To be Argued By:
Erin Beth Harrist
Time Requested: 20 Minutes

New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

CRISPIN HERNANDEZ; WORKERS' CENTER OF CENTRAL NEW YORK; WORKER JUSTICE CENTER OF NEW YORK, *Plaintiffs-Appellants,*

-against-

THE STATE OF NEW YORK and GOVERNOR ANDREW CUOMO, in his official capacity, *Defendants-Appellants,*

NEW YORK FARM BUREAU, INC., *Intervenor-Defendant-Respondent.*

BRIEF OF PLAINTIFFS-APPELLANTS

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QUESTIONS PRESENTED

1. Whether Article 1, Section 17 of the New York Constitution, which provides that "employees shall have the right to organize and collectively bargain through representatives of their own choosing," protects farmworkers.

   The lower court erroneously held that Article 1, Section 17 does not confer a constitutional right to organize upon farmworkers.

2. Whether the farmworker exclusion in the State Employment Relations Act (SERA) is subject to heightened scrutiny because the right to organize, located in New York's Bill of Rights, is a fundamental right in New York.

   The lower court failed to address this question, having erroneously concluded that farmworkers have no constitutional right to organize.

3. Whether the farmworker exclusion in the SERA violates the equal protection clause of the New York Constitution (Article 1, Section 11) because it was rooted in racial discrimination.

   The lower court held that the SERA exclusion was not rooted in racial discrimination against black workers.

4. Whether, in dismissing Plaintiffs' equal protection claim, the court below failed to accept as true the allegations set forth in the complaint regarding the racially discriminatory reason behind the farmworker exclusion.

   The court below improperly engaged in fact-finding by concluding that Plaintiffs "failed to demonstrate" that the SERA exclusion was racially motivated.

5. Whether the farmworker exclusion in the SERA is subject to heightened scrutiny because farmworkers are a disempowered and marginalized community.

The lower court erroneously held that discrimination against farmworkers is not subject to heightened scrutiny.

6. Whether Plaintiffs have alleged that the farming industry has sufficiently changed since the 1937 enactment of the farmworker exclusion in the SERA to render the exclusion invalid under rational basis review.

   The lower court erroneously held that the exclusion survives rational basis review.

PRELIMINARY STATEMENT

This case presents the issue of whether New York State can exclude farmworkers, some of the most vulnerable and mistreated laborers in the nation's workforce, from the State law that protects workers' right to organize, the State Employment Relations Act ("SERA"). While the overwhelming majority of New York's workers enjoy protections from employer retaliation for organizing, farmworkers remain unprotected. The State Defendants agree with Plaintiffs that the exclusion of farmworkers from SERA's protection is unconstitutional because it is inconsistent with the fundamental right to organize conferred by Article 1, Section 17 of the New York Constitution. The only party in this case arguing that the farmworker exclusion is valid is the powerful trade association representing the agricultural industry, the New York Farm Bureau. Having intervened as a Defendant in the case, the Farm Bureau moved to dismiss the complaint on the grounds that the discriminatory exclusion is subject to only rational basis review, the traditionally lax standard of review applicable to economic legislation. The court below granted that motion in a summary decision that failed to accept the complaint allegations as true as required on a motion to dismiss and failed to apply any controlling Court of Appeals precedent on constitutional interpretation. Plaintiffs now appeal and ask this Court to reverse the lower court's order pursuant to its de novo review of the sufficiency of the complaint.

Plaintiffs raise four claims, each of which independently provide grounds to reverse the lower court's order. First, the farmworker exclusion is subject to heightened review and ultimate invalidation because it conflicts with the constitutional mandate in Article 1, Section 17 of the New York Constitution's Bill of Rights. The constitutional provision provides that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." When interpreting constitutional provisions, the Court of Appeals looks first and foremost to the plain language, recognizing the deliberation and precision that attends the process of constitutional amendment. The constitutional provision at issue here protects "employees" without limitation or reservation. And there is no evidence that the framers of the provision intended the term "employee" to exclude farmworkers. Moreover, this right to organize is fundamental, as repeatedly recognized by its framers who purposefully placed the provision in the Bill of Rights. As the allegations demonstrate, the exclusion means that farmworkers such as Plaintiff Crispin Hernandez are effectively prevented from exercising their fundamental right to organize and collectively bargain.

Second, the farmworker exclusion is also subject to heightened review because it was rooted in legislation enacted for a racially discriminatory purpose: to exclude jobs disproportionately held by blacks from the progressive labor reforms of the New Deal. As admitted by the Farm Bureau in the court below, the New York legislature borrowed the exclusion whole-cloth from federal New Deal-era legislation and enacted it *for the same reasons*. Because the exclusion was substantially motivated by racial animus, it is subject to heightened scrutiny and invalidation. With regard to this claim, the lower court failed to accept as true Plaintiffs' allegations that the legislation was rooted in racism and, instead, granted the motion to dismiss because Plaintiffs "failed to demonstrate that the SERA exclusion violates equal

protection." In reaching this conclusion, it is unclear whether the court below wrongly discounted Plaintiffs' allegations of racial motivation or whether it concluded that these allegations, even if true, would not support an equal protection claim. In either event, the court below erred.

Plaintiffs' third claim asserts that New York Constitution's equal protection clause prohibits enactments that single out politically powerless and marginalized groups for differential treatment. This doctrine rests upon the recognition that such groups do not enjoy equal access to the legislative process and the judiciary must therefore be especially vigilant to protect them. This is clearly the case with farmworkers, who often lack lawful immigration status and cannot vote, speak little or no English, live in isolation on the employer's land, and are predominantly racial and ethnic minorities from out of State. Court of Appeals precedent extends special solicitude to such marginalized individuals and requires the application of intermediate review to discriminatory enactments like the one at issue here.

All three of these claims require the application of heightened judicial scrutiny to SERA's exclusion of farmworkers from the protection of the right to organize and bargain collectively. The New York statute cannot survive such scrutiny. As the State itself recognizes, no substantial State interest justifies the exclusion, nor is it narrowly tailored.

Finally, the statutory exclusion fails even if it is subject to only rational basis review. Even assuming that the unique needs of family farms justified the exclusion in the 1930s when it was enacted, Plaintiffs have sufficiently alleged that dramatically changed circumstances in the agricultural industry over the last eight decades as a result of mechanization and consolidation render the exclusion of disadvantaged farmworkers irrational and unconstitutional today.

STATEMENT OF FACTS

In reviewing an order dismissing a complaint under CPLR 3211(a)(7), this Court must "accept the facts as alleged in the complaint as true [and] accord plaintiffs the benefit of every possible favorable inference[.]" *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The factual allegations that must be accepted as true for the purposes of this motion, as well as the legislative and legal history of the SERA exclusion, are set forth below.

