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# **SURVIVING IN THE FIELD: PROVIDING THE BARE MINIMUM FOR FARM WORKERS IN NEW MEXICO**

Annie Swift\*

## **ABSTRACT**

*People have cultivated the land now known as New Mexico for millennia. Throughout the last century, however, state law has denied important protections to agricultural workers and thereby contributed to the creation of an agrarian working class that is especially vulnerable to political majorities and powerful interests. For example, the New Mexico legislature explicitly exempted certain farm workers from the Workers' Compensation Act in 1937, and from the Minimum Wage Act in 1966. Nationally, farm workers have faced exclusion from various labor, health, and safety laws. Consequently, farm workers have enjoyed few legal safeguards against the risk of injury and ubiquitous exploitative labor practices. To frame discussion of this issue, this Comment first briefly explores the historical rationale for exempting agricultural workers from labor laws nationwide. Then, it shifts its focus to New Mexico law, examining *Rodriguez v. Brand West Dairy*,<sup>1</sup> a landmark case that extended mandatory workers' compensation benefits for farm and ranch laborers. In *Rodriguez*, the New Mexico Supreme Court determined that exempting certain farm workers from the Workers' Compensation Act violated the Equal Protection Clause of the New Mexico Constitution. This Comment argues that the New Mexico Constitution provides similar avenues to overturn minimum wage exemptions for dairy and piecework laborers by following the rationale of *Rodriguez*. Finally, regardless of how courts consider challenges to the Minimum Wage Act, the legislature should reconsider these antiquated agricultural exemptions. Recent state legislation—in parallel areas of law—provides further support for extending statutory protections to farm workers.*

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1. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, 378 P.3d 13.

## INTRODUCTION

New Mexico has a rich and tumultuous agrarian history.<sup>2</sup> Indigenous Pueblo peoples lived on and farmed the land now known as New Mexico for thousands of years before Spanish conquest. Following “discovery” by Francisco Vázquez de Coronado in 1540–42 and initial Spanish settlement under Juan de Oñate in 1598, Spanish land grantees farmed the land for hundreds of years. After Mexican independence from Spain in the early nineteenth century, the United States invaded the Mexican Republic in 1846, and ultimately captured the vast land then known as Nuevo México. Congress quickly incorporated New Mexico as a U.S. territory after the Mexican-American War ended in the Treaty of Guadalupe Hidalgo of 1848, although it only reluctantly admitted it as the forty-seventh state of the union in 1912.<sup>3</sup>

Around the same time as New Mexico’s admission to the U.S., the rise of industrial agriculture began to limit legal protections for farm workers.<sup>4</sup> At the beginning of the twentieth century, state and national legislatures exempted farm workers from various New Deal labor, health, and safety laws.<sup>5</sup> The trend solidified in 1938, when the U.S. Congress excluded agricultural laborers from receiving minimum wages under the Federal Fair Labor Standards Act (“FLSA”).<sup>6</sup> These foundational exclusions allowed for the agricultural industry’s persistent undervaluation of the labor of farm workers, and generally justified the industry’s denial of farm workers’ health, wealth, and safety.

Congress initially enacted the FLSA, in part, to promote economic stability in the wake of the Great Depression.<sup>7</sup> Consider President Roosevelt’s statement to Congress on May 24, 1934:

Today you and I are pledged to take further steps to reduce the lag in purchasing power of industrial workers and stabilize the markets for the farmer’s products. The two go hand in hand. Each depends

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2. See generally FABIOLA CABEZA DE BACA GILBERT, *THE GOOD LIFE* (1949) (detailing traditional New Mexican agricultural practices and cuisine); *SOUTHWESTERN AGRICULTURE: PRE-COLUMBIAN TO MODERN* (Henry C. Dethloff & Irvin M. May Jr eds., Texas A&M Press 1982) (outlining a general history of agricultural practices in New Mexico); Frances Leon Quintana, *Land, Water, and Pueblo-Hispanic Relations in Northern New Mexico*, 32 J. SOUTHWEST 287 (1990) (discussing how indigenous Pueblo people, Hispanic and Anglo-American colonizers have negotiated land and water management in Northern New Mexico).

3. See Richard Melzer, *New Mexico in Caricature: Images of the Territory on the Eve of Statehood*, 62 N.M. HIST. REV. 335, 335 (1987) (discussing New Mexico’s transition from territory to state).

4. See generally Robert J. Thomas, *The Mythology of Agricultural Exceptionalism: Some Comments*, 9 DEF. ALIEN 18, 18 (1986) (arguing that agricultural “exceptionalism” allowed for the implementation of policy harmful to farmworkers by defending the notion that farm work fundamentally differs from other types of labor).

5. See Guadalupe T. Luna, *An Infinite Distance: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 489 (1998).

6. Pub. L. No. 75-718, 52 Stat. 1067 (codified as amended at 29 U.S.C. § 213(a)(6) (2018)).

7. See Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLIN L. REV. 649, 649 (1989).

for its effectiveness upon the other. Both working simultaneously will open new outlets for productive capital.<sup>8</sup>

Like President Roosevelt, many U.S. Senators believed that protecting industrial workers' purchasing power would provide indirect support for farmers.<sup>9</sup> Following President Roosevelt's address, lawmakers, especially those from the South, vigorously advocated for lower labor standards in the agricultural industry to benefit other segments of the workforce.<sup>10</sup> For instance, in 1937, then Senator Hugo Black of Alabama sponsored the original bill for the FLSA, which exempted "any employee employed in agriculture" from receiving minimum wages.<sup>11</sup> Senator Black also argued that farm workers did not merit protection under federal laws because farm workers only operated on a local or state level.<sup>12</sup> In contrast, other legislators, including Representative Frederick Hartley of New Jersey, suggested that the exemptions protected the political interests of the House members who saw themselves as representing farm owners and employers, rather than historically marginalized farm workers.<sup>13</sup>

In accord with this latter line of reasoning, the agricultural exemptions well could have been rooted in racial animus towards minority farm workers. Legal scholars argue persuasively that Congress excluded agricultural workers as a compromise with Southern legislators to uphold the plantation system and inhibit the social progress of Black farm workers.<sup>14</sup> Indeed, the majority of the so-called "farm bloc" hailed from Southern states with a history of discriminating against Black workers,<sup>15</sup> and the New Deal legislation could not have passed without this bloc of Senate votes.<sup>16</sup> Ultimately, the minimum wage exemptions in the FLSA did hinder

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8. S. REP. NO. 75-884, at 2 (1937).

9. Senator Francis Maloney (Connecticut) explained: "[I]t seems to me that the best way we can help agriculture is by giving a buying power to [industrial] labor through economic force. Give labor a chance to buy the produce and product the produce and product of the farm. . . . [If Congress would] protect industrial workers, I am satisfied they would be casting bread upon the waters." Anderson, *supra* note 7, at 652 (quoting 81 CONG. REC. 7808, 7808 (1937)).

10. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011).

11. Pub. L. No. 75-718, 52 Stat. 1067 (codified as amended at 29 U.S.C. § 213(a)(6) (2018)).

12. 81 CONG. REC. 7808, 7648 (1937) ("That [exemption] is done for two reasons. In the first place the bill rests squarely upon the interstate commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee, that businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and the States in which business units operate.").

13. Representative Hartley argued that the agricultural worker exemption resulted from the political influence of a bloc of legislators who represented farm interests. "Political expediency rather than relief for the exploited workers of America has dictated the terms of this bill. . . . [W]hy is it that the poorest paid labor of all, the farm labor, . . . has been omitted from this bill? The answer is that the votes of the farm bloc in the House, the best organized bloc we have here, would have voted against the bill and defeated it." (quoted in Anderson, *supra* note 7 at 654 (quoting 83 CONG. REC. 9257 (1938)).

14. See, e.g., Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1337 (1987); Perea, *supra* note 10, at 104.

15. Anderson, *supra* note 7, at 657.

16. See Anderson, *supra* note 7, at 656.

farm workers from escaping societal marginalization while benefiting farm employers.

Following the enactment of the FLSA, large agricultural employers in the South and on the West Coast became the primary beneficiaries of the agricultural exemptions.<sup>17</sup> Not surprisingly, these same employers relied heavily on underpaid Black, Mexican, Puerto Rican and Filipino workers to plant, harvest, and produce food.<sup>18</sup> In short, racial animus behind the FLSA—and other New Deal Legislation—may have directly limited Black, Hispanic, and Indigenous workers' ability to accumulate property nationwide.

Despite considerable evidence of this racial animus, other rationales may explain why Congress exempted agricultural workers from the FLSA. The exemptions have typically been defended as a means to protect the financial security of traditional family farms.<sup>19</sup> Alternatively, the federal government may have provided for more flexible labor standards in the farm industry to ensure an abundance of food for the general public at lower costs.<sup>20</sup> Whatever the precise mixture of justifications that animated the enactment of the FLSA, the sweeping agricultural exemption prevailed. Three years after its enactment in 1937, then Justice Hugo Black would join Justice Stone in a unanimous opinion to uphold the constitutionality of the FLSA under the Commerce Clause.<sup>21</sup>

The FLSA subsequently became the prototype for state labor laws, including in New Mexico. In the same year of the FLSA's enactment, the New Mexico legislature officially exempted farm workers from the New Mexico Workers' Compensation Act.<sup>22</sup> Agricultural workers have since fought continuously to overcome the legal and social barriers instituted by the FLSA, its state analogues, and other related national laws that directly harmed them.<sup>23</sup>

National and state governments denied agricultural workers other basic protections while their employers reaped the rewards of their labor.<sup>24</sup> Just prior to passing the FLSA, Congress excluded farm workers from the National Labor Relations Act of 1935,<sup>25</sup> which legalized union organizing and collective bargaining. Congress later excluded them from the Occupational Safety and Health Act of 1970,<sup>26</sup> which governs health and safety in the workplace.<sup>27</sup> As a result of these

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17. Linder, *supra* note 14, at 1337.

18. *Id.* at 1338.

19. See, e.g., J. W. Looney, *Farmers and the Law: A Survey of Agricultural Exemptions and Exemptions in State and Federal Law*, 50 J. KAN. B. ASS'N 7, 7 (1981).

