs, Ms. Bolina, Mr. Payag, Ms. Ocampo, Ms. Robles, Mr. Castillo, and Mr. Villalobos (“the Caregivers”) were employed by Defendants at several Adult Family Homes (“AFHs”) in the greater Puget Sound area. The Caregivers were

on call, day or night, to respond to residents' needs, and worked in dangerous conditions exposing them to injury and illness.

Despite the critical nature of the Caregivers' work, and its danger, Defendants underpaid the Caregivers and did not provide paid sick leave. Defendants' business model relies on an exemption to the Washington Minimum Wage Requirements and Labor Standards Act ("MWA")⁵ that denies all wage and sick leave protections to workers who live where they work. Defendants receive a corresponding benefit in discounted labor costs, a privilege that offends the Washington Constitution and was appropriately struck down by the King County Superior Court.⁶

A. The Caregivers provided around-the-clock care in Defendants' Adult Family Homes.

The record is clear: the Caregivers, like all live-in caregivers at AFHs, worked extremely long hours in challenging

⁵ Chapter 49.46, RCW.

⁶ Clerk's Papers ("CP") at 617-637 (Order Granting Plaintiffs' Second Motion for Partial Summary Judgment).

conditions. It is undisputed that the Caregivers were paid a flat daily wage, regardless of the number of hours they worked, with no overtime premium even though the Caregivers worked more than 40 hours per week. And Defendants admit that they had no system in place to provide the Caregivers with uninterrupted breaks.⁷

The Caregivers assisted residents with personal care and hygiene, followed healthcare plans prescribed by residents' doctors, assisted patients with eating, exercising and other

⁷ CP at 9:10-12, 16-17, 20-21(Complaint ¶¶ 54-55, 57, 60); CP at 675:2-3, 6, 9-10 (Answer ¶¶ 54-55, 57, 60); CP at 119:6-22 (Declaration of Jocylin Bolina ("Bolina Decl.") ¶¶ 13-18); CP at 128:8 (Declaration of Madonna Ocampo ("Ocampo Decl." ¶ 8); CP at 83:9-10, 83:19-84:2, 84:11-13 (Declaration of Adolfo Payag ("Payag Decl.") ¶¶ 6, 10-11, 15); CP at 104:4-6, 9-10, 13-16, 20-21(Declaration of Honorina Robles ("Robles Decl.") ¶¶ 11, 13, 15, 17); CP at 140:2-7 (Declaration of Reginald Villalobos ("Villalobos Decl."), ¶ 9); *see* CP at 220:16-19 (Defendants admit that the Caregivers were on call to respond to residents' needs regardless of the time of day); *see also* CP at 424:13-15 (Declaration of Defendant Marcelina Macandog ("Macandog decl."), ¶ 8) (acknowledging that the Caregivers' breaks were interrupted by the need to respond to residents).

routine tasks, provided emotional support and mobility assistance, and administered medications.⁸ The Caregivers also checked on residents throughout the day and night, rotating and shifting sleeping residents to ensure they did not get bed sores, and assisting residents going to the bathroom.⁹ These tasks often interrupted the Caregivers' sleep, leaving them chronically sleep-deprived.¹⁰ In addition to direct resident care, the

⁸ CP at 8:18-9:2 (Complaint, ¶ 50); CP at 675:21-22 (Answer, ¶ 50); *see* CP at 118:7-10 (Bolina Decl. ¶ 5); CP at 96:17-97:2 (Declaration of Hollee Castillo ("Castillo Decl.") ¶ 10); CP at 128:5-129:11 (Ocampo Decl. ¶¶ 7-8); CP at 83:11-14 (Payag Decl. ¶ 7); CP at 103:7-10 (Robles Decl. ¶ 5); CP at 139:12-18 (Villalobos Decl. ¶ 7); *see* CP at 429:19-22 (Declaration of John Ficker ¶ 13) (describing the basic duties of AFH caregivers).

⁹ CP at 8:18-9:2 (Complaint, ¶ 50); CP at 675:21-22 (Answer, ¶ 50); *see* CP at 118:11-13 (Bolina Decl. ¶ 6); CP at 96:17-97:2 (Castillo Decl. ¶ 10); CP at 128:11-129:11 (Ocampo Decl. ¶ 8); CP at 83:14-16, 84:1-13 (Payag Decl. ¶¶ 8, 11-15); CP at 103:19-104:3 (Robles Decl. ¶¶ 9-10); CP at 140:2-10 (Villalobos Decl. ¶¶ 9-10).

¹⁰ CP at 125:10-12 (Bolina Decl. ¶ 54); CP at 100:4-17 (Castillo Decl. ¶¶ 33-37); CP at 129:15-21 (Ocampo Decl. ¶¶ 10-11); CP at 83:19-84:10 (Payag Decl. ¶¶ 10-14); CP at 104:4-12 (Robles Decl. ¶¶ 11-14); CP at 140:2-16 (Villalobos Decl. ¶¶ 9-12).

Caregivers performed administrative tasks, janitorial services, and the general upkeep of the home.¹¹

The Caregivers cared for residents in the same way that caregivers at other long term care facilities do. The Caregivers' unrebutted expert, Dr. David Grabowski, Ph.D., professor of health care policy in the Department of Health Care Policy at Harvard Medical School, opined that the Caregivers' duties "are the same caregiving tasks that are performed by workers in home care, assisted living facilities, and nursing homes."¹² Defendants' witness, John Ficker, the Executive Director of the Adult Family Home Council of Washington State, agrees, acknowledging that the "type of work" done by AFH employees "is largely the same"

¹¹ CP at 9:3-6 (Complaint ¶¶ 51-52); CP at 675:23-24 (Answer ¶¶ 51-52); *see* CP at 125:12-16 (Bolina Decl. ¶ 7); CP at 97:3-21 (Castillo Decl. ¶¶ 11-16); CP at 128:5-10 (Ocampo Decl. ¶ 7); CP at 83:17-18 (Payag Decl. ¶ 9); CP at 103:11 (Robles Decl. ¶ 6); *see also* CP at 424:6-7 (Macandog Decl. ¶ 4).

¹² CP at 459:4-10, 470:4-10 (Dr. Grabowski expert report, ¶¶ 13, 28).

as work done by “residential care aides, nursing assistants in nursing homes, and direct care workers in other industries.”¹³

Washington state also recognizes the similarity of caregiving work across settings, especially regarding the risk of injury and illness. Washington’s workers’ compensation system, administered by the Washington State Department of Labor and Industries (“L&I”), groups industries into “risk classes” based on the similarity in hazards associated with those occupations.¹⁴ L&I has placed AFHs into a risk class with group homes, treatment centers, and similar facilities that require medical monitoring, care, and supervision, as their working conditions and hazards are the same for workers across these settings.¹⁵

¹³ CP at 428:13-16 (Ficker Decl. ¶ 4); *see id.* CP at 429:7-10 (¶ 10) (“both AFHs and Assisted Living Facilities provide personal care and assistance with activities of daily living...” differing only in that “AFHs are usually smaller and offer a homier ambiance....”).