The Farmworker Exclusion and The Termination of Mr. Crispin Hernandez

The New York State Employment Relations Act ("SERA"), enacted in 1937, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interferences, restraint, or coercion of employees." Lab. Law § 703. SERA creates a regulatory scheme that protects employees' ability to organize and to bargain collectively with their employers through chosen representatives. *See id.* §§ 704, 706.

SERA restricts the right to organize and collectively bargain by adopting a special statutory definition of the term "employee" that explicitly excludes "individuals employed as farm laborers." *Id.* § 701(3)(a). Without SERA's protections, farmworkers who attempt to organize – including through informal meetings to discuss workplace conditions – are swiftly terminated by employers. (R. 67-70 at ¶¶ 133-49.)[1]

The termination of Plaintiff Crispin Hernandez presents just one example of the consequences farmworkers face because of the SERA exclusion. Mr. Hernandez was an employee of Marks Farms, an industrial farm in Lowville, New York and one of the largest

[1] Citations to "R." are citations to the Joint Record on Appeal.

dairies in New York State. (R. 59-60 at ¶¶ 81-83.) When Mr. Hernandez and his coworkers at Marks Farms began to explore, along with the assistance of farmworker advocates from Plaintiff organizations Workers' Center of Central New York (WCCNY) and Worker Justice Center of New York (WJCNY), the possibility of organizing themselves to improve workplace conditions, management at the farm retaliated against him by giving him a less desirable job assignment (R. 61-62 at ¶¶ 94-99); spied on a meeting that was being held between five workers, including Mr. Hernandez, during off-hours in a personal residence of the workers (which was rented from Marks Farms) (R. 62-63 at ¶¶ 100-106); called the police to break up the meeting and intimidate the workers, and unsuccessfully attempted to get the lead organizer of the WCCNY, Rebecca Fuentes, who was present at the meeting, arrested (R. 63-64 at ¶¶ 106-14); fired Mr. Hernandez and another employee one day after they were seen with employees and volunteers of WCCNY and WJCNY (R. 65-66 at ¶¶ 119-21, 123-27); and required other employees who remained at Marks Farms to sign a form on pay day stating whether they would allow Ms. Fuentes to visit them in their homes (R. 60, 67 at ¶¶ 90, 131-32).

As a farmworker, Mr. Hernandez is unable to seek protection from the Public Employment Relations Board ("PERB"), which administers SERA and is authorized to take remedial measures, including awarding equitable and compensatory relief. *See* Lab. Law § 706.[2] Mr. Hernandez's experience, along with that of many other farmworkers, illustrates the harm that flows directly from the lack of protection for farmworkers who discuss workplace conditions and attempt to organize. (R. 67-70 at ¶¶ 134-38, 142-49.)

New York's Farmworkers

[2] Prior to July 2010, the State Employment Relations Board ("SERB") administered SERA. SERB no longer exists. Lab. Law § 717.

The statutory exclusion is particularly harmful because of the systemic abuse and discrimination faced by farmworkers in New York. (R. 58 at ¶¶ 70-76.) New York's farmworkers are predominantly racial and ethnic minorities, largely immigrants from Mexico and Central America. (R. 56 at ¶ 62.) Their wages are far below the poverty level and they often have very low levels of educational attainment. (R. 56 at ¶¶ 60-61.) Because of these characteristics, compounded by the fact that many farmworkers are out of state residents and lack lawful immigration status, farmworkers are subjected to many forms of discrimination and abuse. (R. 57-58 at ¶¶ 64, 66, 73-74.) They work exceedingly long hours in one of the most dangerous jobs in the State, but do not have the same statutory rights as other employees, such as a right to overtime pay or a day of rest. (R. 57-58 at ¶¶ 68-72.) In addition, farmworker women, who face a high rate of sexual harassment, are unable to use collective action as a tool to combat such unlawful and demeaning conduct because of the threat of immediate termination or others types of retaliation. (R. 68 at ¶ 138.) These circumstances make the inability to act collectively devastating to this community.

The History Underlying the Farmworker Exclusion

SERA and its legislative history do not provide a policy justification for the farmworker exclusion. (R. 52 at ¶ 37.) However, a review of the legislative record demonstrates that the exclusion traces its statutory lineage to the federal agricultural exclusions in New Deal era legislation including the National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA). (R. 48-49 at ¶¶ 17-23.) These exclusions were motivated by the need to appease Southern Democrats, who relied upon and actively sought to maintain the social and economic subjugation of black workers, who were, at the time, disproportionately employed as agricultural workers. (R. 48-49 at ¶¶ 17-20.) The racism behind New Deal legislation was made explicit by

some members of Congress during debates on the FLSA. For instance, Senator "Cotton" Ed Smith from South Carolina, who chaired the Agriculture Committee, referred to an early draft of the FLSA, and one that did not exclude farmworkers from its protection, as "unconscionable" and compared it to an anti-lynching measure (which he also opposed). 81st Cong. Rec. 7881-82 (1937). He went on to say that he believed "the main object of this bill is, by human legislation, to overcome *the splendid gifts of God to the South*." *Id.* (emphasis added). Representative J. Mark Wilcox of Florida discussed the "problem of Negro labor" at length, expressing support for the perpetuation of the "difference in the wage scale of white and colored labor" in the South and further expressing concern about the possibility that the federal government might "prescribe the same wage for the Negro that it prescribes for the white man." 82nd Cong. Rec. 1404 (1937). Wilcox opposed many New Deal measures because, he stated, "[y]ou cannot put the Negro and the white man on the same basis and get away with it." *Id.* In response to political opposition of this sort, and to secure the necessary votes to ensure passage of the labor reform bills despite such opposition, the Social Security Act, the FLSA, and the NLRA all contained an agricultural exclusion.[3]

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[3] Legal and historical scholarship has repeatedly examined and confirmed that the subjugation of the black population was a driving concern for the powerful Southern Democrats, leading to concessions such as the farmworker exclusion. *See* Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* 17 (2005) ("[T]he wide array of significant and far-reaching public policies that were shaped and administered by the New Deal and Fair Deal era of the 1930s and 1940s were crafted and administered in a deeply discriminatory manner. This was no accident. Still an era of legal segregation in seventeen American states and Washington, D.C., the southern wing of the Democratic Party was in a position to dictate the contours of Social Security, key labor legislation, the GI Bill, and other landmark laws that helped create a modern white middle class in a manner that also protected what these legislators routinely called 'the southern way of life.'"); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1342-43 (1987) ("To understand the motivations of southern congressman, it is

Members of Congress were well aware that excluding agricultural and domestic laborers from social legislation would have an adverse and disproportionate impact on black Americans. In testimony on the Social Security Act of 1935 before the Senate Finance Committee, the Executive Secretary of Federal Council of Churches, Department of Race, reported:

> Of 4,892,872 Negroes gainfully employed in 1930, more than 2,000,000 were in agriculture and 1,000,000 were in domestic service. . . . These facts make clear that about three-fifths of all Negroes gainfully employed in the United States will be excluded by the very terms of this bill from its unemployment and old-age benefits.