20. See Luna, *supra* note 5, at 490.

21. See *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

22. See 1937, N.M. Laws, ch. 92, § 2 (“This act [sic] shall not apply to employers of private domestic servants or of farm and ranch laborers.”); N.M. STAT. ANN. § 52-1-6(A) (1990) (“The provisions of the Workers' Compensation Act shall not apply to employers of private domestic servants and farm and ranch laborers.”).

23. See Sonia Weil, *Big-Ag Exceptionalism: Ending the Special Protection of the Agricultural Industry*, 10 DREXEL L. REV. 183, 229–38 (2017).

24. See Luna, *supra* note 5, at 490–91.

25. Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (2018)).

26. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651-78 (2018)).

27. Ivette Perfecto & Baldemar Velásquez, *Farm Workers: Among the Least Protected*, 18 EPA J. 13, 14 (1992).

exceptions, farm workers in New Mexico—like many agricultural laborers across the country—remain vulnerable to the risk of injury and exploitative labor practices. As indicated by this brief historical survey, for much of the past century the law has denied farm workers meaningful protection from the specific forms of exploitation and injustice that they experience nationwide.

However, in New Mexico, significant relief for agricultural workers came in the 2016 case of *Rodriguez v. Brand West Dairy*,<sup>28</sup> where the New Mexico Supreme Court found that the farm worker exclusions in the Workers' Compensation Act violated the New Mexico Constitution. Consequently, most agricultural workers in New Mexico received access to workers' compensation benefits for the first time. Remarkably, New Mexico is the first state to invalidate agricultural exemptions in a workers' compensation act on constitutional grounds. Earlier state courts had consistently rejected constitutional challenges to these statutory schemes.<sup>29</sup> Throughout the twentieth century, courts across the country deferred to local legislatures and upheld agricultural exemptions in state workers' compensation systems.<sup>30</sup>

This Comment argues that the rationale from *Rodriguez* should be extended to similar farm worker exclusions, such as those in the New Mexico Minimum Wage Act. These exemptions harm the same class of vulnerable people at issue in *Rodriguez*, and under this precedent, the New Mexico Supreme Court should rule that they too violate the New Mexico Constitution.

This discussion is organized as follows. Part I explains how the New Mexico Supreme Court determined that exemptions of certain farm workers in the Workers' Compensation Act violated the State Constitution. Part II demonstrates how the New Mexico Supreme Court's Equal Protection analysis from *Rodriguez* should apply to minimum wage exemptions for farm and ranch workers, specifically those working as piecework day laborers, and those employed in the dairy industry. Moreover, New Mexican courts have an additional avenue for striking down the minimum wage exclusions under the Inherent Rights Clause of the New Mexico Constitution.<sup>31</sup> Part III explains that beyond possible remedy in the courts, the New Mexico legislature should reform the state's antiquated agricultural exemptions. In 2019, the state legislature passed two bills that demonstrate a potential willingness to provide living wages for farm workers. These recent law reforms suggest a reasonable pathway for extending legal protections to farm workers by abrogating their original exclusion from the FLSA.

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28. 2016-NMSC-029, 378 P.3d 13.

29. See *Becerril v. Call*, 127 Idaho 365, 900 P.2d 1376 (1995); *Collins v. Day*, 604 N.E.2d 647, 649 (Ind. Ct. App. 1992); *Ross v. Ross*, 308 N.W.2d 50, 53 (Iowa 1981); *Fitzpatrick v. Crestfield Farms, Inc.*, 582 S.W.2d 44, 45 (Ky. Ct. App. 1978); *Eastway v. Eisenga*, 362 N.W.2d 684, 688 (Mich. 1985); *State ex rel. Hammond v. Hagar*, 503 P.2d 52, 54-55 (Mont. 1972); *Otto v. Hahn*, 306 N.W.2d 587, 591 (Neb. 1981); *Haney v. N.D. Workers Comp. Bureau*, 518 N.W.2d 195, 201 (N.D. 1994); *Simons v. Longbranch Farms, Inc.*, 345 S.C. 277, 547 S.E.2d 500 (Ct. App. 2001); *Baskin v. State ex rel. Workers' Comp. Div.*, 722 P.2d 151, 157 (Wyo. 1986).

30. See, e.g., *W. Indem. Co. v. Pillsbury*, 151 P. 398 (Cal. 1915).

31. NM CONST., art. II, § 4. See also *Morris v. Brandenburg*, 2016-NMSC-027, 376 P.3d 836; *Griego v. Oliver*, 2014-NMSC-003, 316 P.3d 865.

## DISCUSSION

### I. How the New Mexico Supreme Court extended workers' compensation to all farm workers.

New Mexico's workers' compensation is a highly regulated no-fault system meant to provide injured workers with predictable recovery.<sup>32</sup> Both the statute and the relevant caselaw emphasize that the system should efficiently limit litigation, maximize coverage for vulnerable workers, and minimize costs to employers.<sup>33</sup> Nonexempt workers receive an exclusive remedy for accidental injuries or deaths that occur in the course of employment.<sup>34</sup> The New Mexico Workers' Compensation Act statutorily eliminates common employer defenses used to limit recovery in similar tort claims,<sup>35</sup> prevents injured workers from becoming a public charge, and helps injured employees return to work.<sup>36</sup>

However, since its enactment, major questions have arisen regarding the Act's application to various kinds of agricultural workers. For example, when the legislature first adopted the Workers' Compensation Act in 1917, it provided compensation for specific "extra-hazardous occupations or pursuits," not including agricultural labor.<sup>37</sup> Two decades later, the legislature definitively excluded "farm and ranch laborers" from the Workers' Compensation Act in 1937.<sup>38</sup> However, as caselaw interpreting these provisions developed, the New Mexico courts determined that certain agricultural workers *would* receive workers' compensation benefits, while other agricultural workers *could not* receive compensation because of their status as "farm and ranch laborers." This court-created distinction is discussed in detail below, but for now, it suffices to say that leading up to *Rodriguez*, the courts had interpreted the Act to determine the eligibility of farm workers based on the farming activities they performed.

The Court granted certiorari in *Rodriguez* to test whether excluded farm and ranch laborers were similarly situated to other agricultural employees, and whether they had experienced unconstitutional discrimination.<sup>39</sup> Ultimately, in the 2016 *Rodriguez* opinion, the New Mexico Supreme Court "refuse[d] to perpetuate . . . discrimination—regardless of how long it ha[d] persisted[.]"<sup>40</sup> The Court recognized that the Equal Protection Clause of Article II, Section 18, of the New Mexico

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32. See *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-034, ¶ 12, 131 N.M. 272, 276 34 P.3d 1148, 1152.

33. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 12, 378 P.3d 13, 20.

34. See N.M. STAT. ANN. § 52-1-9 (1973).

35. See N.M. STAT. ANN. § 52-5-1 (1990).

36. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 36, 138 N.M. 331, 120 P.3d 413, 424.

37. See 1917, N.M. Laws, ch. 83, §§ 2, 10.

38. See 1937, N.M. Laws, ch. 92, § 2 ("This act [sic] shall not apply to employers of private domestic servants or of farm and ranch laborers.").

39. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 2, 378 P.3d 13, 17.

40. *Id.*

Constitution does not allow disparate treatment of similarly situated individuals without reasonable justification.<sup>41</sup>

*A. The Court concluded that farm and ranch laborers are similarly situated to other agricultural workers.*

In *Rodriguez v. Brand West Dairy*, the New Mexico Supreme Court set out to decide whether it was constitutional under the state constitution to provide workers' compensation to some farm workers and deny benefits to others. Until that time, New Mexico appellate courts had only considered the agricultural exclusions in the Workers' Compensation Act to determine the narrow question of whether certain workers qualified for workers' compensation.<sup>42</sup> As previously noted, the Workers' Compensation Act explicitly did not apply to "employers of farm and ranch laborers."<sup>43</sup> However, in 1980, the New Mexico Court of Appeals noted that a literal interpretation of this exemption would have produced "absurd results" by excluding *all* employees who worked in business at all associated with agriculture.<sup>44</sup> Consequently, the courts interpreted the Act to allow certain agricultural workers to receive workers' compensation, as long as they were not employed as "farm or ranch laborers."

To make the determination of whether a given employee was a "farm or ranch laborer," the appellate courts looked to the general nature of an agricultural employee's work to see if she or he could qualify for relief under the Workers' Compensation Act.<sup>45</sup> In effect, the courts settled on an approach that excluded farm and ranch laborers if their "primary responsibility [was] performed on the farming premises and [was] an essential part of the *cultivation* of the crop."<sup>46</sup> If so, these excluded workers could not receive workers' compensation even if injured while performing administrative or managerial tasks not essential to cultivation.<sup>47</sup> In contrast, non-excluded workers who performed clerical or processing tasks would receive workers' compensation benefits, even if they suffered injuries in the field.<sup>48</sup>

Despite this "primary responsibility" test, the courts continued to struggle to clearly define the line between farm and ranch laborers and all other agricultural employees. Invariably, the determination required case-by-case analysis that produced idiosyncratic results. For example, the Court of Appeals held that a worker who prepped and packaged onions qualified for workers' compensation because he

41. *Id.* ¶ 1, 378 P.3d at 17 ("[O]stensibly discriminatory classifications in social and economic legislation 'must be founded upon real differences of situation or condition, which bear a just and proper relation to the attempted classification, and reasonably justify a different rule' for the class that suffers the discrimination.") (quoting *Burch v. Foy*, 1957-NMSC-017, ¶ 10, 308 P.2d 199).

42. See *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, ¶ 6, 94 N.M. 223, 608 P.2d 535, 536; *Holguin v. Billy the Kid Produce, Inc.*, 1990-NMCA-073, ¶ 19, 110 N.M. 287, 795 P.2d 92, 95; *Tanner v. Bosque Honey Farm, Inc.*, 1995-NMCA-053, ¶¶ 2-3, 119 N.M. 760, 895 P.2d 282, 283.

43. See N.M. STAT. ANN. § 52-1-6(A) (1990).

44. *Cueto*, 1980-NMCA-036, ¶ 6, 608 P.2d at 536 ("It is clear that the legislature did not intend to permit employers to exempt their entire work force from the act by employing a few farm and ranch laborers. This exemption applies only with respect to farm and ranch laborers.").