¹⁴ WAC 296-17-31011.

¹⁵ WAC 296-17A-6509; *see* CP at 442 (M.M. Quinn et al., *Healthy Aging Requires a Healthy Home Care Workforce: The Occupational Safety and Health of Home Care Aides*, 8 Current

B. Caregiving work in Adult Family Homes is dangerous.

The work of caregiving at AFHs is incredibly dangerous; the undisputed record in this case establishes the very real threats to the health and safety of caregivers at AFHs.

The Caregivers' expert, Dr. Grabowski, provided an uncontroverted opinion detailing the injury and illness risks for caregivers at AFHs. AFH caregivers, like all caregivers, face serious musculoskeletal injuries from physically assisting residents. They are prone to severe shoulder, back, and knee injury from transferring, lifting, or repositioning residents, and handling falls.¹⁶

environmental health reports, 235 (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).

¹⁶ CP at 460:6-461:7, 464:11-467:2 (Dr. Grabowski expert report ¶¶ 16-18, 24); Nursing homes and personal care facilities - overview, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, <https://www.osha.gov/nursing-home> (last visited Jun 11, 2025) (identifying "lifting and repositioning

Further, caregivers are also vulnerable to physical attacks by confused or combative residents, especially when working over 40 hours a week.¹⁷ Those without nursing degrees, like the Caregivers in this case, experience the highest rate of intentional injury of all healthcare workers, suffering intentional injuries at a rate more than eight times higher than hospital workers, and more than four times higher than nursing home workers.¹⁸

Additionally, caregivers face exposure to serious blood-borne and respiratory diseases,¹⁹ including during the COVID-

patients” as an occupational hazard); *see also* COLIN J. BRIGHAM, ET AL., HOME HEALTH CARE AIDES: OCCUPATIONAL HEALTH AND SAFETY CHALLENGES AND OPPORTUNITIES (2021), <https://www.hfes.org/Portals/0/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).

¹⁷ CP at 461:8-15 (Dr. Grabowski expert report, ¶ 19).

¹⁸ *Id.*; CP at 467:3-468:5 (¶ 25).

¹⁹ CP at 442-443 (Quinn, *supra* note 15); *see* 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); *see also* CP at 468:6-469:17 (Dr. Grabowski expert report, ¶ 26) (The Caregivers were exposed

19 pandemic, where the death rate for healthcare workers, like the Caregivers in this case, more than doubled the 2019 rates for the previous years' deadliest occupations, logging and commercial fishing.²⁰

The grueling, "always on" nature of caregiving, including lack of sleep, worsens all these risks to caregivers' safety and health, leading to physical and mental health issues and increasing the likelihood of workplace injuries.²¹

Defendants' putative expert, Mariann McKee, RN, agrees with Dr. Grabowski's assessment:

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

to MRSA and Hepatitis C; Caregiver Robles contracted COVID-19 while working for Defendants and was hospitalized).

²⁰ CP at 461:16-462:7 (Dr. Grabowski expert report, ¶ 20).

²¹ CP at 471:18-473:12 (Dr. Grabowski expert report, ¶¶ 31-32).

wheelchair, I herniated a disk. My story is not atypical.²²

Dr. Grabowski's analysis and conclusions are also reflected in national and Washington-specific data tracking workplace illness and injuries for workers like the Caregivers. National data shows caregivers have the ninth highest injury and illness rate of all employment tracked by the Bureau of Labor Statistics, exceeding the injury and illness rates for aluminum and steel foundries, mobile home manufacturing, and light truck manufacturing.²³ Washington state's workers' compensation

²² CP at 580:2-6 (Declaration of Mariann McKee, Ex. 1).

²³ CP at 450 (Survey of Occupational Injuries and Illnesses Data, Table SNR01, UNITED STATES DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, (2022) <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 (continuing care retirement communities and assisted living facilities for the elderly) has an injury and illness rate of 8.1 per 100 full time equivalent workers. *Id.* NAICS code 6233 includes workers at businesses who are "primarily engaged in providing residential and personal care 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

data aligns with national trends. Between 2017 and 2021, the rate of compensable claims for AFH caregivers, driven primarily by serious musculoskeletal injuries, traumatic injuries, and viral illnesses,²⁴ was more than 40% higher than the rate for the healthcare industry as a whole and the rate for “all industry.”²⁵

The expert analysis of working conditions and available data on injury and illness rates is borne out in the Caregivers’ experiences. In their un rebutted declarations, the Caregivers describe becoming injured and ill from lifting and moving

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.

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. *Id.*

²⁴ CP at 537-538 (Declaration of Margaret Leland ¶ 3, Ex. 1 (Workers’ Compensation Claim Data, Washington State Risk Class 6509, January 1, 2017 – December 31, 2021)).

²⁵ *Id.*

patients, interacting with combative patients with dementia, and working with ill residents.²⁶

C. The exclusion of live-in caregivers from labor standards is the legacy of deeply entrenched discrimination.

The exemption of live-in caregiving work from fundamental labor protections has racist and sexist motivations dating back to at least the 1930s. During the New Deal Era, the exclusion of Black and female workers from labor protections was codified into the groundbreaking labor legislation that formed the foundation for our country's (and Washington State's) workplace protections.²⁷ A critical element of this statutory scheme, the Fair Labor Standards Act of 1938 ("FLSA") established national minimum labor standards,

²⁶ CP at 82-142 (declarations of the Caregivers).

²⁷ *Martinez-Cuevas*, 196 Wn.2d at 528-529 (C.J. Gonzales, concurring); CP at 147-191 (Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 Ohio St. L.J. 95 (2011)).

including the minimum wage.²⁸ In its initial enactment, the FLSA excluded domestic workers, like live-in caregivers, completely.²⁹ The goal of lawmakers was to maintain the existing social hierarchy and prevent Black, brown, and female-

²⁸ 29 U.S.C. §§ 201 *et seq.* (1938).