Econ. Sec. Act: Hearings on S. 1130 Before the S. Comm. on Fin., 74th Cong. 487 (1935). The National Association for the Advancement of Colored People (NAACP) warned Congress that "the more it studied the bill, the more holes appeared, until from a Negro's point of view it looks like a sieve with the holes just big enough for the majority of Negroes to fall through." *Id.* at 640-41. The Executive Secretary of the National Urban League expressed concern about the impact more bluntly: "Shutting off benefits to [farmworkers] and domestic and personal-service workers would immediately exclude almost two-thirds of all Negro workers." *Unemployment, Old Age and Soc. Ins.: Hearings on H.R. 2827 Before the Subcomm. of the H. Comm. on Labor*, 74th Cong. 327 (1935).[4] Despite these objections, Congress passed the NLRA and its related New Deal legislation with the agricultural exemptions.

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necessary to understand the southern plantation as a social system – a system threatened by many New Deal reforms."); *see also* Juan 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); Harvard Sitkoff, *A New Deal for Blacks: The Emergence of Civil Rights as a National Issue: The Depression Decade* (1978); Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (2008).

[4] Farmworkers, domestic workers, and personal-service workers are all excluded from SERA's definition of "employee." *See* Lab. Law § 701(3)(a).

The NLRA, also known as the Wagner Act after its sponsor New York Senator Robert F. Wagner, covered only certain laborers engaged in businesses affecting interstate commerce, leaving approximately one million private sector workers in New York without any labor law protections. (R. 49 at ¶ 21.) In an effort to extend coverage to workers in New York, the State legislature began considering a "little Wagner Act" shortly after the federal statute was enacted. (R. 49 at ¶ 22.) Just weeks after the Supreme Court upheld the federal law after a due process and commerce clause challenge, *see National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the New York legislature conformed the State act to its federal analog, including adopting the NLRA's exclusion of farmworkers. (R. 49 at ¶ 23.) This State bill was enacted into law as the New York State Labor Relations Act, later renamed the State Employment Relations Act, or SERA.

New York Constitutional Convention of 1938 and the Addition of Article I, Section 17 to New York's Bill of Rights

One year after the enactment of SERA, New York amended its Constitution. It adopted, as a new provision in the Bill of Rights, Article I, Section 17. This provision mandates, in relevant part, that "[e]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing." While there were several proposals to adopt lengthy definitions of the term "employee" in the provision and provide more specific protections for labor in the Constitution, those proposals were rejected in favor of this simple, clear, and universal declaration of rights. Revised Record of the N.Y. Constitutional Convention ("Revised Record") at 1215-26, 1249, 1595-96, 2205, 2241-48 (1938).

The Constitutional Record of 1938 reveals that the placement of the right to organize and collectively bargain in the Bill of Rights was a deliberate choice by the drafters to highlight its significance. The original proposal would have included the right to organize in a different part of

the Constitution. But the acting chairman in the floor debate recognized that the provision would "be better in the Bill of Rights" and made a procedural suggestion to "bring it into [its] proper place in the Constitution." *Id.* at 2244. As a result, the provision was moved to its current location in the Bill of Rights.

Numerous delegates stressed the importance of recognizing the right to organize as a fundamental right. Revised Record at 1218-19, 1222, 1226. (R. 50 at ¶¶ 26-28.) Senator Robert Wagner, a delegate to the 1938 Convention and the same Senator from whom the National Labor Relations Act takes its unofficial name (the "Wagner Act"), referred to the right as "fundamental" numerous times. Revised Record at 1236, 1246, 1247. (R. 50 at ¶ 28.) He insisted that "the most fundamental right of the American worker today is the right to organize and the right to bargain collectively." Revised Record at 1246. Delegate Edward Weinfeld, a representative of the Committee on Industrial Relations, the committee that most carefully studied the labor amendments to the Constitution in 1938, recommended that this provision be adopted precisely because a "fundamental right in a statute of necessity is not as effective as a constitutional provision. This provision should be contained in the Constitution as a declaration of policy or principle, in which we firmly believe." *Id.* at 2205.

PROCEDURAL HISTORY

On May 10, 2016, Plaintiffs commenced the present action, seeking injunctive and declaratory relief against the State of New York and Governor Andrew Cuomo, in his official capacity, for failing to protect their right to organize as required by Article 1, Section 17 of the New York Constitution. In addition to Article 1, Section 17, Plaintiffs bring claims under the New York Constitution's equal protection and due process clauses. The State Defendants agree with Plaintiffs that the exclusion violates equal protection. However, the New York Farm

Bureau, the agricultural industry's trade association and lobbying group, moved to intervene in this case on June 20, 2016, on the premise that it would defend the constitutionality of the SERA exclusion of farmworkers on behalf of its members – private farm employers across the State who benefit from the statutory exclusion of their employees from this protective labor law. The Court granted the Farm Bureau's motion for permissive intervention on October 14, 2016. On November 11, 2016, the Farm Bureau filed a motion to dismiss the complaint. The Court granted that motion in a decision dated January 3, 2018.

THE LOWER COURT'S DECISION

The lower court summarily held that Plaintiffs failed to state a claim upon which relief could be granted and dismissed the complaint in its entirety.

The lower court began by asserting that farmworkers do not have a constitutional right to organize despite the plain language of Article 1, Section 17 that protects the "right to organize and bargain collectively" of "employees" without limitation or restriction. (R. 33 ("Article 1, Section 17 did not create new bargaining rights for those employees who were expressly excluded by the NLRA or the SERA.").) In doing so, the lower court erred in several key respects. First, the lower court failed to apply controlling Court of Appeals precedent on constitutional interpretation, including cases addressing how to interpret the plain language of constitutional provisions. Instead, the court summarily concluded that SERA's definition of the term employee, which excludes farmworkers, is implicitly incorporated into the constitutional text. (R. 33-34.) Second, the lower court ignored the tiered analytic methodology employed by courts in reviewing claims under the State Constitution. Instead, it relied upon non-precedential and inapplicable decisions, including one by a federal district court and several decisions that, to the degree they considered Article 1, Section 17 at all, would have involved applying this

provision to constrain *private employers*. (R. 33-34.) Unlike those cases, this case is about the obligations the Constitution imposes on the State (the traditional entity bound by constitutional precepts).