45. See, e.g., *Holguin*, 1990-NMCA-073, ¶¶ 3-5, 795 P.2d at 93.

46. *Id.* ¶ 9, 795 P.2d at 94 (emphasis added).

47. *Id.*

48. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 15, 378 P.3d 13, 21-22.



did not perform tasks essential to cultivation.<sup>49</sup> In another instance, the Court of Appeals held that a worker whose “primary responsibility was to manufacture fertilizer from farming operations” could not receive workers’ compensation because this task was essential to the cultivation of pecans.<sup>50</sup> In a third case, the Court of Appeals held that a beekeeper was an excluded farm worker because his primary responsibilities included tasks essential for “harvesting” honey.<sup>51</sup>

The plaintiffs in *Rodriguez* both regularly performed farm and ranch labor tasks that would typically exclude them from the Workers’ Compensation Act. Noe Rodríguez worked at Brand West Dairy as a dairy worker and herdsman.<sup>52</sup> A cow butted him into a wall causing him to fall headfirst onto a cement floor.<sup>53</sup> Mr. Rodríguez sustained traumatic brain and neck injuries that left him in a coma for two days.<sup>54</sup> The Workers’ Compensation Administration denied his claim under the ranch laborer exclusion.<sup>55</sup>

The other plaintiff, María Angelica Aguirre, worked as a chile picker for M.A. & Sons.<sup>56</sup> She slipped in the field and broke her wrist, which caused permanent damage and limited her ability to return to work in the fields.<sup>57</sup> The Workers’ Compensation Administration denied her claim as well.<sup>58</sup> The New Mexico Court of Appeals consolidated the claims brought by Mr. Rodríguez and Ms. Aguirre, and struck down the farm and ranch laborer exclusion as a violation of the state constitution’s Equal Protection Clause.<sup>59</sup> Brand West Dairy, M.A. & Sons, and the state Uninsured Employers’ Fund appealed to the New Mexico Supreme Court.<sup>60</sup>

In reviewing the decision of the Court of Appeals, the Supreme Court had to determine whether the lower court had correctly determined that the Workers’ Compensation Administration inappropriately excluded employees like Mr. Rodríguez and Ms. Aguirre. The Supreme Court ultimately held that no valid justification existed to deny workers’ compensation to some farm and ranch laborers while granting it to others. The exemptions in the Workers’ Compensation Act led lower courts to arbitrarily distinguish farm and ranch laborers from others employed in the agricultural industry.<sup>61</sup>

*B. The Court found no rational basis for discriminating against farm and*

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49. *Holquin*, 1990-NMCA-073, ¶ 11, 795 P.2d at 94 (“[The] worker’s primary responsibilities were not performed on land where crops were grown, nor were his duties an essential part of cultivation of onions or related to some essential part of the cultivation process such as irrigation or fertilization.”).

50. *Cueto v. Stahmann Farms, Inc.*, 1980-NMCA-036, ¶ 9, 94 N.M. 223, 608 P.2d 535, 536.

51. *Tanner v. Bosque Honey Farm, Inc.*, 1995-NMCA-053, ¶ 13, 119 N.M. 760, 895 P.2d 282, 285.

52. *Rodriguez*, 2016-NMSC-029, ¶ 5, 378 P.3d at 18–19.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* ¶ 3, 378 P.3d at 18.

57. *Id.*

58. *Id.* ¶ 4, 378 P.3d at 18.

59. *See Rodriguez v. Brand West Dairy*, 2015-NMCA-097, ¶ 1, 356 P.3d 546, 549.

60. *Rodriguez*, 2016-NMSC-029, ¶ 8, 378 P.3d at 19.

61. *Id.* ¶ 1, 378 P.3d at 17.

*ranch laborers.*

Justice Edward L. Chávez, writing for the *Rodriguez* Court, adopted rational basis review to determine whether the economic and social farm and ranch laborer exclusions were rationally related to the government's purpose of providing a no-fault coverage system to injured employees around the state.<sup>62</sup> It is worth emphasizing that the "rational review" employed by the Court was rational review under the *state* constitutional equal protection guarantees. Importantly, the Court explicitly dismissed the federal standard for rational basis review as "toothless," and therefore directly declined to apply it.<sup>63</sup> As noted by the *Rodriguez* Court, the federal approach to rational basis review finds economic legislation constitutional if *any* conceivable rational basis exists to support the law.<sup>64</sup> Reflecting critically on this standard, the Court stated that "the federal rational basis review is insufficient to protect discrete groups with little chance to influence changes in the law."<sup>65</sup> Justice Chávez further noted that the state judiciary has a "constitutional duty to protect . . . New Mexicans from arbitrary discrimination by political majorities and powerful special interests."<sup>66</sup> Indeed, the farm workers excluded from the Workers' Compensation Act belonged to a discrete group of people subject to the mercy of their employers.

Consequently, the Court adopted New Mexico's "modern articulation" of the rational basis test, which required the plaintiffs to "demonstrate that the classification created by the legislation [was] not supported by a *firm legal rationale or evidence in the record*."<sup>67</sup> Under this heightened level of rational basis review, the Court questioned whether the petitioners could objectively justify the disparate treatment of certain farm workers.<sup>68</sup>

In analyzing the farm and ranch laborer exemptions under this new standard, the Court examined five possible justifications for the exceptions: (1) cost savings; (2) administrative efficiency; (3) unique aspects of the agriculture industry; (4) protection of New Mexican farming traditions; and (5) use of tort law as a remedy for farm and ranch laborers' injuries.<sup>69</sup>

As to the first justification, the Court recognized cost savings as a legitimate government purpose, but held that no rational basis, evidence, or firm legal rationale existed for discriminating against specific farm and ranch laborers to this end.<sup>70</sup> According to the Court, "rational basis review, at a minimum, still requires that a

62. *Breen v. Carlsbad Mun. Scho.*, 2005-NMSC-028, ¶ 11, 138 N.M. 331, 120 P.3d at 418 ("Rational basis review applies to general social and economic legislation that does not affect a fundamental or important constitutional right or a suspect or sensitive class.").

63. *Rodriguez*, 2016-NMSC-029, ¶ 27, 378 P.3d at 25 (citing *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 30, 125 N.M. 721, 965 P.2d 305).

64. *Id.* ¶¶ 26-27, 378 P.3d at 25-26.

65. *Id.* ¶ 27, 378 P.3d at 25 (citing Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1093-1101 (2013)).

66. *Rodriguez*, 2016-NMSC-029, ¶ 27, 378 P.3d at 25.

67. *Id.* ¶ 25, 378 P.3d at 25 (emphasis added) (citing *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 24, 137 N.M. 734, 114 P.3d 1050).

68. *Id.* ¶ 28, 378 P.3d at 26.

69. *Id.* ¶ 31, 378 P.3d at 27.

70. *Id.* ¶ 33, 378 P.3d at 27-28.

cost-saving classification ‘be based upon some substantial or real distinction, and not artificial or irrelevant differences.’”<sup>71</sup> In the case of the *Rodriguez* defendants, the farm employers still had to pay for coverage of nonexempt farm employees like those who sort or package crops.<sup>72</sup> These employers did not provide a substantial reason for not paying for coverage for their farm and ranch employees. Furthermore, the Court cautioned against allowing excessive reliance on cost-savings justifications under rational basis review for fear that “cost containment alone could justify nearly every legislative enactment without regard for equal protection.”<sup>73</sup> Although farmers likely faced reduced costs by not buying into workers’ compensation for certain employees, the arbitrary discrimination did not satisfy a legitimate government purpose.<sup>74</sup>

Similarly, in the Court’s view, administrative efficiency did not justify arbitrary discrimination against farm and ranch laborers.<sup>75</sup> The Workers’ Compensation Administration had previously admitted that the agency could absorb additional claims brought by farm and ranch laborers.<sup>76</sup> The overhead administrative costs would be covered by the payroll fees collected from the workers.<sup>77</sup> The Court also rejected the Employer-Respondents’ argument that locating migrant workers would cause an administrative burden on the Workers’ Compensation Administration.<sup>78</sup> The difficulty of finding temporary migrant workers did not justify excluding farm workers employed in similar positions year-round.<sup>79</sup> Furthermore, other industries, such as construction or service trades, hired temporary migrant workers that did not face the same exclusions from the Workers’ Compensation Act.<sup>80</sup> Accordingly, the Court held that “[i]t is arbitrary to exclude a subset of workers from just one industry based on concerns regarding administrative convenience that are not even remotely unique to that industry.”<sup>81</sup> It was therefore unreasonable to claim that migrant farm workers must be excluded from workers’ compensation, while migrant construction workers would not.

The Court then turned to the unique characteristics of agribusiness. The Employer-Respondents had argued that federal regulation of agricultural prices justified the exclusions for farm and ranch laborers.<sup>82</sup> However, the Court

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71. *Id.*, 378 P.3d at 27 (citing *Schirmer v. Homestake Mining Co.*, 1994-NMSC-095, ¶ 9, 118 N.M. 420, 882 P.2d 11, 14).

72. *Rodriguez*, 2016-NMSC-029, ¶ 35, 378 P.3d at 28 (citing *Holguin*, 1990-NMCA-073, ¶ 20, 795 P.2d at 95).

73. *Rodriguez*, 2016-NMSC-029, ¶ 34, 378 P.3d at 28 (citing *Caldwell v. MACo Workers’ Comp. Tr.*, 2011 MT 162, ¶ 34, 256 P.3d 923) (internal quotes and omissions omitted).

74. *Rodriguez*, 2016-NMSC-029, ¶ 33, 378 P.3d at 27–28.

75. *Id.* ¶ 36, 378 P.3d at 28.

76. *Id.* ¶ 37, 378 P.3d at 29 (noting that—in another case—the Workers’ Compensation Administration stated that “[i]t would be administratively feasible to administer the workers’ compensation system with the addition of farm and ranch laborers,” including temporary or seasonal workers).

77. *Id.*

78. *Id.* ¶ 38, 378 P.3d at 29–30.

79. *Id.* ¶ 39, 378 P.3d at 30.

80. *Id.* ¶ 38, 378 P.3d at 29–30.