²⁹ CP at 295-339 (Harmony Goldberg, *The Long Journey Home: The Contested Exclusion and Inclusion of Domestic Workers from Federal Wage and Hour Protections in the United States*, International Labor Organization, Conditions of Work Series No. 58 (Aug. 27, 2015)); the exclusion of domestic workers from workplace protections is widespread, *see, e.g.*, 29 U.S.C. § 152(1935)(3) (National Labor Relations Act: “[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....”); *see also* 29 C.F.R. § 1975.6 (1986) (Occupational Safety and Health Act: individuals 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” are not employers); 42 U.S.C. § 2000e(b) (1964) (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....”); RCW 49.60.040(10) (Washington Law Against Discrimination: “‘Employee’ does not include any individual employed... in the domestic service of any person.”).

identifying workers from gaining political power.³⁰ Indeed, in the case of the Caregivers, the exclusion of workers continues the millennia-long tradition of devaluing work thought to be the “natural” province of women and people of color.³¹ These tendencies are incorporated into Washington laws, including the MWA, which is fundamentally “based on the Fair Labor Standards Act of 1938” with “functionally identical” coverage of employers and employees.³²

Structural racism and sexism continue to play a major role in the operation of our economy and the laws concerning working people. Live-in caregiving is still performed primarily

³⁰ CP at 149-153 (Perea, *supra* note 27, pp. 96-100); CP at 341-384 (Evelyn Nakano Glenn, *From Servitude to Service Work: Historical Continuities in the Racial Division of Paid Reproductive Labor*, 18 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 1 (1992)).

³¹ See, e.g., CP at 371 (Glenn, *supra*) (“[w]hatever the setting, [caregiving] work continues to be a specialty of racial- ethnic women. The work is seen as unskilled and subordinate and thus appropriate to their qualifications and status.”).

³² *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 867, 281 P.3d 289 (2012) (cleaned up).

by women and people of color. In the United States, 83% of home care aides are women, and 60% of home care aides are people of color.³³ These trends are reflected in Washington as well; 83% of the more than 97,000 home care workers in Washington are female, nearly half are non-white, and one third are foreign born.³⁴ Black, Hispanic, and Asian American/Pacific Islander women are vastly overrepresented in the caregiving workforce compared with their numbers in the general workforce, and face discrimination across multiple dimensions.³⁵

³³ CP at 400-401 (DIRECT CARE WORKERS IN THE UNITED STATES: KEY FACTS (2022), <https://www.phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-3/>).

³⁴ CP at 459:11-15 (Dr. Grabowski expert report, ¶ 14).

³⁵ CP at 193-213 (CASSANDRA ROBERTSON, ET AL., ALL STATES MUST SET HIGHER WAGE BENCHMARKS FOR HOME HEALTH CARE WORKERS 2 (2022), <https://files.epi.org/uploads/247820.pdf>).

D. Washington’s enactment of the live-in exemption to its minimum wage laws lacks any legislative justification.

Set against the purposeful exclusion of live-in caregivers from labor standards generally, it is striking that the MWA’s legislative history presents *no rationale whatsoever* for the live-in exemption. The Washington legislature enacted the MWA in 1959, originally without excluding live-in workers from its entitlements to a minimum wage and overtime pay.³⁶ In 1961, the legislature amended the MWA, excluding groups of workers from coverage, including those whose duties require that they live at their place of employment.³⁷ But the legislative history is silent as to the purpose behind the “live-in” exemption.³⁸ The legislature provided no reason for depriving live-in workers of

³⁶ Laws of 1959, ch. 294.

³⁷ Laws of 1961, ch. 18 (codified at RCW 49.46.010(3)(j)).

³⁸ CP at 224-290 (Declaration of Janae Choquette and exhibits).

the MWA’s vital protections.³⁹ And the legislature did not revise this exemption during subsequent amendments to the MWA; it remains substantially intact to date.⁴⁰

E. Defendants benefitted from the suspect live-in exemption to the MWA, reaping a significant economic reward.

It is axiomatic that employers who underpay workers reap economic rewards. Defendants acknowledge that “it would be cost-prohibitive for owners and operators of adult family homes if they would have to pay live-in caregivers” minimum wage, overtime, and sick leave as required by the MWA.⁴¹ Defendants

³⁹ *Id.* Defendants’ assert, without citing to any evidence, that the exemption is a “book-keeping” exemption. Brief of Petitioner at 21. Entirely excluding a class of workers from the basic labor standards guaranteed in Washington cannot reasonably be described as an effort to simplify accounting for employers.

⁴⁰ The exemption was updated to include female pronouns in 1989 by voter initiative. Minimum Wage—Rates and Coverage Revised, Laws of 1989, ch. 1. *See also* Brief of Petitioner at 6-7, acknowledging no further updates to the MWA.

⁴¹ Brief of Petitioner at 7. Though Defendants devote considerable space in their briefing to wholly unsupported threats of economic fallout for AFHs if the law is declared unconstitutional (*see, e.g., id.* at 2, 7-8), they also provide the

continued to take advantage of the Caregivers through the live-in exemption, despite the recent removal of other exemptions in the MWA as violative of the Privileges and Immunities clause both in *Martinez-Cuevas* and through legislative activities.⁴²

The outsized transfer of economic value from the Caregivers to Defendants was aided both by the live-in exemption and Defendants' structure of the employment relationship.⁴³ Defendants repeatedly emphasize the “benefits” of living at an AFH and being paid subminimum wages

answer to this supposed problem. AFHs can and do renegotiate Medicaid reimbursement rates to address increased costs. *Id.* at 8 and CP at 431:15-17 (Ficker Decl. at ¶ 25).

⁴² See, e.g., UPDATE Dairy workers eligible for overtime; all other ag workers eligible beginning Jan. 1, 2022, WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, (2021) <https://lni.wa.gov/news-events/article/21-020> (citing *Martinez-Cuevas* and legislative activities).

⁴³ Caregiving is often done by shift work. CP at 469:19-471:20 (Dr. Grabowski expert report at ¶¶ 27-31). Indeed, here, Defendants also employed shift-based caregivers that did not live in the homes. See, e.g., CP at 221:19-23 (Defendants admit that they do not require all caregivers to live on-site); see also CP at 83:9-10 (Payag decl. at ¶ 6, “[s]ome of my co-workers worked 12-hour shifts and had their own homes”).

throughout their brief.⁴⁴ But in reality, live-in work functions primarily for benefit of Defendants. The Caregivers lived on site so they could provide round-the-clock care for residents.⁴⁵ Whatever the quality of those accommodations,⁴⁶ room and board for the Caregivers can hardly be considered a benefit of employment as they primarily served the interest of the employer.⁴⁷

⁴⁴ Brief of Petitioner at 4, 10, 21-22, 26, 34.

⁴⁵ CP at 424:11-12 (Macandog Decl. ¶ 7); *see* Brief of Petitioner at 9, acknowledging that at least some residents required 24-hour care.

⁴⁶ The Caregivers describe sleeping and living conditions that hardly constitute adequate “room and board” for anyone. *See, e.g.*, CP at 103:12-15 (Robles Decl. ¶ 7) (“my sleeping area was a recliner in the TV room. I put cardboard on the sliding glass door so that people outside couldn’t see me sleeping.”); *see also* CP 83:7-8 (Payag Decl. ¶ 5) (“For the first year and a half, I slept on a recliner or the floor in the common area of the home.”). Defendants suggest that being a live-in caregiver permits “caregivers to live in communities and to enjoy lifestyles that they could not otherwise afford” (Brief of Petitioner at 4) but if they had paid the Caregivers properly, perhaps they would have had the means to make their own living arrangements.