Moreover, while paying lip-service to the proposition that a court considering a motion to dismiss must accept plaintiffs' allegations as true, the court instead ignored Plaintiffs' allegations and accepted as true factual statements put forth by Intervenor-Defendants in an improperly submitted affidavit by the Executive Director of the Farm Bureau. (R. 31 ("The Farm Bureau alleges collective bargaining would create a disproportionate hardship for farmers due to the seasonality of their labor forces, the perishability of their products and the low prices farmers receive for their goods.").) Indeed, the lower court explicitly relied upon over two hundred pages of material extrinsic to the complaint that the Farm Bureau improperly submitted in support of its motion. (R. 35, 73-346.)

The lower court erred similarly with regard to Plaintiffs' claims that the exclusion of farmworkers from the protections of SERA was rooted in racism and invalid on this basis. This claim turns upon allegations of impermissible motive in the legislative history that resulted in the enactment of SERA. Plaintiffs pled allegations supporting the impermissible motive claim. (R. 48-49 at ¶¶ 17-23.) But the court failed to accept these allegations as true, summarily concluding that the Plaintiffs "have not demonstrated that the Labor Law statutes are racially discriminatory[.]" (R. 34.) The court likewise summarily dismissed Plaintiffs' claim that farmworkers are a discrete and disempowered minority, wholly ignoring the Plaintiffs' allegations regarding who farmworkers are. (R. 34.)

Finally, the lower court entirely ignored Plaintiffs' claim that the exclusion of farmworkers cannot be regarded as rational given the dramatically changed circumstances in the

agricultural industry since SERA was passed over eighty years ago. As pled in the complaint, the farming industry has changed dramatically since the 1930s, becoming substantially more industrialized and mechanized. (R. 53-55 at ¶¶ 46-58.) These changes render the exclusion irrational. Nevertheless, the court again failed to accept these allegations as true and to consider how those facts impact the constitutional analysis.

ARGUMENT

This Court reviews the dismissal of a complaint pursuant to CPLR 3211 de novo and accordingly applies the same standard applied by the court below. Extending no deference to the decision of the lower court, this Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Bynum v. Keber*, 135 A.D.3d 1066, 1066 (3rd Dep't 2016) (citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)); *see also ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208, 227 (2011). Applying this standard to Plaintiffs' four claims, this Court should reverse the lower court's dismissal of the case.

I. The SERA Exclusion is Subject to Heightened Review Because It Directly Conflicts with The Fundamental Right to Organize Established by Article 1, Section 17 of New York's Bill of Rights

The statutory exclusion of farmworkers from the protections of SERA is subject to heightened review because it violates the fundamental right to organize provided by Article 1, Section 17 of the New York Constitution. First, farmworkers are clearly encompassed in the plain meaning of the term "employee" and therefore have "the right to organize" as established in Article 1, Section 17. Second, the right to organize is a fundamental right under the analysis conducted by the Court of Appeals when determining the scope of a constitutional provision. The provision is located in the Bill of Rights, its drafters intended it to be treated as fundamental, and New York

State has a long history of protecting the rights of labor. Because the exclusion infringes on a fundamental right, it is subject to heightened scrutiny.

A. Farmworkers Are Employees Within the Meaning of Article 1, Section 17

The Court of Appeals has repeatedly held that constitutional provisions must, first and foremost, be construed in accordance with their plain meaning. As explained by the Court of Appeals when interpreting Article 1, Section 2 of the Bill of Rights, which provides the right for a trial by jury:

> The most compelling criterion in the interpretation of an instrument is, of course, the language itself. Particularly is this so in the case of a constitutional provision like the one before us where the writing is the deliberate product of a group of men specially selected for and peculiarly suited to the task of its authorship. It is obvious good sense, under such circumstances, to attribute to the provision's authors the meaning manifest in the language they used.

People v. Carroll, 3 N.Y.2d 686, 689 (1958); *see also Schoenefeld v. State*, 25 N.Y.3d 22, 26 (2015) ("It is well settled that, where the language of a statute is clear, it should be construed according to its plain terms.").

The Court of Appeals again reiterated this fundamental principle of analysis in *Matter of Di Brizzi*, 303 N.Y. 206 (1951). At issue in *Di Brizzi* was whether the Attorney General had the power to investigate an alleged relationship between organized crime and State government pursuant to his statutory authority to "inquire into matters concerning the public peace, public safety and public justice." *Id.* at 214 (internal quotation marks omitted). Relying on the fact that the relevant language was enacted into law one month following the entry of the United States into World War I, the petitioner argued that the statutory language should be limited by that historical moment and that, therefore, it should extend only to issues such as riots, insurrections, and sabotage that challenged the authority of the State. *Id.* Despite acknowledging that the Legislature did indeed pass the law due to the war emergency, the Court held that it could not interpret the

statute in such a limited fashion because its express terms were broad and clearly encompassed the situation at hand. *Id.* It reasoned:

> A general law may, and frequently does, originate in some particular case or class of cases which is in the mind of the legislature at the time, but, so long as it is expressed in general language, the courts cannot, in the absence of express restrictions, limit its application to those cases, but must apply it to all cases that come within its terms and its general purpose and policy.

Id. (internal quotation marks omitted).

Applying this analysis to Article 1, Section 17, this Court must first look to the language of the constitutional provision: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." As with the free speech provision of the State Constitution, this language is expansive and broad in scope.[5] By its own terms, it does not limit the meaning of the term "employee." Given the lack of any explicit exclusion, the term "employee" should be interpreted consistent with its definition: a laborer working for another for hire. *See Rosner v. Metro. Prop. & Liab. Ins. Co.*, 96 N.Y.2d 475, 479-80 (2001) ("[W]e construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded definitions as "useful guideposts" in determining the meaning of a word or phrase."); *see also* Restatement (Third) of Agency § 7.07(3) (2006) ("an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work"); "Employee." Merriam-Webster Online Dictionary https://www.merriam-webster.com/dictionary/employee (Jan. 12, 2017) ("a person who works for another person or company for wages or a salary"). This definition is consistent with the legal definition that applies

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[5] The highest courts of two other states, New Jersey and Missouri, have recognized robust protections for violations of the right to organize and collectively bargain enshrined in their respective state constitutions. *See Comite Organizador de Trabajadores Agricolas (COTA) v. Molinelli*, 114 N.J. 87 (1989); *Am Fed. of Teachers v. Ledbetter*, 387 S.W.3d 360 (Mo. 2012) (en banc).

generally in New York's Labor Law. *See* Lab. Law § 2 (an employee is "a mechanic, workingman or laborer working for another for hire").[6] It is clear that Mr. Hernandez and his fellow farmworkers are "employees" under the plain meaning of that term.[7]

B. The Right to Organize is A Fundamental Right in New York

The right to organize is a fundamental right in New York for any of several reasons the New York Court of Appeals has cited when identifying such rights. First, it is located in the Bill of Rights alongside the most fundamental individual liberties such as freedom of speech, the right to a jury trial, the right to vote, and the right to equal protection and due process, and its positive, mandatory duties mirror those of these other fundamental rights. Second, the drafters of the constitutional provision clearly intended it to be a fundamental right, purposefully placing it in the Bill of Rights and repeatedly referring to the right as "fundamental." Finally, the State of New York has a long history of fostering the rights of labor, as it is well-known as the "cradle of the American labor movement."