81. *Id.*

82. *Id.* ¶ 41, 378 P.3d at 30.

emphasized that the price fixing schemes were designed to support farmers, rather than reduce the prices of agricultural commodities.<sup>83</sup> The Court determined that national price fixing stabilizes the market for agricultural commodities and allows farmers to cover overhead costs.<sup>84</sup>

Next, the Court addressed the need to protect New Mexico's small farms. It noted that the Workers' Compensation Act does not apply to the majority of small New Mexican farms because workers' compensation is only required for businesses that employ three or more people.<sup>85</sup> Less than eight percent of New Mexican "farms" employed more than three people at the time *Rodriguez* was decided.<sup>86</sup> Consequently, the Court reasoned that New Mexico's small farms would not be affected by extending benefits to farm and ranch laborers.

Finally, the Court rejected the idea that farm and ranch laborers could pursue negligence claims outside of the workers' compensation system.<sup>87</sup> No rational basis existed for requiring certain agricultural workers to litigate, while allowing others to receive remedies through a no-fault system.<sup>88</sup> Tort actions could also put farm owners at greater risk of economic failure if forced to pay for catastrophic injuries that would normally be covered by workers' compensation.<sup>89</sup>

As a consequence of this analysis, the agricultural employers failed to provide evidence or a firm legal rationale to support the exclusion of farm and ranch laborers under New Mexico's heightened form of rational basis review. The decision to depart from the federal standard of rational basis review drew sharp criticism in a dissenting opinion by Justice Judith Nakamura. She argued that the New Mexico Constitution should not grant the judiciary greater discretion to invalidate social or economic legislation.<sup>90</sup> In her view, the federal rational basis standard was appropriate, and that the "farm and ranch laborer" exemption would have survived given the economic and administrative rationale provided by the petitioners.<sup>91</sup>

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83. *Id.*

84. *Id.*

85. *Id.* ¶ 43, 378 P.3d at 31.

86. *Id.* ("1,864 of the 24,721 'farms' in New Mexico employ three or more workers, which means that only approximately the largest 7.5% of farms in New Mexico benefit from the exclusion.") (citing U.S. DEP'T OF AGRIC., 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA, Vol. 1 at Tables 1 & 7 (May 2014), [http://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_US/usv1.pdf](http://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1_Chapter_1_US/usv1.pdf)). It should be noted that piecework laborers were excluded from these calculations because they are employed on a temporary basis as contractors and are therefore exempt from workers' compensation. See N.M. STAT. ANN. § 52-1-22 (1989).

87. *Rodriguez*, 2016-NMSC-029, ¶ 44, 378 P.3d at 31–32.

88. *Id.*

89. *Id.* See also Joshua A. Duden, Note, *Unreasonable Exemptions: Analyzing the Agricultural Worker Exemptions to Workers' Compensation Laws in Light of Rodriguez v. Brand West Dairy*, 24 DRAKE J. AGRIC. L. 75, 91 (2019) ("Contrary to nearly a century of precedent, the Court [in *Rodriguez*] found the exclusion of agricultural and farm-laborers would increase potential employer liability, as it would subject them to civil damages if the employee decides to seek relief elsewhere, specifically by suing in tort. This increased exposure to liability rises as the antithesis of one of the dominant purposes of workers' compensation law, limiting employer liability, thus the exclusion seems to exist contrary to the operation of New Mexico workers' compensation law.").

90. *Rodriguez*, 2016-NMSC-029, ¶ 90, 378 P.3d at 43–44 (Nakamura, J., dissenting).

91. *Id.* ¶¶ 90, 92, 378 P.3d at 43–44 (Nakamura, J., dissenting).

Nonetheless, she noted that under the federal standard, a court may use rational basis review “with bite” when evaluating “governmental regulation [that] harbors an *animus* toward a particular group.”<sup>92</sup> According to Justice Nakamura, such “a tailoring analysis can be useful to discern whether the Legislature created a discriminatory classification with animus toward a particular, discrete group and disguised the animus with a socioeconomic rationale.”<sup>93</sup> However, she did not believe that the Workers’ Compensation Act contained any animus toward farm and ranch laborers.<sup>94</sup>

In any event, the majority of the Court found no rational basis for the disparate treatment of farm and ranch laborers. For the first time, a state supreme court deemed agricultural exclusions in a workers’ compensation act unconstitutional. The New Mexico Supreme Court is the first, and currently the only, court to use equal protection analysis to strike down agricultural exemptions because of arbitrary discrimination against certain farm workers.<sup>95</sup>

## ANALYSIS

### II. How to use *Rodriguez* to overturn other farm worker exemptions.

The Court’s analysis in *Rodriguez* serves as a framework to overturn agricultural exemptions in workers’ compensation acts in other jurisdictions,<sup>96</sup> and in other areas of employment law. In *Rodriguez*, the Court indicated that “the legislature is at liberty to offer economic advantages to the agricultural industry, but it may not do so at the sole expense of the farm and ranch laborer while protecting all other agricultural workers.”<sup>97</sup>

Mr. Rodríguez and Ms. Aguirre belong to classes of people subject to other labor law exemptions. Specifically, the Minimum Wage Act excludes employees “principally engaged in the range production of livestock or in milk production,” and those “employed as a hand-harvest laborer and . . . paid on a piece-rate basis in an operation that has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment.”<sup>98</sup> Although these designated subgroups of farm workers do not fall into precisely the same categories as the farm and ranch laborers who had been excluded in *Rodriguez*, the exemptions target the same vulnerable workers. The workers’ compensation and minimum wage exemptions also resemble one another because they both were enacted upon a similar, outdated legal rationale, as discussed below.

#### *A. A closer look at the agricultural exemptions in the Minimum Wage Act.*

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92. *Id.* ¶ 90, 378 P.3d at 43–44 (Nakamura, J., dissenting).

93. *Id.* ¶ 95, 378 P.3d at 45 (Nakamura, J., dissenting) (citing *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 449–50 (1985)).

94. *Rodriguez*, 2016-NMSC-029, ¶ 96, 378 P.3d at 45–46 (Nakamura, J., dissenting).

95. Duden, *supra* note 89, at 93.

96. *Id.*

97. *Rodriguez*, 2016-NMSC-029, ¶ 2, 378 P.3d at 18.

98. N.M. STAT. ANN. § 50-4-21(8)(c),(e) (2021).

New Mexico initially prescribed a minimum wage in 1955.<sup>99</sup> The Minimum Wage Act was originally designed with the laudable goal to:

(1) . . . establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency and general well-being, and (2) to safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hour standards which do not provide adequate standards of living.<sup>100</sup>

Unfortunately, this well-intentioned legislation explicitly excluded workers in various professions, including “any individual employed in agriculture.”<sup>101</sup> This sweeping definition precluded all farm workers from receiving the general welfare and safety benefits proffered by the Act.

New Mexico would later amend the Act in line with national trends that further justified paying certain farm workers subminimum wages.<sup>102</sup> Since the original enactment of the FLSA in 1938, federal courts began to distinguish farm workers employed in “production” from those employed in “processing” when determining who could receive minimum wages.<sup>103</sup> The U.S. Congress eventually codified these distinctions in the 1966 amendments to the FLSA,<sup>104</sup> by granting

99. See H.B. 420, 22nd Leg., 1st Sess. (N.M. 1955); N.M. Laws 1955, ch. 200, §§ 1–7.

100. H.B. 420, 22nd Leg., 1st Sess. (N.M. 1955); N.M. Laws 1955, ch. 200, § 1.

101. H.B. 420, 22nd Leg., 1st Sess. (N.M. 1955); N.M. Laws 1955, ch. 200, § 2(d)(1).

102. See Harry S. Kantor, *A Minimum Wage for Farm Workers*, 83 MONTHLY LAB. REV. 677, 683 (1960).

103. See, e.g., *Bowie v. Gonzalez*, 117 F.2d 11 (1st Cir. 1941) (holding that employees of a sugarcane mill responsible for processing the cane were not subject to minimum wage exemptions); *Calaf v. Gonzalez*, 127 F.2d 934 (1st Cir. 1942) (holding that employees of a sugarcane mill responsible for transporting the cane from the field to the mill were not subject to minimum wage exemptions); *Vives v. Serralles*, 145 F.2d 552 (1st Cir. 1944) (holding that employees of a sugarcane mill responsible for transporting the cane in the fields were performing “harvesting” tasks and were therefore subject to minimum wage exemptions).

104. Pub. L. No. 89-601, 80 Stat. 830 (relevant sections codified as amended at 29 U.S.C. § 213 (2018)).

The exemptions now apply to “any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer’s immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at

minimum wages to some farm workers, and excluding others, in ways similar to the distinctions previously drawn between farm and ranch laborers and other agricultural workers under the Workers' Compensation Act in New Mexico.<sup>105</sup> Congress ultimately struck a balance between providing farmers with decent wages, and recognizing the agricultural industry's limited capacity to satisfy the needs of all workers.<sup>106</sup> In particular, Congress considered how much change the farming sector could endure without causing damage to small businesses or increased unemployment.<sup>107</sup>

Following the 1966 amendments to the FLSA, New Mexico adopted the same exemptions, nearly word for word, in the Minimum Wage Act of 1967.<sup>108</sup> The next sections consider how New Mexican courts might interpret the local Minimum Wage Act exemptions given the plain language, structure, and effect of the state statute. The *Rodriguez* decision itself lends support to a positive outcome for farm workers in this different legal context.

*B. New Mexico courts should invalidate certain agricultural exemptions in the Minimum Wage Act.*

Both the 1966 FLSA amendments and the New Mexico legislature's adoption thereof exempted certain agricultural workers from receiving minimum wages. The New Mexico Supreme Court has already determined that farm employers cannot arbitrarily discriminate against farm and ranch laborers because they belong to a class of people similarly situated to other protected farm workers. Following this same reasoning, the minimum wage exemptions for certain farm workers should not survive constitutional review.

Under the New Mexico Minimum Wage Act, an exempted agricultural employee, who had agreed to be paid subminimum wages, would not likely recover in a subsequent wage theft claim. However, the New Mexico Constitution, grants a plaintiff a right to appeal such a final judgment in a wage theft claim.<sup>109</sup> Thus, potential plaintiffs can substantively challenge the agricultural minimum wage exemptions.