⁴⁷ Defendants’ focus on the value of room and board is a red herring. The “value” of room and board would only matter for calculating damages owed to the Caregivers, an issue that is only

IV. ARGUMENT

As this Court made clear in *Martinez-Cuevas*, the Washington Constitution requires that the labor standards established by the MWA apply to workers in dangerous occupations. Live-in caregivers at AFHs, like the Caregivers here, are undeniably engaged in dangerous occupations; however, the MWA explicitly exempts them from *all* its

relevant if the MWA applies. And even there, Defendants are unlikely to receive credit for room and board. Under the MWA, employer deductions from wages of employees are only permitted where “the employee expressly authorizes the deduction in writing and in advance for a lawful purpose for the benefit of the employee.” WAC 296-126-028(2). And “[n]either the employer nor any person acting in the interest of the employer can derive any financial profit or benefit from any of the deductions...” *Id.* at (3). See also David Weil, *Field Assistance Bulletin No. 2015-1: Credit toward Wages under Section 3(m) of the FLSA for Lodging Provided to Employees*, UNITED STATES DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, (2017), <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2015-1> (under the FLSA’s lodging credit, “where an employee provides round-the-clock care, or if the employee’s sleep or off-duty time is regularly interrupted to perform work for the employer, the lodging typically will be deemed as primarily for the benefit of the employer” and not an offset to wages).

protections. This exclusion privileges AFH employers over other businesses that must comply with the MWA. Because there is no reasonable ground for the live-in exemption, it violates the Washington Constitution's Privileges and Immunities clause. The Superior Court correctly declared the exemption to be unconstitutional on this basis, and this Court should affirm the Superior Court.

Though the Superior Court declined to rule on the issue, Defendants have also asked this Court to give prospective effect only to the determination that the live-in exemption violates the Washington Constitution. This is contrary to the normal application of judgments in Washington and is wholly unjustified here, especially as the matter before the court requires nothing more than the application of the rule announced in *Martinez-Cuevas* to the undisputed facts of this case. Coupled with the balance of equities, which strongly favors paying Washington workers what they are owed, the Superior Court's ruling should be affirmed and applied retroactively.

A. Standard of review.

This Court reviews the constitutionality of a statute and summary judgment rulings *de novo*.⁴⁸ The Court applies the same standard for summary judgment as the Superior Court: “summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”⁴⁹ Material facts may be established through party admissions, declarations, expert opinions, and judicial notice of certain facts.⁵⁰ Where evidence presented is not

⁴⁸ *Schroeder v. Weighall*, 179 Wn.2d 566, 571, 316 P.3d 482 (2014) (constitutionality reviewed *de novo*); *Bangerter v. Hat Island Cmty. Ass’n*, 199 Wn.2d 183, 188, 504 p.3d 813 (2022) (summary judgment rulings reviewed *de novo*).

⁴⁹ *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 217, 515 P.3d 525 (2022) (cleaned up); *see* Wash. Sup. Ct. Civ. R. 56(c) (same).

⁵⁰ *Bernal v. Am. Honda Motor Co., Inc.*, 11 Wn. App. 903, 906, 527 P.2d 273 (1974) *overruled on other grounds* 87 Wn.2d 406 (1976) (for summary judgment, the court may consider “affidavits, pleadings, depositions... judicial notice...”); *Volk v. DeMeerleer*, 187 Wn.2d 241, 276, 386 P.3d 254 (2016) (approving a trial court’s use of an expert opinion in deciding summary judgment).

controverted, it is considered established for the purposes of summary judgment.⁵¹

B. Undisputed material facts.

Based on the parties' submissions to the Superior Court, the facts material to this action are described in Section III, *supra*. The record conclusively establishes (1) excusing AFH employers from paying wages or providing leave consistent with the MWA for live-in caregivers benefits those employers, (2) caregiving at AFHs is dangerous work, exposing caregivers to the risk of injury and illness, and (3) there is no legislative history explaining the purpose or aims of the live-in exemption to the MWA.

None of these facts are in dispute, notwithstanding Defendants' intimations otherwise. For example, Defendants

⁵¹ See *Washington Osteopathic Medical Assoc. v. King County Medical Service Corp.*, 78 Wn.2d 577, 579, 478 P.2d 228 (1970) ("factual data contained in affidavits and exhibits filed with motion for summary judgment will be considered as established" if not controverted).

claim that the rate of injuries for “home health caregivers” is “less than... other caregiving work.”⁵² But what Defendants rely on for this assertion is a statement by Ms. McKee (Defendants’ putative expert) that, in 2022, the raw number of reported injuries⁵³ (with approved claims) for “home health aides” was less than the raw number of reported injuries for “[c]hildcare workers.”⁵⁴ She also opines that Defendants’ business has a lower risk rating than other AFHs.⁵⁵ Ms. McKee does not cite a source for this information, nor does she explain how the raw numbers of complaints translate to a rate of injury⁵⁶ nor how a

⁵² Brief of Petitioner at 10.

⁵³ Reported injuries are well known to under-state the scale of injuries suffered by workers. Hannah Sabitoni, *Why Injuries Often Go Unreported*, LABORERS' HEALTH AND SAFETY FUND OF NORTH AMERICA (2022), <https://lhsfna.org/why-injuries-often-go-unreported/>.

⁵⁴ CP at 580:6-9 (McKee Decl. at p. 8).

⁵⁵ *Id.*

⁵⁶ If the total number of “childcare workers” is much larger than the total number of “home health aides” then the rate of injury will be much higher for home health aides.

purportedly low rate of injury at Defendants' businesses bears on how dangerous the industry is, as a whole.⁵⁷

Regardless, Ms. McKee's assertions do not contradict the evidence provided by the Caregivers' expert, Dr. Grabowski specific to caregiving in AFHs, or by L&I statistical data specific to AFHs, both of which establish how dangerous it is to provide caregiving services at an AFH.⁵⁸ It also does not controvert the declarations of the Caregivers describing the real injuries and

⁵⁷ This Court has already established that the inquiry is focused on the industry as a whole, not an individual workplace or individual workers. *Martinez-Cuevas*, 196 Wn.2d at 525. Any other understanding renders entitlement to basic labor standards dependent on the actual illnesses or injuries suffered at an individual business, an untenable (and unworkable) result.