The right to organize is enshrined in the Bill of Rights, the specific part of the Constitution "designed to protect individual rights against the government." *SHAD Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 502 (1985). It sits alongside the State's most protected liberties: the right to vote (Section 1), to trial by jury (Section 2), to free exercise of religion (Section 3), to be free from cruel cruel and unusual punishment (Section 5), to due process (Section 6), to freedom of speech (Section 8), to peaceably assemble (Section 9), to equal protection (Section 11), and to be free

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[6] The limited SERA definition of "employee" applies to a relatively small section of New York's labor law protections, while the definition contained in Section 2 of the Labor Law has much broader application.

[7] Since the time he began working at Marks Farms in April 2012, he received a weekly paycheck and was on the farm's payroll, he used a punch card to punch in and out daily, and he worked under the direct supervision and direction of the farm employers. (R. 60 at ¶ 88.)

from unreasonable search and seizures (Section 12). N.Y. Const. art. 1, §§ 1-3, 5-6, 8-9, 11-12. The positive, mandatory language of Section 17 mirrors these other fundamental liberties. *Compare* Section 17 ("employees shall have the right to organize and collectively bargain") *with* Section 1 ("no member of this state shall be disenfranchised"); Section 3 ("the free exercise and enjoyment of religious profession and worship . . .shall forever be allowed"); Section 6 ("no person shall be deprived of life, liberty, or property without due process of law"); Section 8 ("no law shall be passed to restrain or abridge the liberty of speech or of the press").

In addition to its placement in the Bill of Rights and the similarity of language to the other well-established fundamental rights, it was also clearly intended to be fundamental by its drafters. *See SHAD Alliance*, 66 N.Y.2d at 500 (looking to the intention of the drafters of the free speech provision to determine if it was intended to protect against private conduct); *Tucker v. Toia*, 43 N.Y.2d 1, 7 (1977) (conducting extensive exploration of the 1938 Constitutional Convention and concluding that the "aid to needy" clause creates "a positive duty upon the State to aid the needy"). The drafters repeatedly referred to the right as "fundamental," and, although the provision was not originally in the Bill of Rights, the drafters moved it there because of its fundamental importance. (*See* R. 50 at ¶¶ 26-29 and *supra* pp. 10-11 (including several references by key players at the 1938 Constitutional Convention to the "fundamental" status of the right to organize).)

These attributes of language and location in the constitutional text support the conclusion that the right to organize is fundamental. But it is also fundamental because of the State's history and tradition of protecting this right. The Court of Appeals has relied on this factor in its free speech jurisprudence. The Court has repeatedly recognized New York's "long tradition, with roots dating back to the colonial era, of providing the utmost protection to freedom of the press." *Matter*

of Holmes v. Winter, 22 N.Y.3d 300, 307 (2013); *see also Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991) ("This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas."). As with New York's history with regard to free speech, New York also has a long history of protecting and fostering the rights of employees to work together to challenge unfair and dangerous workplace practices. Decades before the right to organize and collectively bargain was incorporated into the State Constitution, there was a strong tradition of organizing and collective bargaining among workers in this State. (R. 51 at ¶¶ 30-32.) It is evident from the speeches on the floor of the 1938 Constitutional Convention cited above that the drafters wanted to enshrine Article 1, Section 17 as a fundamental right in New York, in large part because of the important place the right has in this State's history. *See supra* pp. 10-11.

C. The Farmworker Exclusion in SERA Is Subject to Heightened Review Because It Infringes on Farmworkers' Article 1, Section 17 Rights

Given Article 1, Section 17's plain language, its location in the Bill of Rights, the intention of the drafters, and New York's long tradition of fostering the rights of employees, laws that infringe upon the right to organize must face a higher form of scrutiny than rational basis review, the traditionally lax standard of review applicable to economic legislation.

As with the federal courts, the Court of Appeals regularly applies heightened scrutiny to laws that burden rights given special protection under New York's Bill of Rights, such as the right not to incriminate oneself in Article 1, Section 6 and the right to "freely speak" in Article 1, Section 8. *See People v. Pavone*, 26 N.Y.3d 629, 640-41 (2015) (citing the state constitutional analysis in *People v. Conyers*, 49 N.Y.2d 174, 180 (1980), *rev'd on other grounds*, 449 U.S. 809 (1980), which held that penalizing a person for exercising the fundamental right to remain silent "must be scrutinized with extreme care"); *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528-29 (1988)

(applying a strict test under New York's free speech provision to determine whether a reporter must disclose sources, having recognized that courts must review such laws with "particular vigilance"); *see generally Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 332-34 (1976) (discussing the strict standard of review for constitutional claims involving fundamental rights).

The Court also applies a heightened form of review to claims under the aid to the needy clause. In *Tucker*, for instance, the Court struck down a social services law that denied home relief to individuals under 21 who did not live with a parent or guardian and had not commenced a support proceeding against their parents or guardians. 43 N.Y.2d at 4-6. While acknowledging that the law was "in furtherance of a valid State objective," it held that "[t]his valid purpose . . . cannot be achieved by methods which ignore the realities of the needy's plight and the State's affirmative obligation to aid all its needy." *Id.* at 9. The Court ultimately concluded that the law "contravenes the letter and spirit of section 1 of article XVII [the aid to the needy clause] of the Constitution." *Id*; *see also Matter of Aliessa v. Novello*, 96 N.Y.2d 418 (2001) (striking down a social services law denying State Medicaid benefits to certain non-citizens because the law "violates the letter and spirit" of the aid to the needy clause).