This Comment focuses primarily on two of the exemptions in the New Mexico Minimum Wage Act. First, the exemption of dairy workers employed at large-scale dairy farms, and second, the exemption of piecework day laborers who receive wages based on how much produce they pick. These are some of the most vulnerable workers in the state because of their susceptibility to extreme poverty and the dangerous nature of their work.<sup>110</sup>

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the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock[.]” *Id.* at § 213(a)(6).

105. See *supra* notes 43–61 and accompanying text.

106. Anderson, *supra* note 7, at 663.

107. *Id.*

108. See H.B. 119, 28th Leg., 1st Spec. Sess. (N.M. 1967); N.M. Laws 1967, ch. 188.

109. N.M. CONST., art. VI, § 27 (“Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts as provided by law.”).

110. These specific exemptions were chosen, in part, following discussions with Felipe Guevara and Stephanie Welch, both of whom are Worker’s Rights attorneys at the New Mexico Center on Law and

The New Mexico exemption for ranch laborers differs slightly from the federal standard. In addition to those employees “principally engaged in the range production of livestock,” the local Minimum Wage Act also exempts those employees engaged in “milk production.”<sup>111</sup> At the federal level, courts have construed the exemption specific to livestock workers to reflect the congressional intent to reduce record keeping requirements for ranches that could not easily keep track of workers managing livestock away from ranching headquarters.<sup>112</sup> The legislative history available in New Mexico fails to explain why the local legislature expanded the exemption to include dairy workers.

The exemptions for piecework laborers include workers who have received or would traditionally receive piece rate wages based on the quantity of produce harvested, who commute daily to their work, and who were employed for less than thirteen weeks in the previous calendar year.<sup>113</sup> Under the FLSA, these exemptions were designed to protect piece rate incentives that motivate workers to maximize production.<sup>114</sup> The New Mexico legislature adopted this exemption word for word, but its legislative history provides no additional information concerning local motives.

In the wake of *Rodriguez*, New Mexico state courts should be amenable to hearing an appeal based on unconstitutional discrimination under the Minimum Wage Act. Potential plaintiffs should prevail by presenting claims under the state constitution’s Equal Protection Clause, as seen in *Rodriguez*. The plaintiffs will bear the burden of proving that the exemption from the Minimum Wage Act discriminates against a discrete class of people under a statute founded on an illegitimate government purpose.<sup>115</sup>

Under the New Mexican “modern articulation” of rational basis review, courts typically defer to the judgement of the legislature with the presumption that the lawmakers did not err.<sup>116</sup>

While federal courts and some state courts would likely apply rational basis review because the Minimum Wage Act exemptions constitute social or economic legislation,<sup>117</sup> after *Rodriguez*, New Mexico courts would apply the heightened form of rational basis review because exempted farm workers remain vulnerable to the political majority and vested special interests.<sup>118</sup> Under this form of rational review, farm employer defendants would need to present evidence and a firm legal rationale to defend the disparate payment of exempted agricultural workers. In the alternative,

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Poverty. They suggested a targeted approach towards these minimum wage exemptions based on the particular vulnerabilities of workers in these industries, to be discussed in greater detail below. *See infra* notes 120–56 and accompanying text.

111. *See* N.M. STAT. ANN. § 50-4-21(C)(9)(e) (2021).

112. *See* Anderson, *supra* note 7, at 663.

113. *See* N.M. STAT. ANN. § 50-4-21(C)(9)(c) (2021); 29 U.S.C. § 213(a)(6)(C) (2018).

114. *See* Anderson, *supra* note 7, at 663.

115. *Rodriguez v. Brand West Dairy* 2016-NMSC-029, ¶ 10, 378 P.3d 13, 19–20 (“[a] statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation.”) (alteration in original) (citing *Benavides v. E. N.M. Med. Cty.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265).

116. *Id.* ¶ 10, 378 P.3d at 19–20.

117. *Id.* ¶ 23, 378 P.3d at 24.

118. *Id.* ¶ 27, 378 P.3d at 25.



such plaintiffs could also argue that the minimum wage exclusions merit intermediate or even strict scrutiny, by showing that the statutory distinctions discriminate against a class of politically powerless people who have faced historical and ongoing animus on bases including, *inter alia*, race, color, national origin, ethnicity, citizenship and/or immigration status.<sup>119</sup>

The first step for plaintiffs will be to show that the Minimum Wage Act exemptions result in arbitrary discrimination between similarly situated people. The plaintiffs will then need to counter any reasons offered by defendants to justify the discriminatory treatment. Below, sections i and ii explain how a plaintiff could argue the case under rational basis review. Section iii demonstrates how a plaintiff could argue for heightened levels of review, given historical discrimination against politically powerless agricultural workers, as well as discrimination based on national origin. Section iv provides an additional avenue of relief through the Inherent Rights Clause of the New Mexico State Constitution. Based on this analysis, New Mexican courts should strike down the Minimum Wage Act's exclusion of certain kinds of farm workers due to violations of the state constitution.

i. The Minimum Wage Act creates classes of workers that experience arbitrary discrimination.

To determine whether the Minimum Wage Act violates the Equal Protection Clause, a court must first decide “whether the legislation at issue results in dissimilar treatment of similarly-situated individuals.”<sup>120</sup> The plain language of the Act calls for dissimilar treatment of people employed in various sectors of agriculture, or those performing certain types of work. The structural application of the Minimum Wage Act categorically precludes dairy workers and piecework laborers from receiving minimum wages, while allowing other agricultural workers to receive full benefits under the Act, even if they perform the same tasks. That is, an agricultural worker employed at a dairy or a cattle ranch is excluded from the Minimum Wage Act, whereas an agricultural worker that incidentally works with cows is not. Similarly, a piecework laborer who picks chile or onions, for example, is exempted from the Minimum Wage Act. Meanwhile, a farm worker who picks chile or onions, but is not paid by the quantity of the produced picked, must receive minimum wages.

The *Rodriguez* Court explicitly deemed this kind of discrimination unlawful.<sup>121</sup> The Court found the inequitable treatment of similarly situated agricultural workers arbitrary and unconstitutional.<sup>122</sup> The same should be said of the minimum wage exclusions for the most vulnerable classes of agricultural workers, especially when one witnesses how this statute affects the lives of farmers in practice. The disparate impact of minimum wage exclusions can be measured by evaluating the dire poverty that many excluded farm workers experience. The plaintiffs in a

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119. See generally Susana W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012) (detailing how animus towards the abovementioned groups can substantiate equal protection arguments). See also *infra* notes 146–56 and accompanying text.

120. *Madrid v. St. Joseph Hospital*, 1996-NMSC-064, ¶ 35, 122 N.M. 524, 928 P.2d 250, 261.

121. *Rodriguez v. Brand West Dairy*, 2016-NMCA-029, ¶ 28, 378 P.3d 13, 26.

122. *Id.* ¶ 17, 378 P.3d at 22.

Minimum Wage Act challenge should present evidence of how receiving subminimum wages affects their quality of life. One potential measure could be a survey of the annual income of excluded laborers in New Mexico.

The New Mexico Center on Law and Poverty (“NMCLP”) performed such a survey in 2012,<sup>123</sup> likely in preparation for their role as advocates for the plaintiffs in *Rodriguez*. NMCLP, in tandem with the Colonias Development Council, Sin Fronteras Organizing Project, Tierra del Sol Housing Corporation, and La Clínica de Familia, surveyed sixty dairy workers and one-hundred and ninety-three field workers across New Mexico. The survey revealed that the average annual household income for the surveyed workers was \$8,978 to support a household of three to four people.<sup>124</sup> In 2012, the poverty threshold for a household of four was \$23,050,<sup>125</sup> more than two and a half times greater than the average household earnings of the farm workers surveyed by the NMCLP.

At this time, the Department of Workforce Solutions (“DWS”) does not offer specific information about the wages of piecework and dairy laborers. Available information may provide a general idea of how much these agricultural workers earn. However, the data appears largely underinclusive. In 2019, DWS estimated that only 2,870 jobs were available for all workers employed in “Farming, Fishing & Forestry Occupations.”<sup>126</sup> Based on the job descriptions, piecework laborers would likely fall under the “Farm workers & Laborers, Crop, Nursery & Greenhouse” category, along with various other workers.<sup>127</sup> Dairy workers would likely fall into the “Farm workers, Farm, Ranch & Aquacultural Animals” category.<sup>128</sup> However, the DWS survey only accounts for the wages of 1,570 positions in the “Farm worker & Laborers, Crop, Nursery and Greenhouse” category, and 370 positions in the “Farm workers, Farm, Ranch & Aquacultural Animals category.” Undoubtedly, New Mexico employs more agricultural laborers than those

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123. NEW MEXICO CTR. ON L. AND POVERTY, HUMAN RIGHTS ALERT: NEW MEXICO’S INVISIBLE AND DOWNTRODDEN WORKERS (2012), [https://media.kjzz.org/s3fs-public/field/docs/2013/07/Report-FINAL-PDF-2013-06-28\\_1.pdf](https://media.kjzz.org/s3fs-public/field/docs/2013/07/Report-FINAL-PDF-2013-06-28_1.pdf).

124. *Id.* at 4.

125. U.S. DEP’T OF HEALTH & HUM. SERVS., FEDERAL POVERTY GUIDELINES (2012), <https://aspe.hhs.gov/2012-poverty-guidelines-federal-register-notice>.

126. DEP’T OF WORKFORCE SOLS., OCCUPATIONS AND WAGES, <https://www.dws.state.nm.us/en-us/Researchers/Data/Occupations-Wages> (in the “Occupational Employment & Wages Table,” locate the “Major Occupational Group” dropdown tab, then select “Farming, Fishing & Forestry” group to view relevant data).

127. *Id.* DWS provides the following job description for these workers: “Manually plant, cultivate, and harvest vegetables, fruits, nuts, horticultural specialties, and field crops. Use hand tools, such as shovel, trowels, hoes, tampers, pruning hooks, shears, and knives. Duties may include tilling soil and applying fertilizer; transplanting, weeding, thinning, or pruning crops; applying pesticides; or cleaning, grading, sorting, packing and loading harvested products.”