⁵⁸ Defendants' bald assertion that AFH injury rates are lower than some other injury rates, or that work at AFHs is not dangerous are purely "conclusionary statements of fact" that do not suffice to create a dispute as to a material fact. *Am. Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App. 757, 767, 551 P.2d 1038 (1976); see *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).

illnesses they suffered from their work.⁵⁹ And, perhaps most tellingly, Ms. McKee agrees that caregiver work at AFHs is dangerous, stating that caregivers “are going to get hurt.”⁶⁰

Simply put, there is no dispute that the Caregivers worked long hours⁶¹ in jobs that threatened their physical and mental

⁵⁹ Relatedly, Defendants claim that no Caregiver suffered an injury while working for Defendants. Brief of Petitioner at 10-11. However, Defendants rely on the declaration of Defendant Marcelina Macandog for this assertion, which only claims that the Caregivers did not *report* injuries to her. CP at 566:20. This does not create a dispute about the Caregivers *suffering* injuries and illnesses described in their declarations.

⁶⁰ CP at 580:1-4.

⁶¹ CP at 9:20-21 (Complaint, ¶60), CP at 677:9-10 (Answer, ¶60). Relatedly, Defendants make an unsupported claim that the Caregivers were not assigned to 24-hour shifts. Brief of Petitioner at 9. For this contention, they rely on Defendant Marcelina Macandog’s declaration, that only asserts that the Caregivers “were not required to work 24-hour shifts” but rather were only “assigned” shifts necessary to provide 24-hour coverage at the AFHs. CP at 567:9-10. This does not contradict testimony from Caregivers that they were assigned to work overnight shifts with no assistance from other caregivers, after working daytime shifts. *See* CP 83:9-10, 84:15-18 (Payag decl. at ¶ 6, 17 Defendants did not hire a second caregiver at the home where Caregiver Payag worked, so he was “on-call 24 hours per day”), *see also* CP at 103:19-21 (Robles decl. at ¶ 9, same).

health, with a compounded risk of injury due to lack of sleep. The highly dangerous nature of caregiving at AFHs is well known from statistical data and caregivers' job duties. Even the most generous read of Defendants' position amounts to nothing more than a disagreement about conditions at their AFHs; the conditions in the industry are not contested by Defendants.

There is similarly no dispute that the legislature has articulated no rationale for its decision to exclude these workers from the basic protections of the MWA. Defendants' instead construct a hypothetical series of explanations for the legislature's implementation of the exemption.⁶² But their explanation is pure speculation; they point to no evidence that the legislature actually endorsed any aspect of Defendants' proposed reasoning for the exclusion, or any reasoning at all.

⁶² *See, e.g.*, Brief of Petitioner at 26-28.

C. The “live-in” exemption to the MWA violates the Washington Constitution’s Privileges and Immunities Clause.

Under the Washington Constitution’s Privileges and Immunities clause, “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same term shall not equally belong to all citizens, or corporations.”⁶³ When a law is

⁶³ Wash. Const. art. I, § 12. *See Schroeder* 179 Wn.2d at 566, 577, 316 (the Privileges and Immunities clause prevents both discrimination and special interest favoritism). Contrary to Defendants’ implication (Brief of Petitioner at 22), the Privileges and Immunities clause is addressed to any legislative favoritism, not just favoritism for one class of businesses over another class of the same business. Both the plain language of the Constitution and cases like *Martinez-Cuevas*, *Schroeder*, and *Ockletree* conclusively demonstrate that the clause prevents all favoritism. *See* Wash. Const. art. I § 12 (forbidding the granting of any privilege or immunity to “any citizen, class of citizens, or corporation”) (emphasis supplied); *see also* *Martinez-Cuevas*, 196 Wn.2d at 522-525 (striking down the overtime exemption for dairy workers as a privilege to all dairy employers over other employers); *Schroeder*, 179 Wn.2d at 488 (striking a statute of repose for medical malpractice claims without finding it benefited one class of insurance providers over another); *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 806, 317 P.3d 1009 (2014) (applying the Privileges and Immunities clause to a religious exemption from the state’s antidiscrimination law

challenged under this clause, this Court has provided a two-part test:

First, [courts] ask whether a challenged law grants a privilege or immunity for purposes of our state constitution. If the answer is yes, then [courts] ask whether there is a “reasonable ground” for granting that privilege or immunity.⁶⁴

To be actionable, the challenged “privilege” or “immunity” must implicate “fundamental rights of state citizenship.”⁶⁵ Fundamental rights of state citizenship may derive from a variety of sources; among the fundamental rights protected by the Washington Constitution is “the fundamental right to statutory protection” at work for individuals in dangerous jobs.⁶⁶

that applied to religious non-profits across a wide range of industries).

⁶⁴ *Martinez-Cuevas*, 196 Wn.2d at 519 (cleaned up).

⁶⁵ *Id.*

⁶⁶ *Bennett v. United States*, 2 Wn.3d 430, 444, 539 P.3d 361 (2023) (citing, *Martinez-Cuevas*, 196 Wn.2d at 519).

If the legislature grants a privilege or immunity, courts must scrutinize the reason for that grant, searching for a reasonable ground for statutory favoritism. A “reasonable ground” requires much more than a “rational basis”—a court will not hypothesize facts to justify a legislative choice.⁶⁷ Rather, the legislature must have had a contemporaneous justification for the privilege or immunity “that *in fact* serves the legislature’s stated goal”⁶⁸ for the underlying law.

1. The live-in exemption grants a privilege or immunity to Defendants.

Article II, section 35 of the Washington Constitution establishes a fundamental right of state citizenship to health and safety protections for Washington workers in dangerous industries: “[t]he legislature shall pass necessary laws for the protection of persons working in mines, factories, and other

⁶⁷ *Martinez-Cuevas*, 196 Wn.2d at 523.

⁶⁸ *Schroeder*, 179 Wn.2d at 574 (emphasis in the original).

employments dangerous to life or deleterious to health; and fix pains and penalties for the enforcement of the same.”⁶⁹

In *Martinez-Cuevas*, this Court explained that the MWA is “the very protection” owed to vulnerable workers under article II, section 35.⁷⁰ This interpretation is consistent with the plain terms of the law: “the health, safety and the general welfare of the citizens of this state require the enactment of” the MWA.⁷¹ It is also consistent with this Court’s long-standing commitment to protecting the health and safety of working people.⁷² Indeed, this Court has repeatedly uplifted the safety and health purposes of

⁶⁹ Wash. Const. art. II, § 35.

⁷⁰ *Martinez-Cuevas*, 196 Wn.2d at 520-521.

⁷¹ RCW 49.46.005(1).

⁷² See, e.g., *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) (upholding Washington’s minimum wage law, recognizing that low wages and long hours are deeply harmful to the health and well-being of workers).

the MWA, aligning it with the requirements of article II, section 35.⁷³

As the Superior Court reasoned, the fundamental right to the protections of the MWA applies to workers in occupations that are either “dangerous to life *or* deleterious to health” or both.⁷⁴ On reviewing the plain meaning of “dangerous” and “deleterious,” the Washington Constitution’s protections encompass a range of dangerous employment and do not require a specific degree of danger to qualify for statutory protections.⁷⁵ The Superior Court correctly concluded that “if working as a

⁷³ See, e.g., *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 history of labor standards enactments, including the state’s 1913 minimum wage law identifying substandard wages with health risks).