D. The Lower Court Failed to Apply Controlling Cases on Constitutional Interpretation and Relied Upon Decisions That Do Not Support the Conclusion that Article 1, Section 17 Incorporated SERA's Limited Definition of the Term "Employee"

Without any reference to Court of Appeals precedent on constitutional interpretation, the lower court concluded that Article 1, Section 17 does not protect Mr. Hernandez on the grounds that the constitutional provision's definition of "employee" implicitly incorporates SERA's exclusion of farmworkers from the definition of "employee." (R. 33-34.) In doing so, the lower court ignored the Court of Appeals' clear instruction that "particularly . . in the case of a constitutional provision . . . the most compelling criterion in the interpretation of an instrument is,

of course, the language itself," nor did it cite to anything in the legislative history indicating that the framers of the provision intended to impose limitations upon the clear and broad language of the constitutional provision. *Carroll*, 3 N.Y.2d at 689. In addition, the lower court failed to cite any precedent supporting the proposition that the terms of *a constitutional provision* can be defined by a specific statutory definition – particularly one that is inconsistent with the common law and plain language definition. (*See* R. 33 (citing to Statutes § 92; *Matter of Perry Orens v. Novello*, 99 N.Y.2d 190 (2002) (interpreting Section 230 of the Public Health Law); *Matter of Sutka v. Conners*, 73 N.Y.2d 395 (1989) (interpreting Section 363-a of the Retirement and Social Security Law and Section 207-a of the Municipal law); *Parochial Bus Sys. v. Bd. of Educ.*, 60 N.Y.2d 539 (1983) (interpreting Section 3813 of the Education Law)).) The approach offered by the lower court turns constitutional analysis on its head. If the Constitution could change based on statutory revision, it would no longer command durability, consistency, and supremacy over the legislative process, but would be constantly subject to modification by the politics of a transient legislative majority.

The notion that Article 1, Section 17 incorporates SERA's definition of the term "employee" is predicated on the same mistake the petitioner made in *Di Brizzi*, discussed above. There, the Court of Appeals rejected the petitioner's argument that a statute should be interpreted consistent with the historical events that may have motivated the passage of the statute, instead looking to the words chosen by the legislative body. When the law is, as here, stated in "general language," it cannot be limited unless there are "express restrictions." *Di Brizzi*, 303 N.Y. at 214. There are no such express restrictions in Article 1, Section 17.

The lower court cites to several cases to support its conclusion that "Article 1 Section 17 did not create new bargaining rights for those employees who were expressly excluded by the

NLRA or the SERA." (R. 33-34.) But these cases are inapposite and not controlling. First, the lower court relies upon *Trustees of Columbia University v. Herzog*, 269 A.D. 24 (1st Dep't 1945). This decision by the First Department is not controlling on this Court, nor should it be persuasive as it was directed at a very different issue. *Herzog* involved the question of whether an exemption from collective bargaining obligations conferred by former Labor Law Section 715 upon Columbia University as a private, educational organization would extend to Columbia's employees who worked in one of the University's commercial buildings and not in support of its educational mission. In concluding that the statutory exemption extended to all of Columbia's employees, the First Department engaged in an extensive parsing of Section 715 and its history. *Id.* at 27-29. Only in passing and as an after-thought did the First Department consider whether such an interpretation of the statute would be inconsistent with Article 1, Section 17 of the Constitution. Finding no inconsistency, the First Department observed that "neither the [State Labor Relations] Board nor the Union which filed an amicus brief" urged a contrary conclusion. *Id.* at 30. In short, the scope of Article 1, Section 17 was not a contested issue in that case, nor was it an issue that was fully explored.[8]

The other cases relied upon by the trial court also do not support the conclusion that farmworkers enjoy no fundamental right to organize. Like *Herzog*, none of those cases offers

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[8] The Court of Appeals summary affirmance in *Matter of Trustees of Columbia Univ. in City of N.Y. v. Herzog*, 295 N.Y. 605 (1945), has no bearing on the constitutional analysis for the reasons set forth above. Even beyond that, the summary affirmance does not indicate the Court of Appeals' approval of that analysis. The Court of Appeals itself has recognized that its own affirmance without opinion does not mean that it has "adopted the opinion of the court below in its entirety." *Adrico Realty Corp. v. City of N.Y.*, 250 N.Y. 29, 44 (1928); *see also Comm'r of Pub. Welfare v. Jackson*, 265 N.Y. 440, 440-41 (1934) (an affirmance without opinion does not mean that the Court of Appeals has endorsed "the theory of law set forth in the opinion of the Appellate Division").

controlling precedent or persuasive authority for the dismissal of Plaintiffs' claims. *McGovern v. Local 456*, 107 F. Supp. 2d 311 (S.D.N.Y. 2000) was a federal district court decision that has no relevance to this case because it involved the question of whether a group of employees, specifically senior assistant county attorneys, had a claim under Article 1, Section 17 against a union for excluding them from a collective bargaining agreement. *Id.* at 313-15. But it is well recognized that constitutional limitations are imposed upon governmental agencies, not private entities such as labor unions. As such, dismissal of Plaintiffs' claims was appropriate because of the lack of "state action." *Id.* at 317-18. It had no occasion to address the State's obligations under Article 1, Section 17 to protect the right to organize for an entire class of excluded workers.[9] That is the claim at issue here.

O'Reilly v. Cahill, 28 A.D.2d 527 (1st Dept. 1967) also did not involve the State's obligations to protect the right to organize. (R. 34.) It involved a claim by members of a teachers union that their private employer had violated their Article 1, Section 17 rights. Relying solely on *Herzog* – which also involved a private employer – the court dismissed the constitutional claim (which, as previously noted, cannot be asserted against a private entity). For this reason, *O'Reilly* does not foreclose Plaintiffs' claims. The final case cited by the trial court is *Railway Mail Association v. Corsi*, 293 N.Y. 315, *aff'd*, 326 U.S. 88 (1945), but that case says nothing about Article 1, Section 17 because it did not involve an Article 1, Section 17 claim. (R. 34.)

[9] In addition, the federal district court in *McGovern* specifically noted that the plaintiffs failed to brief the Article 1, Section 17 claim. 107 F. Supp. 2d at 318 n.2.

II. The SERA Exclusion is Subject to Heightened Review Because It Was Enacted for A Discriminatory Purpose

SERA's farmworker exclusion is also subject to heightened review under the equal protection clause of the New York Constitution because it was rooted in the discriminatory purpose of perpetuating the economic subjugation of black workers. As an enactment motivated by racial animus, it is subject to heightened scrutiny.

It is a fundamental principle of equal protection doctrine that racial bias cannot serve as a legitimate basis for a law. In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 265-68 (1977), the Supreme Court held that even a facially neutral law violates equal protection if it is motivated by racial discrimination. The discriminatory purpose need not be the sole factor, as long as it was a substantial or motivating factor behind the enactment. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In determining the purpose of legislation, key evidentiary sources are "[t]he historical background of the decision" and the legislative history, including "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 267-68; *Hunter*, 471 U.S. at 228-30 (reviewing legislative history and expert testimony to conclude motivating factor was racial animus); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[A]n invidious discriminatory purpose may often be inferred from the totality of relevant facts."); *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 223-27 (4th Cir. 2016) (reviewing decades long history of North Carolina's disenfranchisement of black voters in concluding voting legislation violated equal protection clause).