128. *Id.* DWS provides the following job description for these workers: “Attend to live farm, ranch, or aquacultural animals that may include cattle, sheep, swine, goats, horses and other equines, poultry, finfish, shellfish, and bees. Attend to animals produced for animal product, such as meat, fur, skins, feathers, eggs, milk, and honey. Duties may include feeding, watering, herding, grazing, castrating, branding, de-beaking, weighing, catching and loading animals. May maintain records on animals; examine animals to detect diseases and injuries; assist in birth deliveries; and administer medications, vaccinations, or insecticides as appropriate. May clean and maintain animal housing areas. Includes workers who shear wool from sheep and collect eggs in hatcheries.”

listed on the DWS website.

The U.S. Department of Agriculture (“USDA”) conducted the most recent national Census of Agriculture in 2017 (“Census”). Unfortunately, the Census does not contain information regarding the exact nature of producers’ work, nor their annual wages. The Census does, however, indicate that approximately 40,850 producers were employed in the farm industry in New Mexico in 2017.<sup>129</sup> Notably, the survey only counts a maximum of four producers per farm. Such data suggest that both the USDA and DWS underreport jobs held by farms, dairies and ranches that employ more than four producers.

In terms of wages, DWS reports that the bottom ten percent of the “Farm workers & Laborers, Crop, Nursery & Greenhouse” workers earned \$16,850 or less annually in 2020. The median annual wage for all workers in this category was \$19,420.<sup>130</sup> Of the workers employed in the “Farm workers, Farm, Ranch & Aquacultural Animals” category, the bottom ten percent earned \$18,090 or less, and the median annual wage was \$24,860 annually.<sup>131</sup> While these numbers suggest that the workers could potentially earn wages that would put them slightly above the current federal poverty guidelines,<sup>132</sup> the data remain underinclusive. The USDA Census indicates that far more agricultural employees work in New Mexico than those counted by DWS.

An updated and more expansive survey of dairy and piecework laborers around the state could show the effect of minimum wage exclusions on these workers. The current data issued by governmental agencies provide fragmentary information regarding the wages of these workers. However, the 2012 NMCLP survey provides initial insight into the impact of minimum wage exclusions for certain farm workers. As the findings of the survey demonstrate, a substantial number of excluded farm workers endure extreme and inhumane poverty. If nothing else, the wage information from DWS indicates that similarly situated farm workers can and do earn legal minimum wages.

In addition to a more expansive survey of excluded farm workers, proof of unequal wages could be gathered through discovery after filing a complaint against farm employers in the dairy or piecework industries. In either case, further information would be necessary to confirm what initial data suggest regarding the harm caused by the minimum wage exemptions. In short, it appears that the practical application of the Minimum Wage Act results in arbitrary discrimination against certain New Mexican agricultural workers. As of 2012, many dairy and piecework laborers in the state were living well below the poverty line because of their inability to obtain minimum wages.

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129. U.S. DEP’T OF AGRIC., 2017 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA, Vol. 1, Table 63 (2017), [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_State\\_Level/New\\_Mexico/st35\\_1\\_0063\\_0063.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1_Chapter_1_State_Level/New_Mexico/st35_1_0063_0063.pdf).

130. DEP’T OF WORKFORCE SOLS., *supra* note 126.

131. *Id.*

132. *See* Appendix at 240, Table 1.

- ii. There is no rational basis, nor firm legal rationale, for the discriminatory treatment of piecework and dairy laborers.

The likely defendants in a challenge to the agricultural minimum wage exemptions will include large-scale dairy employers and farmers that produce monocrops that require hand-harvesting. The potential defendant-employers could present arguments like the justifications for the workers' compensation exclusions seen in *Rodriguez*. They may defend the minimum wage statute on the grounds of cost savings, administrative convenience, and other concerns unique to the agricultural industry. However, as in *Rodriguez*, the challengers could readily counter each of these arguments, especially considering the vulnerability of these particular farm workers in the face of "political majorities and powerful special interests."<sup>133</sup> These arguments—and counterarguments—are considered in turn.

In the first instance, the New Mexico courts should not be convinced that cost savings justify the unequal payment of dairy and piecework laborers. Further economic analysis may show that the farms that typically employ piecework laborers and dairy workers could absorb the costs of raising wages for their workers. For example, the livestock industry in New Mexico tends to produce the highest net income for all agricultural business sectors in the State. Between 2015 and 2018, the average annual net income for "Animal & Products Production" was approximately \$2.29 billion, which represents 69% of the average net income of the entire New Mexico Agricultural Sector during the same period (approximately \$3.3 billion).<sup>134</sup> Also, in 2018, the dairy industry alone accounted for 41.4% of cash receipts for all agricultural commodities in New Mexico.<sup>135</sup> The scale of these businesses suggests that employers could readily provide their employees minimum wages.

However, the dairy industry will likely allege that small-scale dairies could not afford to pay their workers minimum wages. In 2017, only twenty-five farms with less than ten milk cows in their herds chose to sell their milk—the total value of annual milk production was \$74,000, or \$2,960 per farm.<sup>136</sup> While these farms might struggle to pay minimum wages, they are likely family-owned small businesses that would otherwise be exempted from the minimum wage laws.<sup>137</sup> At the opposite end of production, the fifty-seven New Mexican farms with milk cow herds between 2,500 and 4,999 valued their total annual milk sales at \$729,039,000,

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133. See *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 27, 378 P.3d 13, 25–26, for discussion regarding heightened rational basis review for protected discrete groups.

134. Four-year average net incomes derived from data in U.S. DEP'T OF AGRIC., NATIONAL AGRICULTURAL STATISTICS SERVICE, NEW MEXICO ANNUAL BULLETIN 10 (2018).

135. *Id.* at 13. See also Appendix at 241, Graph 1.

136. U.S. DEP'T OF AGRIC., *supra* note 129, at Vol. 1 at Table 17, [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_State\\_Level/New\\_Mexico/st35\\_1\\_0017\\_0019.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_State_Level/New_Mexico/st35_1_0017_0019.pdf).

137. N.M. STAT. ANN. § 50-4-21(C)(9)(b) (2021). This article focuses on the dairy and piecework exclusions as a starting point and will avoid looking into the other exemptions because of the potential impacts on small-scale family-owned farms. If these initial exemptions are overturned, other exclusions may also face scrutiny to determine whether the statutes unjustifiably discriminate against other farm workers.

or approximately \$12,790,157 per farm.<sup>138</sup> Further economic analysis could confirm that it would not be a hardship for these large-scale farms to increase their workers' wages to the state minimum.

Considering agricultural work outside the animal and animal products sector, the farms that hire piecework laborers in New Mexico primarily include crops such as chile and onions. These two crops represent the largest economic value of any vegetables produced in the state. Between 2017 and 2018, the average value of production for onions was \$76,207,500, and the average value of production for chile was \$49,159,500.<sup>139</sup> These farms employ many of their workers on a temporary basis at the time of harvest. The farms would only bear the burden of raising these wages in the few weeks in which harvest occurs. Furthermore, farm employers around the globe have moved away from piecework for policy reasons.<sup>140</sup> For example, workers competing for pay incentives based on productivity avoid resting periods and subject themselves to additional safety risks.<sup>141</sup>

In terms of administrative convenience, DWS would receive additional wage violation claims from piecework and dairy laborers, which could cause delays in processing.<sup>142</sup> However, wage claims can be brought at any state district court, and the farm workers would have the right to have their cases heard. Access to multiple venues reduces the administrative burden on DWS.

Finally, the farm industry is uniquely situated to absorb additional overhead costs because of the wide availability of governmental subsidies. The USDA and the New Mexico Department of Agriculture offer a multitude of subsidy programs ranging from price support and facility loans, to providing further support to farmers who contribute to conservation efforts.<sup>143</sup> As seen in *Rodriguez*, national price-fixing for agricultural commodities is also designed to help farm employers cover overhead costs.

Considering the net incomes produced by large-scale farming businesses, the administrative capacity for various legal venues to hear wage challenges, and the additional support provided by government subsidies, New Mexican courts should find that no rational basis exists for discriminating against piecework and dairy laborers. Under the New Mexico heightened form of rational review, these Minimum Wage Act exclusions are not supported by a "firm legal rationale." It remains to be seen whether evidence in the record would otherwise support potential defendant-

138. See U.S. DEP'T OF AGRIC., *supra* note 129, at Vol. 1, Table 17, [https://www.nass.usda.gov/Publications/AgCensus/2017/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_State\\_Level/New\\_Mexico/st35\\_1\\_0017\\_0019.pdf](https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1_Chapter_1_State_Level/New_Mexico/st35_1_0017_0019.pdf).

139. See U.S. DEP'T OF AGRIC., *supra* note 134, at 39.

140. PHILIP L. MARTIN, *MIGRANT WORKERS IN COMMERCIAL AGRICULTURE*, INTERNATIONAL LABOUR ORGANIZATION 8–11 (2016), [http://wcmsq3.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_538710.pdf](http://wcmsq3.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_538710.pdf).

141. *Id.*

142. See discussion regarding domestic workers *infra* at Part III.B.

143. See, e.g., U.S. DEP'T OF AGRIC., *New Mexico State Programs*, <https://www.fsa.usda.gov/state-offices/New-Mexico/programs/index> (listing the USDA's various subsidy/loan programs in New Mexico); NEW MEXICO DEP'T OF AGRIC., *Competitive Grant Programs*, <https://www.nmda.nmsu.edu/nmda-homepage/divisions/marketing/competitive-grant-programs/> (listing state-level agricultural grant programs); EWG FARM SUBSIDY DATABASE, *New Mexico Farm Subsidy Information*, <https://farm.ewg.org/region.php?fips=35000&statername=NewMexico> (same).

employers' arguments. While the minimum wage exemptions for these two classes would likely fail rational basis review, plaintiffs should also consider arguing for a higher standard of review. As a result, potential defendant-employers would face a greater burden to justify the exemptions.

iii. Pleading in the alternative: Pieceworkers and dairy laborers belong to a politically powerless group that has suffered historical discrimination and therefore merits heightened scrutiny.