⁷⁴ CP at 627:9-628:10 (Superior Court order granting the Caregivers’ motion for summary judgment).

⁷⁵ *Id.* CP at 627:15-17.

live-in caregiver in an adult family home can be physically or psychologically harmful, those workers enjoy a fundamental right” to legislative protections at work.⁷⁶

Here, the evidence establishes that live-in caregiving work at AFHs is dangerous to life or deleterious to health. The uncontested testimony of the Caregivers describes physical, demanding labor, done over long hours, undertaken with little sleep, and in conditions where exposure to physical strain, violence, and infectious diseases is a given.⁷⁷ Further, the Caregivers’ expert, Dr. Grabowski, provided an unrebutted opinion detailing the serious threats to the health and safety of caregivers at AFHs.⁷⁸ This opinion is consistent with statistical evidence at a national level, and statistical evidence provided by L&I, showing elevated risks of illness and injuries at AFHs.⁷⁹ It

⁷⁶ *Id.* CP at 628:7-9.

⁷⁷ *See generally* Section III.A-B *supra*.

⁷⁸ CP at 453-473 (Dr. Grabowski expert report).

⁷⁹ CP at 534-538 (Leland Decl. and report).

is also consistent with Defendants' own putative expert witness' opinion; Ms. McKee agrees that caregiving work is dangerous.⁸⁰

These serious risks to the safety and health of caregivers comes from the nature of their jobs. Lifting, moving, transferring, and otherwise handling residents with reduced mobility results in serious injury to caregivers in the form of neck, back, shoulder, elbow, knee, or hip injuries. Additionally, caregivers are subject to physical violence in their workplace from residents, suffering significant intentional injuries.

Further, bloodborne and respiratory illnesses are widespread in caregivers' workplaces. The COVID-19 Pandemic heightened the risks of caregiving for the elderly and disabled, with a fatality rate exceeding the rate for extremely dangerous occupations like logging and commercial fishing.

Of course, these risks to caregiver safety and health are only exacerbated by the 24-hour nature of the work at AFHs.

⁸⁰ CP at 580:2-6 (McKee Decl. and report).

Always operating on the verge of exhaustion, live-in caregivers at AFHs are significantly more susceptible to workplace illnesses and injuries. And the rates of those illnesses and injuries are incredibly high, exceeding the rates of injury and illness in factory work.⁸¹

Taken together, the record establishes that live-in caregiving work at AFHs is dangerous. Just like the plaintiffs in *Martinez-Cuevas*, the Caregivers “worked long hours in conditions dangerous to life and deleterious to their health” in part because Defendants’ AFHs “were operated around-the-clock” and the Caregivers “worked over 40 hours per week” to provide that care.⁸² The Caregivers were exposed to “to physical strains... and risk of contracting diseases and injuries” from residents at the AFH.⁸³ And Defendants “do[] not dispute that”

⁸¹ Factory work is one of the professions explicitly identified by the Washington Constitution as requiring statutory protections. Wash. Const. art. II, § 35.

⁸² *Martinez-Cuevas*, 196 Wn.2d at 520.

⁸³ *Id.*

work at AFHs generally “is dangerous to the health of” caregivers.⁸⁴

Viewing Defendants’ evidence in the light most favorable to them, it at most suggests that they may run AFHs that are safer than the average. But this is insufficient. The Court looks to the danger in the industry,⁸⁵ and the danger to caregivers at AFHs is undeniable.

Defendants attempt to evade this conclusion with a variety of category errors. As one example, Defendants attempt to distinguish *Martinez-Cuevas* from this case. They argue that the dairy workers “were denied [overtime premium payments]

⁸⁴ *Id.* at 520-521. *See* CP at 580:2-6.

⁸⁵ *Martinez-Cuevas*, 196 Wn.2d at 520-521 (finding that dairy work as a whole is dangerous, describing the types of injuries that dairy workers as a group can suffer, and noting that overtime work is particularly dangerous). A test that turned on individual injuries, or on the safety of individual workplaces, would render entitlement to minimum labor standards dependent on finding that a worker had been injured, or their workplace was unsafe. Such a scheme is unworkable and undermines the remedial nature of the MWA.

because a categorical exemption applied to all dairy workers” while the “live-in” exemption “does not apply to all adult family home caregivers,” rather it applies only to those that live at the AFHs.⁸⁶ Defendants have simply got this wrong; the exemption in *Martinez-Cuevas* applied to all dairy workers, but was only meaningful for those that worked overtime. The same is true here, the live-in exemption applies to all AFH workers but is only meaningful if those workers live where they work.

Similar confusion about the nature of the Privileges and Immunities clause and article II, section 35 of the Washington Constitution permeates Defendants’ position. For example, Defendants assert that the relevant question is whether live-in caregiving is more dangerous than caregiving work.⁸⁷ This is in error. In *Martinez-Cuevas* the Court made its determination about the danger of the occupation of “dairy work” citing

⁸⁶ Brief of Respondents at 20-21.

⁸⁷ Brief of Petitioners at 25-26.

national and state data for injuries and illnesses in the industry as a whole.⁸⁸ Here, the record establishes that caregiving work at AFHs is highly dangerous, meaning that all AFH caregivers should have the protections of the MWA; and therefore the live-in exemption for live-in caregivers at AFHs is unconstitutional, absent a reasonable ground for excluding them.⁸⁹

2. There is no “reasonable ground” for granting AFH operators an exemption from the MWA for their live-in employees.

The history of the MWA and its exemptions provides no “reasonable ground” for the “live-in” exemption; indeed, it provides *nothing at all* to explain the legislature’s action.⁹⁰ Defendants do not dispute the lack of any MWA legislative history explaining the legislature’s decision to exclude workers

⁸⁸ *Martinez-Cuevas*, 196 Wn.2d at 520-521.

⁸⁹ Even if Defendants were correct about the analysis, the Caregivers’ expert, Dr. Grabowski, provided uncontroverted evidence that the chronic lack of sleep suffered by live-in caregivers heightens the risk of injury and illness for those caregivers. CP at 471:7-19.

⁹⁰ See Section III.D. *supra*.

from its basic safety and health protections if they live where they work.

In the absence of any plain statements about the exemption, Defendants invite this Court to guess at the legislature's actual motives.⁹¹ Defendants urge this Court to draw an inference that the legislature must have intended to protect AFHs from economic costs related to having employees, despite the lack of any reference to AFHs or associated entities in the MWA, and no reference to the MWA in the later-enacted laws that created and regulate AFHs.⁹² Defendants attempt to backfill

⁹¹ Defendants invite this speculation despite their call for this Court to not “second-guess” the legislature in matters of economic legislation. Brief of Petitioner at 15-16. Parenthetically, Defendants’ argument that economic regulation of a business under the police power insulates the challenged regulation from *any* court review has also been rejected by this Court. *Washington Food Indus. Ass’n & Maplebear, Inc. v. City of Seattle*, 1 Wn.3d 1, 40-42, 524 P.3d 181 (2023) (J. Johnson, concurring); *see also Matter of Recall of Fortney*, 196 Wn.2d 766, 777, 478 P.3d 1061 (2021) (Washington courts have the authority to determine whether laws are constitutional).