When racial animus is a predominating motive, as alleged here, strict scrutiny applies. *Miller v. Johnson*, 515 U.S. 900, 913 (1995) ("[S]tatutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when,

though race neutral on their face, they are motivated by a racial purpose or object."). The Court of Appeals has adopted these principles when reviewing legislative enactments under Article, Section 11, New York's equal protection clause. *See Campaign Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 321 (1995) (citing to *Arlington Heights* in its review of the claim that heightened scrutiny is required to evaluate the State's educational funding methodology because of its impact on minority students); *Golden v. Clark*, 76 N.Y.2d 618, 624 (1990) ("An analysis of [Federal decisions] is appropriate because our State Constitution's equal protection guarantee is as broad in its coverage as that of the Fourteenth Amendment.").

The Supreme Court's ruling in *Hunter v. Underwood* is particularly instructive here. In *Hunter*, the Court analyzed whether an 84-year-old provision of the Alabama Constitution providing for the disenfranchisement of persons convicted of certain enumerated crimes, including crimes of moral turpitude, violated the equal protection clause. 471 U.S. at 223-24. Noting that it was a facially neutral provision, the Court applied the approach from *Arlington Heights* and examined whether the passage of the law was motivated by a desire to racially discriminate. In doing so, the Court examined, with particularity, the proceedings of the Alabama constitutional convention, historical studies, and the testimony of two expert historians. *Id.* at 227-33. The Court ultimately concluded that the Alabama provision violated equal protection principles because the desire to discriminate against blacks was the motivating factor behind its adoption. *Id.* at 233. The fact that the racial bias that infected the Alabama provision took place nearly a century earlier than the *Hunter* litigation provided no basis to avoid the finding of impermissible discrimination. *Id.* Moreover, the Court rejected the argument, made by the provision's defenders, that the State had a legitimate interest in denying the franchise to those who committed a crime involving moral turpitude. The Court specifically rejected the argument

that the provision could be re-enacted today without any racist motivation and be constitutionally permissible; the discriminatory purpose behind its enactment alone rendered the provision invalid. *Id.* at 233; *see also N. Carolina State Conference of NAACP*, 831 F.3d at 223-27, 229-30 (enjoining application of election law motivated in part on discriminatory racial intent as demonstrated by the legislative record and broader historical context). In *Hunter*, the Court ultimately struck down the constitutional provision as a violation of equal protection.

An allegation of racial animus fulfills the plaintiff's pleading requirements for an equal protection claim involving a facially neutral law. *Hayden v. Paterson*, 594 F.3d 150, 163 n.11 (2d Cir. 2010) (noting that, on a motion to dismiss, the only concern is whether plaintiffs have adequately alleged that racial discrimination was a substantial or motivating factor behind the enactment). Here, Plaintiffs allege that the federal exclusion of farmworkers rested upon racial animus and this purpose carried over to the New York legislature, who adopted the exclusion whole-cloth without offering an independent policy or rationale, as the Farm Bureau concedes. (R. 48-50 at ¶¶ 17-24; R. 308.) In the exact words of the Farm Bureau, "the exclusion of farm laborers from the federal and state statutory collective bargaining framework was the result of a political judgment on the part of Congress (and later an identical judgment on the part of the New York legislature) . . ." (R. 308.) But if the purported legitimate reasons for the federal exclusion can be imputed to New York's legislature, so too must the extensive record of racial bias as alleged by Plaintiffs that motivated the federal exclusion. And even if a mixed set of motivations were to explain the enactment, Plaintiffs' allegations are sufficient to defeat the motion to dismiss.

III. The SERA Exclusion is Subject to Heightened Review Because Farmworkers are a Protected Class

When evaluating the constitutionality of laws impacting politically disempowered groups, the Court of Appeals has held that a more searching form of review is appropriate. Because farmworkers are a systemically abused and disempowered minority, as described in detail in the complaint, the farmworker exclusion is subject to heightened review.

In *Alevy v. Downstate Medical Center*, the Court of Appeals held that New York courts are not constrained by a binary choice of applying either rational basis or strict scrutiny review "but instead [must be] ready to adopt middle ground tests in situations where such review is warranted." 39 N.Y.2d 326, 334 (1976). The Court of Appeals has recognized that heightened scrutiny is particularly applicable when laws target "discrete and insular minorities" who are shut out of the political process. *See Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 431 (2001); *see also Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 43-44 (1982) (more careful scrutiny should be applied when "the challenged State action has resulted in intentional discrimination against a class of persons grouped together by reason of personal characteristics"); *Plyler v. Doe*, 457 U.S. 202, 223-26 (1982) (applying intermediate scrutiny—requiring demonstration that classification is "reasonably adapted" to further a "substantial goal of the State"—to statute denying public education to undocumented immigrant children).

The history and ongoing reality of farmworkers' disadvantaged status demands heightened scrutiny in this case. Reinforced by this country's historical association of agricultural work with slavery, agricultural workers were and have remained a systematically abused and disempowered minority. (R. 56-58 at ¶¶ 59-74.) As one of the most grueling, low-paying, and dangerous occupations, R. 56-58 at ¶¶ 60, 68-72, farm work in New York inevitably falls to the least educated, most desperate segments of the workforce. For decades, the

multibillion dollar New York agricultural industry has relied predominantly on racial and ethnic minorities coming from out of state. (R. 56 at ¶ 62.) Today, as many as 75 percent of New York farmworkers lack a lawful immigration status, and another 5 to 10 percent are in the United States on temporary work visas that do not permit them to change employers. (R. 57 at ¶¶ 64-65.) As noncitizens, these workers have no means of effectuating change through voting; as a report by a state taskforce commissioned by Governor Mario Cuomo noted in 1991, farmworkers are "nobody's constituents." (R. 53 at ¶¶ 42-43.) A majority of farmworkers speak poor English or no English at all, and many live on farm labor camps owned by their employers and have very limited access to transportation, further contributing to their isolation. (R. 56-57 at ¶¶ 63, 67.) In the words of the taskforce, they are "unseen and unheard, and easy to forget." (R. 53 at ¶ 42.)