The *Rodriguez* Court did not consider strict or intermediate scrutiny because the plaintiffs failed to provide an argument to classify farm and ranch laborers as a “suspect” or “sensitive” class.<sup>144</sup> Given that the *Rodriguez* Court did not reach the issue of whether farm and ranch laborers merit heightened levels of review, the option of requesting heightened levels of review remains viable.<sup>145</sup>

In this alternative, plaintiffs could attempt to invoke strict scrutiny, which gives the least deference to the legislation if the court finds that the law specifically targets a suspect class of people. According to the New Mexico Supreme Court, a suspect class is a “discrete group ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’”<sup>146</sup> In New Mexico, race, national origin, alienage, and gender-based classifications are considered suspect classes subject to strict scrutiny.<sup>147</sup> Under strict scrutiny, the party supporting the legislation must show that the provision is closely tailored to a compelling government interest.<sup>148</sup>

Admittedly, New Mexican courts have applied the strict scrutiny standard for equal protection analysis in extremely limited circumstances, where the suspect class was made up of people with “certain immutable characteristics.”<sup>149</sup> While all pieceworkers and dairy laborers do not share the immutable characteristics of race and gender, these workers may be able to invoke strict scrutiny review by demonstrating discrimination on the basis of national origin.<sup>150</sup> Foreign agricultural workers frequently come to the United States under H-2A Agricultural Visas, which guarantee receipt of at least federal minimum wages—\$13.27 per hour.<sup>151</sup> Meanwhile, U.S. Citizen or Lawful Permanent Resident dairy and piecework laborers are subject to the Minimum Wage Act exemptions. No compelling

144. *Rodriguez v. Brand West Dairy*, 2016-NMSC-029, ¶ 24, 378 P.3d 13, 24.

145. *Id.*

146. *Richardson v. Carnegie Library Rest., Inc.*, 1988-NMSC-084, ¶ 27, 107 N.M. 688, 763 P.2d 1153, 1161 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)), *overruled on other grounds* by *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 36, 125 N.M. 721, 965 P.2d 305.

147. *Richardson*, 1988-NMSC-084, ¶ 27, 763 P.2d at 1161; *New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 27, 126 N.M. 788, 975 P.2d 841, 850–51.

148. *Wagner v. AGW Consultants*, 2005-NMSC-016, ¶ 12, 137 N.M. 734, 114 P.3d 1050, 1056.

149. *See e.g., Richardson*, 1988-NMSC-084, ¶¶ 38–43, 763 P.2d at 1164–66.

150. Ismael Camacho, Staff Attorney for New Mexico Legal Aid’s Farmworker Project, suggested using discrepancies in the federal minimum wage and the state minimum wage for foreign and domestic farm workers as the basis for a strict scrutiny argument.

151. U.S. DEP. LABOR, ADVERSE EFFECT WAGE RATES (2021), <https://www.dol.gov/agencies/eta/foreign-labor/wages/adverse-effect-wage-rates>.

governmental interest exists in providing disparate wages to foreign and domestic farm workers that perform the same work, yet that is the state of the law in New Mexico.

Piecework and dairy laborers may also request intermediate scrutiny, which requires defenders of a discriminatory statute to show that the legislation is substantially related to an important government interest.<sup>152</sup> Plaintiffs could challenge the minimum wage exemptions if they can show that the law “either (1) restrict[s] the ability to exercise an important right or (2) treat[s] the person or persons challenging the constitutionality of the legislation differently because they belong to a sensitive class.”<sup>153</sup> To qualify as a sensitive class, courts may consider if the people in question “have been subjected to a history of discrimination and political powerlessness based on a characteristic that is relatively beyond their control.”<sup>154</sup> Under intermediate scrutiny, the Potential challengers to the Minimum Wage Act can easily show that dairy and piecework laborers belong to a sensitive class.

Ample evidence exists to show that certain farm workers have been subject to discrimination and political powerlessness beyond their control. Agricultural exclusions from labor laws, including workers’ compensation acts, health and safety laws, minimum wage acts and overtime provisions, suggest purposeful discrimination towards a discrete class of workers. These workers have been excluded from opportunities to organize and unionize. Additionally, as previously discussed, legal scholars have unearthed substantial evidence that early agricultural exclusions from the protections of employment laws were enacted, at least in part, to subjugate Black, Brown, and Indigenous farm workers in southern and western states.<sup>155</sup>

To further counter the potential defendant employers’ arguments that a person can simply seek other work to obtain higher wages, it bears noting that the ability to switch professions may not be possible as dairy and piecework laborers may not have qualifications to obtain jobs in other fields.<sup>156</sup> Undocumented status may also contribute to a worker’s inability to find work or have a chilling effect on requesting judicial action for workplace abuses.

If potential defendants would struggle to provide a “firm legal rationale” to defend the minimum wage exclusions under rational basis review, they should also fail to justify upholding the historical discrimination and political powerlessness of farm workers. Under intermediate review, they could not show that the discriminatory provisions in the Minimum Wage Act that exempt certain classes of farm workers substantially relate to an important government interest.

*Rodriguez* was the first decision to find that agricultural exemptions violated the Equal Protection Clause of the New Mexico Constitution. The New Mexican courts could also be the first to find an Equal Protection violation in a

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152. *Breen v. Carlsbad Mun. Sch.*, 2005-NMSC-028, ¶ 13, 138 N.M. 331, 120 P.3d 4, 418.

153. *Id.* ¶ 17, 120 P.3d at 419.

154. *Griego v. Oliver*, 2014-NMSC-003, ¶ 52, 316 P.3d 865, 884.

155. *See supra* Introduction.

156. DEP’T OF WORKFORCE SOLS., OCCUPATIONS AND WAGES, <https://www.dws.state.nm.us/en-us/Researchers/Data/Occupations-Wages> (select “Farm workers, Farm, Ranch & Aquacultural Animals,” or “Farm workers & Laborers, Crop, Nursery & Greenhouse” categories to view job qualifications.).

minimum wage act. Doing so would constitute another step towards vindicating farm workers in the face of historical discrimination.

iv. An additional avenue of relief exists under the Inherent Rights Clause of the New Mexico State Constitution.

The Inherent Rights Clause in Article II, Section 4 of the New Mexico Constitution, might likewise provide additional protections for agricultural pieceworkers and dairy laborers. The Inherent Rights Clause states that “[a]ll persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.”<sup>157</sup> As previously discussed, the minimum wage exemptions inhibit dairy and pieceworkers’ ability to attain economic stability. The exemptions also threaten the physical safety of certain farm workers by subjecting them to severe poverty. A family subsisting on the subminimum wages afforded to pieceworkers and dairy laborers struggles to obtain proper healthcare, nutrition, and education. As such, a coherent argument can be made that Article II, Section 4, of the New Mexico Constitution protects the rights of agricultural workers to acquire, possess and protect their property, and to work and live in safe conditions.

Such an assertion may face skepticism in New Mexican courts, which have rarely interpreted the Inherent Rights Clause. The courts have repeatedly refused to define the scope of Article II, Section 4,<sup>158</sup> despite a duty to construe the state constitution “so that no part is rendered surplusage or superfluous.”<sup>159</sup> Rather, the New Mexico Supreme Court has held that the inherent and inalienable rights to acquire property under Article II, Section 4, “are not absolute, but subject to reasonable regulation.”<sup>160</sup> Consequently, a court reviewing the Minimum Wage Act under the Inherent Rights Clause may feel tempted to defer to the state legislature if plaintiffs were to challenge the Act. However, as demonstrated in the foregoing analysis, the Minimum Wage Act exemptions of certain farm workers cannot be considered reasonable.

Moreover, dairy and piecework laborers merit careful consideration under the Inherent Rights Clause because of the dangerous conditions of their work, the heightened risk of experiencing extreme poverty, the substantial social barriers imposed by other labor law exclusions, and the historical animus towards Black, Brown, and Indigenous farm workers. As a result, the New Mexico courts may finally have a proper case that falls within the scope of the Inherent Rights Clause.

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157. NM CONST., art. II, § 4.

158. *Morris v. Brandenburg*, 2016-NMSC-027, ¶ 48, 376 P.3d 836, 854. *See also* *California First Bank v. State*, 1990-NMSC-106, ¶ 44, 111 N.M. 64, 801 P.2d 646, 658; *Reed v. State ex rel. Ortiz*, 1997-NMSC-055, ¶ 102, 124 N.M. 129, 947 P.2d 86, 106–07; *Trujillo v. City of Albuquerque*, 1990-NMSC-083, ¶¶ 22–23, 110 N.M. 621, 798 P.2d 571, 578; *Griego v. Oliver*, 2014-NMSC-003, ¶ 1, 316 P.3d 865, 870.

159. *Hannett v. Jones*, 1986-NMSC-047, ¶ 13, 104 N.M. 392 722 P.2d 643, 646.

160. *Otero v. Zouhar*, 1984-NMCA-054, ¶ 43, 102 N.M. 493, 697 P.2d 493, 504, *aff’d in part and rev’d in part on other grounds by* *Otero v. Zouhar*, 1985-NMSC-021, 102 N.M. 482, 697 P.2d 482, *overruled on other grounds by* *Grantland v. Lea Reg’l Hosp., Inc.*, 1990-NMSC-076, 110 N.M. 378, 796 P.2d 599.



In fact, such a novel constitutional analysis in this context would not be entirely without precedent in the state courts: in a 2020 ruling, the Washington Supreme Court applied their state constitution's previously discounted Privileges and Immunities Clause in a challenge to the state's minimum wage laws.<sup>161</sup>

Like the New Mexico Minimum Wage Act, the Washington Minimum Wage Act mirrored the 1966 amendments to the FLSA. In 2020, the Washington State Supreme Court invalidated agricultural overtime exemptions in the Washington Minimum Wage Act under the oft-ignored state Privileges and Immunities Clause of their state constitution. The Washington Privileges and Immunities clause grants "the right to all workers in dangerous industries to receive workplace health and safety precautions."<sup>162</sup> The Washington Supreme Court applied a "reasonable ground test," which, in the Washington courts, is necessary for challenges under the Privileges and Immunities Clause and more exacting than the federal rational basis review.<sup>163</sup> Specifically, the Court found no reasonable ground to justify restricting overtime protections for dairy workers, who experience extremely dangerous work conditions.<sup>164</sup>

In a concurring opinion, Justice Steven González went beyond the health and safety considerations to state that the defenders of the Washington Minimum Wage Act could not justify the history of discrimination against farm workers.<sup>165</sup> Justice González suggested that the Minimum Wage exclusions merited at least intermediate scrutiny and implicated a violation of the Washington State Constitution's Equal Protection Clause.<sup>166</sup> He emphasized that 99% of agricultural workers in the state of Washington were of "Latino" descent, and that these workers faced additional social barriers in acquiring housing, education, and health benefits.<sup>167</sup> He concluded by stating, "[e]xcluding farm workers from health and safety protections cannot be justified by an assertion that the agricultural industry, and society's general welfare, depends on a caste system that is repugnant to our nation's best self."<sup>168</sup> New Mexico courts can follow Washington's lead by defending the health, safety, welfare, and property of farm workers under the Inherent Rights Clause.