⁹² Brief of Petitioner at 18, 26-28.

legislative intent based on their unsubstantiated assertion as to the economic impact on their businesses of paying a fair wage,⁹³ the subsequent passage of unrelated statutes, and assumptions about legislative policy preferences without offering any direct evidence to support that the legislature actually considered, let alone adopted the position Defendants assert.

⁹³ The Caregivers note that other states have authorized the equivalent care environment to the AFH without the live-in caregiver exemption. *See* CP at 470:11-15 (Dr. Grabowski expert report, ¶ 29) (residential care facilities for the elderly in California function like AFHs in Washington); *see also* LILIA GARCIA BROWER, THE 2002 UPDATE OF THE DLSE ENFORCEMENT POLICIES AND INTERPRETATIONS MANUAL (REVISED) (2019) https://www.dir.ca.gov/dlse/DLSEManual/dlse_enfmanual.pdf at §46.5 (“Employees in the ‘Health Care Industry’ ... who are... required to live on the employer’s premises (residential care facilities, for instance) or working 24-hour shifts, must be paid for all hours they are required to remain on the employer’s premises....”). Paying employees for all the hours they work has not bankrupted the industry in California. RCFES By the Numbers, CALIFORNIA ASSISTED LIVING ASSOCIATION, https://www.caassistedliving.org/CALA/Residents__Families/Senior_Living_in_California/RCFEs_by_the_Numbers.aspx#:~:text=Since%202007%2C%20DSS5%20reports,increased%20by%20about%2018%20percent (last visited June 11, 2025) (documenting the scale of RCFEs in California).

This Court has already rejected the invitation to “hypothesize facts to justify a legislative distinction” in analyzing the existence of a reasonable ground for granting a privilege or immunity.⁹⁴ *Martinez-Cuevas* is conclusive on this point. There, as here, there was no legislative history for the MWA specifically explaining the challenged exemption. And there, as here, defendants had only offered legislative statements from statutes other than the MWA and assertions about the cost of complying with minimum labor standards as the rationale justifying the exemption.⁹⁵

The *Martinez-Cuevas* Court summarily dismissed these sources as insufficient to provide a reasonable ground: “[t]he

⁹⁴ *Martinez-Cuevas*, 196 Wn.2d at 523. See *Bennet*, 2 Wn.3d at 449 (“unlike rational basis review, the reasonable ground test does not allow courts to hypothesize facts to justify a legislative distinction”) (cleaned up); see also *Schroeder*, 179 Wn.2d, at 574 (“Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction”); *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 268, 481 P.3d 1060 (2021) (quoting *Schroeder*, 179 Wn.2d, at 574).

⁹⁵ *Martinez-Cuevas*, 196 Wn.2d at 524.

history of unrelated issues and statutes offers little in the way of legislative intent”⁹⁶ and provides no “convincing legislative history that illustrates a reasonable ground for granting the challenged... exemption.”⁹⁷ Under those circumstances, the Court found that the objective of the MWA (“to protect the health and safety of Washington workers, as required by article II, section 35”⁹⁸) was clearly inconsistent with an exemption that excluded workers in dangerous jobs from the MWA’s protections, constituting “an impermissible grant of a privilege or immunity under article I, section 12 of Washington’s constitution.”⁹⁹ The Court must reach the same conclusion here.

Even if the legislature had articulated its purpose in enacting the live-in exemption to match Defendants’ wishful thinking, it would still be insufficient to provide a reasonable

⁹⁶ *Id.*

⁹⁷ *Id.* at 524-525.

⁹⁸ *Id.* at 525.

⁹⁹ *Id.*

ground for the granting of a privilege to AFH employers. In order to qualify as “reasonable grounds”, legislative justifications for a privilege or immunity “must rest on real and substantial differences bearing a natural, reasonable, and just relation to the subject matter of the act.”¹⁰⁰

This Court recently provided a telling analysis of this exacting standard. Where a challenged statute of repose was enacted to prevent “even one defendant [from having] to answer a stale claim;”¹⁰¹ the existence of exceptions to the statute of repose made it inconsistent with that stated rationale, as it would allow some stale claims to proceed, and so there was no reasonable ground for the privilege granted by the statute of repose.¹⁰² It is unlikely that legislative intent to foster AFH businesses and control their costs “is consistent with” protecting

¹⁰⁰ *Ockletree*, 179 Wn.2d at 783 (cleaned up).

¹⁰¹ *Bennett*, 2 Wn.3d at 450.

¹⁰² *Id.* at 450-451.

the health and safety of Washington workers for the purposes of the reasonable grounds test.

In this case, the “live-in” exemption for caregivers at AFHs has *no stated legislative justification*, much less a justification bearing “a natural, reasonable, and just relation to”¹⁰³ the MWA’s protection of worker health and safety, “the principle for which the statute really stands.”¹⁰⁴ In the absence of any other explanation, the long discriminatory history of excluding domestic workers from labor standards suggests the real basis for this exclusion: the work of caregivers is categorized as “women’s work” or otherwise devalued on discriminatory grounds, resulting in its exclusion from labor protections.¹⁰⁵ Sexist or racist reasons simply are not “just” or “reasonable” and cannot provide a “reasonable ground” for cutting vulnerable

¹⁰³ *Ockletree*, 179 Wn.2d at 783.

¹⁰⁴ *Bennett*, 2 Wn.3d at 449 (cleaned up).

¹⁰⁵ See Section III.C *supra*.

workers in dangerous jobs out of Washington’s minimum labor standards.¹⁰⁶

D. Invalidation of the “live-in” exemption should apply retroactively.

Despite the Superior Court declining to address the issue below,¹⁰⁷ Defendants now ask this Court to rule that the order

¹⁰⁶ Discrimination that is codified in the law “is a persistent and systemic injustice that predates this nation’s founding” and it is incumbent on lawyers and this Court to “remember that even the most venerable precedent must be struck down when it is incorrect and harmful.” WA SUPREME COURT, LETTER TO MEMBERS OF JUDICIARY & LEGAL COMMUNITY (2020) <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>

¹⁰⁷ Defendants’ request for this ruling is not properly before this Court. As an effort to ensure only issues ripe for review reach this Court, Washington Rules of Appellate Procedure (“RAP”) limit the categories of issues on which requests for direct review may be sought. RAP 4.2. A challenge to the retroactive enforcement of available remedies is neither “authorized by statute” for direct review, nor a determination that the “law [is] unconstitutional,” nor necessary to resolve “conflicting decisions” of the courts of appeal, nor an action involving a “state officer,” nor the “death penalty.” RAP 4.2(a)(1)-(3), (5)-(6). Furthermore, Defendants have made no showing that this portion of their appeal involves “a fundamental and urgent issue of broad public import which requires prompt and ultimate

finding the live-in exemption unconstitutional should only apply prospectively. Because the constitutionality of exemptions to MWA protections for workers in dangerous jobs has been in question for years, and because the equities of the circumstances strongly favor paying workers what they are owed, the Court should reject Defendants' request.