Not only do poor working conditions draw a workforce with little to no access to the political process, but the absence of protection for organizing due to farmworkers' exclusion from SERA means—unlike other workers—they are unable to band together to repeal the exclusion. Without any protection from retaliation, workers have been unable to organize themselves to negotiate better working conditions. (R. 67-70 at ¶¶ 135-39, 142-49.) And without any improvement in working conditions, farm work continues to fall to those members of society who are the most marginalized, have the fewest economic options, and the least access to the political process. *Cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 152, n.4 (1938) (noting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation" may be "subject[]to more exacting judicial scrutiny"). Thus, the SERA exclusion itself militates for the application of heightened scrutiny in that it reinforces farmworkers' political powerlessness.

IV. Applying the Proper Heightened Level of Scrutiny, the SERA Exclusion Must Be Struck Down Because It Is Not Narrowly Tailored in the Pursuit of A Substantial Government Interest

Plaintiffs have sufficiently pled that the farmworker exclusion cannot survive heightened review, either under strict or intermediate scrutiny. *See supra* Sections I-III. Under strict scrutiny, the Farm Bureau bears the "very heaven" burden of showing that a compelling state interest is being promoted and there are no "less onerous alternatives" to achieving that goal. *Alevy*, 39 N.Y.2d at 333. Under intermediate scrutiny, the Farm Bureau bears the burden of showing "that the [exclusion] is substantially related to the achievement of important government interests." *Anonymous v. City of Rochester*, 13 N.Y.3d 35, 48 (2009) (internal quotations marks omitted).

As to the existence of a compelling or substantial State interest, the State itself agrees there is no such interest and Plaintiffs have alleged sufficient facts to demonstrate for the purposes of a motion to dismiss that the exclusion is not necessary to further any such interest. (R. 11, 15-28, 380.) The arbitrary nature of the exclusion is starkly presented by the manner in which other seasonal workers or workers who handle perishable goods are treated. For instance, for employees working in packing sheds located on farms, only workers who pack products grown on different farms are protected by the statutory right to organize. (R. 58 at ¶ 76.) Employees packing only produce grown on the farm where the shed is located are excluded. *Id.* But the workers could be performing identical work involving perishable products. Similarly, a worker who connects a cow to a mechanized milking machine or who manages manure storage and disposal is not protected. (R. 59 at ¶ 77.) Those who work in processing plants are. (R. 59 at ¶ 77.) Again, both work with perishable products.

The blanket exclusion of farmworkers from SERA is also not narrowly tailored. There are numerous means by which other states, and New York in other contexts, have protected

small farms and perishable products (the "state interests" identified by the Farm Bureau below). For instance, the law could exempt farms of a certain size. Lab. Law § 672 (limiting certain regulations to only those employers who meet minimum thresholds for cash remuneration to employees); Minimum Wage Order for Farmworkers, 12 N.Y.C.R.R. 190-1.1 (applying New York's minimum wage law to those farmers who, during the preceding calendar year, paid $ 3,000 or more in cash wages). The goal of protecting seasonal produce could be achieved by procedural restrictions on striking during certain time periods. *See* Cal. Lab. Code § 1155.3 (instituting a 60-day no-strike period after notice to change a certified collective bargaining contract); Or. Rev. Stat. Ann. § 662.815 (restricting picketing of farming operations during times of harvest). These are just a few examples of how protections of the agricultural industry could be achieved without the discriminatory exclusion of an entire type of worker from SERA's protections.

V. Even if Rational Basis Applies, the Exclusion Does Not Survive Because the Circumstances Underlying the Purported Need for the Legislation Have Changed.

Even if this Court determines that rational basis review applies to the exclusion, Plaintiffs' complaint should not be dismissed because New York's agricultural industry is significantly more mechanized and consolidated than it was in the 1930s. (R. 53-55 at ¶¶ 46-58.) Taking these allegations as true, the exclusion of farmworkers is no longer rationally related to protecting the small family farm and should be struck down.

The New York Court of Appeals regularly considers whether a legislative enactment has a *current* justification when it reviews the rationality of challenged statutes. In *Defiance Milk Products Co. v. Du Mond*, the Court reviewed the constitutionality of a statute prohibiting the sale of evaporated skimmed milk in containers weighing less than ten pounds. 309 N.Y. 537 (1956). Recognizing that similar statutes were deemed constitutional in *United States v.*

Carolene Products Co., 304 U.S. 144 (1938), the Court nevertheless held the statute unconstitutional. It found that time had made clear that "filled milk" was not in fact injurious to health and, therefore, "later events or later-discovered facts" demonstrated that the law was arbitrary. *Defiance Milk Prods.*, 309 N.Y. at 541, 543; *see also People v. Liberta*, 64 N.Y.2d 152, 167 (1984) (striking down marital exemption for rape as lacking any "present justification" under rational basis review); *People v. Abrahams*, 40 N.Y.2d 277, 284 (1976) (finding the Sunday Blue law, which required businesses to be closed on Sunday, irrational because "it no longer possesses the requisite rationality in light of its avowed purpose").

Here, Plaintiffs allege that the farmworker exclusion – now eighty years after its enactment – is no longer rational under the equal protection clause, even if it once was. As set forth in the Complaint, New York's agricultural industry has undergone significant industrialization and consolidation in the intervening eight decades. (R. 54-55 at ¶¶ 47-58.) Thus, so–called "family farms" today often oversee operations that bear little resemblance to the family farms of the 1930s. (R. 54 at ¶ 53.) Marks Farms, which terminated Mr. Hernandez for speaking to other employees about workplace conditions, is one such example. Employing approximately 60 employees, it uses "milking parlors" where cows are hooked into mechanized milking machines and workers labor up to 12 hours a day with few, if any, breaks. (R. 54-55, 59-61 at ¶¶ 49, 55, 81-83, 92-93.) These conditions exemplify the modern factory-like conditions under which New York agricultural work is performed today, making farm work today virtually indistinguishable from a variety of other factory-like employment contexts where workers enjoy the right to organize. Under the facts as alleged by Plaintiffs, the circumstances in the agricultural industry have so radically transformed since the enactment of SERA in the 1930s

that there is no rational basis for the farmworker exclusion in the modern, mechanized world of agriculture.[10]

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully request that the Court reverse the lower court's dismissal of this action and remand for further proceedings.

Dated: June 18, 2018
New York, New York

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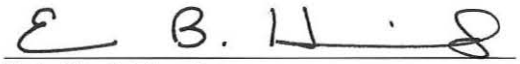

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[10] In deciding that the farmworker exclusion in SERA passes rational basis review, the court below erred by relying on evidence improperly inserted by the Farm Bureau at the motion to dismiss stage. (*See e.g.*, R. 31 ("The Farm Bureau alleges collective bargaining would create a disproportionate hardship for farmers due to the seasonality of their labor forces, the perishability of their products, and the low prices farmers receive for their goods.").) The court's reliance on facts put forward by the Farm Bureau was improper on a motion to dismiss, when Plaintiffs' allegations must be accepted as true.