### **III. The New Mexico legislature can further protect dairy and piecework laborers.**

Even if the New Mexico courts do not eventually find that the aforementioned Minimum Wage Act farm workers exemptions violate the Equal Protection Clause or the Inherent Rights Clause, the legislature should amend the

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161. *Martinez Cuevas v. Deruyter Brothers Dairy, Inc.*, 196 Wash. 2d 506, 525, 475 P.3d 164, 174 (2020).

162. *Id.* at 168.

163. *Id.* at 173.

164. *Id.* at 174.

165. *Id.* at 175 (González, J., concurring).

166. *Id.*

167. *Id.* at 177 (González, J., concurring).

168. *Id.* at 178 (González, J., concurring).

Act to satisfy the needs of these vulnerable classes of farm workers. The legislature could eliminate the dairy and pieceworker exemptions and thereby increase the quality of life for such workers across the state. The legislature has recently enacted laws that indicate a potential willingness to expand the protections of the Minimum Wage Act to include all farm workers. This final section briefly surveys two ways in which the state legislature has demonstrated this willingness and discusses why these legislative actions might have potential relevance to the agricultural workers discussed in this Comment.

*A. The legislature provided typically underpaid farm interns with an avenue for fair wages and workers' compensation benefits.*

In 2019, the legislature instituted the New Mexico Agricultural Workforce Development Program (“AWDP”) to formalize some farm internships with government subsidies issued by New Mexico State University.<sup>169</sup> Unfortunately, the pilot program did not receive additional funding after one year, but the enactment suggests a readiness to provide minimum wages for farm workers. The AWDP was designed to refund participating farms up to fifty percent of costs for hiring interns at a minimum wage.<sup>170</sup> These farm interns would not be subject to the farm worker exemptions in the Minimum Wage Act.<sup>171</sup>

The AWDP was meant to sustain the agricultural industry by increasing the number of skilled young workers and relieving farm owners of the overhead costs to employ them.<sup>172</sup> According to the Financial Impact Report (“FIR”) prepared for the bill, “In 2012, the average age of farmers and ranchers in the state was 60.5 and only 3 percent of farmers and ranchers [in New Mexico] are under the age of 35.”<sup>173</sup> The program would train an incoming generation and provide a reasonable income to budding farmers.

Generally speaking, providing minimum wages for dairy and piecemeal workers might motivate young people to join the agricultural workforce and help sustain the industry. The workers would gain essential training and could potentially save enough money to become farm managers, operators, or even owners in the future. The New Mexico Legislature has taken similar steps to eliminate wage barriers in other professions.

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169. See H.B. 315, 54th Leg., 1st Sess. (N.M. 2019); N.M. Laws 2019, ch. 236, §§ 1–3 (codified at N.M. Stat. Ann. §§ 76-26-1 to -3 (2019)).

170. N.M. STAT. ANN. § 76-26-3(B) (2019).

171. *Id.*; See also N.M. STAT. ANN. § 76-26-3(A)(2)(c) (2019) (stating that the intern would receive “an hourly wage rate that is no less than the minimum wage rate established in Section 50-4-22 NMSA 1978”).

172. See LEGIS. FIN. COMM., FINANCIAL IMPACT REPORT FOR H.B. 315 (Mar. 14, 2019), <https://www.nmlegis.gov/Sessions/19%20Regular/firs/HB0315.PDF>.

173. *Id.* at 2.

*B. The New Mexico legislature repealed similar minimum wage exemptions for domestic workers.*

In 2019, the legislature amended the Minimum Wage Act to repeal the New Deal-era exemption for domestic workers.<sup>174</sup> DWS provided input for an FIR to assist in the legislative process for the bill, which indicated positive impacts would result from increasing the minimum wage for domestic workers.<sup>175</sup> The resulting FIR considered additional burdens on employers. Under its analysis, employers would indeed face higher overhead costs to pay for additional employee benefits. For instance, the FIR calculated increases in employers' unemployment insurance based on the total of covered payrolls each year.<sup>176</sup>

The report also weighed the increased administrative burden of processing wage violation claims against the increased revenue from personal income and gross receipt taxes.<sup>177</sup> The report anticipated greater numbers of wage claims on an already burdened system.<sup>178</sup> The FIR further noted that such increases could require additional funding to absorb claims. Nevertheless, the report highlighted that families earning higher wages would contribute more to the local economy than lower-income workers.<sup>179</sup> In enacting the amendments, the legislature apparently agreed that this latter point outweighed any additional burdens on employers.

Similarly, pieceworkers and dairy laborers would be able to contribute more to the local economy if they received minimum wages. It is true that some farm employers could face additional costs that do not apply to employers of private domestic workers who remain exempt from workers' compensation benefits.<sup>180</sup> Even so, a very limited number of farm employers would have to pay overhead costs for both workers' compensation and minimum wage increases. Pieceworkers remain excluded from workers' compensation, because they primarily work as temporary contractors.<sup>181</sup> Furthermore, only those farms officially employing more than three people would pay both workers' compensation and minimum wages. As of the USDA's 2012 Census of Agriculture, only 7.5% of New Mexican farms employed more than three workers.<sup>182</sup>

If the legislature limited minimum wage increases to dairy workers, the overhead costs would only increase substantially for major producers, because family-owned dairies would remain exempt from the Minimum Wage Act. Similarly,

174. See S.B. 85, 54th Leg., 1st Sess. (N.M. 2019); N.M. Laws 2019, ch. 242 (codified at scattered sections throughout N.M. STAT. ANN. chapter 50).

175. See LEGIS. FIN. COMM., FINANCIAL IMPACT REPORT FOR S.B. 85 (Feb. 1, 2019), <https://www.nmlegis.gov/Sessions/19%20Regular/firs/SB0085.PDF>.

176. *Id.* at 2.

177. *Id.* ("Unquantifiable but positive impacts to personal income taxes (PIT) would likely result from raising the minimum wage. Any positive increases may partially be offset by lower employment levels due to fewer minimum wage jobs. However, the effective PIT rate increases as the income level of a person increases, particularly in the lower income strata, so the net effect is likely to be a positive PIT revenue impact. For example, one person making \$25 thousand annually will contribute more than double the PIT revenues than two people each making \$12.5 thousand would contribute.")

178. *Id.*

179. *Id.*

180. N.M. STAT. ANN. § 52-1-6(A) (1990).

181. N.M. STAT. ANN. § 52-1-22 (1989).

182. See *supra* notes 85–86 and accompanying text.

if piecework day laborers received minimum wages, the overhead costs for unemployment insurance would only increase on a temporary or limited basis based on the total revenue for payrolls each year. The burdens on employers would be countered by the increased payments taken out of the dairy and pieceworkers' payroll, and their increased capacity to contribute to the local and statewide economy.

### CONCLUSION

The landmark decision in *Rodriguez v. Brand West Dairy* marked a shift in how the state of New Mexico treats agricultural workers. Increased access to workers' compensation benefits provided farm and ranch laborers greater legal protections in the face of catastrophic injuries. With this precedent—and its state constitutional grounding—local courts can reconsider other longstanding laws that reduce farm workers' ability to receive fair treatment, work safely, and earn a reasonable living. The minimum wage exemptions for certain agricultural workers provide the next avenue for expanding farm workers' rights in New Mexico, whether through litigation or legislation. The time has come to overturn antiquated laws that harm the very people who sustain us in the most fundamental way—by providing food for families around the state and across the country.

### APPENDIX

TABLE 1.<sup>183</sup>

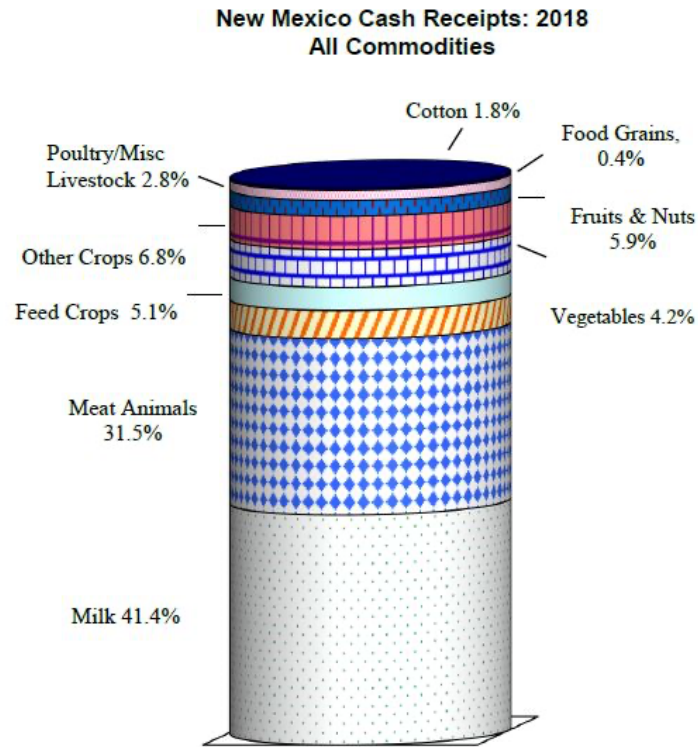
2021 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA		
PERSONS FAMILY/HOUSEHOLD	IN	POVERTY GUIDELINE
1		\$12,880
2		\$17,420
3		\$21,960
4		\$26,500
5		\$31,040
6		\$35,580
7		\$40,120
8		\$44,660

For families/households with more than 8 persons, add \$4,540 for each additional person.

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183. U.S. DEP'T OF HEALTH & HUM. SERVS., FEDERAL POVERTY GUIDELINES (2021), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2021-poverty-guidelines>.

GRAPH 1.<sup>184</sup>



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184. U.S. DEP'T OF AGRIC., NATIONAL AGRICULTURAL STATISTICS SERVICE, NEW MEXICO ANNUAL BULLETIN 10 (2018).