In Washington, there is a strong presumption in favor of applying new legal rules retroactively,¹⁰⁸ prospective-only application is exceedingly rare.¹⁰⁹ To determine whether circumstances warrant such a rare departure, Washington courts allow prospective-only application of the law only when all the following conditions are met:

- (1) The decision established a new rule of law that either overruled clear precedent upon which the parties relied or was not clearly foreshadowed; (2)

determination.” See RAP 4.2(a)(4). Retroactive application of rulings is the norm. See *infra*.

¹⁰⁸ *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 271, 208 P.3d 1092 (2009).

¹⁰⁹ *McDevitt v. Harborview View Med. Ctr.*, 179 Wn.2d 59, 75-76, 316 P.3d 469 (2013).

retroactive application would tend to impede the policy objectives of the new rule; and (3) retroactive application would produce a substantially inequitable result.¹¹⁰

The Caregivers note, however, that the United States Supreme Court case *Chevron Oil*, on which the test quoted above relies, may have been essentially overruled.¹¹¹ This Court has continued to apply *Chevron Oil* through *Lunsford*,¹¹² but a key thread from cases questioning *Chevron Oil* remains in Washington's jurisprudence: "the decision to apply a new rule prospectively must be made in the decision announcing the new rule of law."¹¹³ *Martinez-Cuevas* established a new rule: the

¹¹⁰ *Lunsford*, 166 Wn.2d at 272 (citing *Chevron Oil Co. v. Hudson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-356 (1971)).

¹¹¹ *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517 (1993)

¹¹² See, e.g., *McDevitt v. Harbor View Med. Ctr.*, 179 Wn.2d 59 at 75; see also *Lunsford*, 166 Wn.2d at 288-292 (J. Madsen, concurring) (explaining state courts' reasons for departing from *Harper* and concluding that Washington does not follow *Harper* for state law claims).

¹¹³ *Lunsford*, 166 Wn.2d at 279.

Washington Privileges and Immunities clause requires that workers in dangerous professions get the protections of the MWA in the absence of a reasonable ground for denying them those protections. The Court specifically did not decide that the rule should be applied prospectively, and therefore it was retroactive.¹¹⁴ The rule from *Martinez-Cuevas* is being applied here, and it cannot now be applied only prospectively to benefit Defendants.

Even if the rule were new today, Defendants cannot satisfy any of the *Lunsford* elements justifying prospective-only application. First, finding the live-in exemption unconstitutional as violating the Privileges and Immunities clause for workers in dangerous employment was, at a minimum, clearly foreshadowed by this Court's decision five years ago in

¹¹⁴ *Martinez-Cuevas*, 196 Wn.2d at 525 & n.4 (specifically declining to reach the issue); *id.* at 533 & n.5 (J. Gonzalez, concurring) (indicating that prospective-only application would be improper); *compare id.* at 561-563 (J. Johnson, dissenting) (urging the prospective-only application of the law).

Martinez-Cuevas. The Court made clear that exemptions from the MWA that exclude workers in dangerous occupations are subject to precisely the present constitutional challenge. Given this clear warning, Defendants were on notice that the exemption they relied on was constitutionally suspect.

Second, retroactive application would further, rather than impede the policy objectives of the decision. The aim of the Superior Court's decision is to ensure that employees in dangerous industries are guaranteed access to their fundamental rights. The Caregivers have been denied the protections they are constitutionally guaranteed, and retroactive application would provide some measure of a remedy to this wrong.¹¹⁵ Conversely, prospective only application would undercut these policy

¹¹⁵ See *Martinez-Cuevas*, 196 Wn.2d at 533 & n.5 (J. Gonzalez, concurring) ("retroactive application of the decision will further, rather than impede, the policy objective of the decision. Farmworkers deprived of overtime pay have been denied equal protection of the law, and retroactive application would give them a remedy for this constitutional wrong.")

objectives by requiring the Caregivers to absorb Defendants' cost of doing business over the course of their employment.¹¹⁶

Third, retroactive application does not produce an inequitable result. The Caregivers, as workers in a dangerous occupation, were unconstitutionally denied the basic health and safety protections of the MWA, including the minimum wage, overtime premium payments, and paid sick leave. And these are the very protections that are intended to prevent the kinds of injuries and suffering that the Caregivers experienced. There is nothing equitable about a system that allows an employer to gain a business advantage or increase its profits by paying workers less than a minimum wage and denying them sick leave. The financial burden Defendants raise is weak and speculative and

¹¹⁶ The Caregivers' lawsuit covers wages owed for defined periods starting in 2019. Generally, suits under the MWA have a three-year statute of limitations. RCW 4.16.080(2).

simply cannot outweigh the price already paid by the Caregivers through their physical, psychological, and emotional health.¹¹⁷

V. CONCLUSION

RCW 49.46.010(3)(j) *wholly excludes* live-in caregivers at AFHs from the most fundamental worker safety and health protections available in Washington. Live-in caregiver jobs at AFHs are highly dangerous, putting workers at risk of grievous injuries and illnesses. In the absence of any legislative justification, and in the context of the deeply discriminatory history of modern labor standards, this exclusion offends the Washington Constitution’s Privileges and Immunities clause at article I, section 12.

Accordingly, this Court should affirm the Superior Court’s ruling that the live-in exemption for caregivers at AFHs is

¹¹⁷ See *Martinez-Cuevas*, 196 Wn.2d at 533 & n.5 (J. Gonzalez, concurring) (“[w]hile I recognize DeRuyter relied on a statute that had not yet been challenged, its reliance interest is outweighed by the overriding equities that favor retroactivity.”).

unconstitutional, entitling the Caregivers to the protections of the MWA. This Court should also apply the usual retroactivity rule, allowing the Caregivers to recover for years of low wages and unsafe working conditions imposed by Defendants.

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Respectfully submitted this 11th day of June 2025,

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

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

/s/ Janae Choquette
JANAE CHOQUETTE, WSBA #58701

FAIR WORK CENTER
2100 24th AVE S., STE 270
SEATTLE, WA 98144
(206)-331-3824
Attorneys for Plaintiffs

FAIR WORK CENTER / WORKING WASHINGTON

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