

FACTORY FARMS AND LABOR LAW: CAN UNIONIZATION GET THE JOB DONE?

By
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At different moments in U.S. history, workers have joined together to fight for a better future. Now more than ever, as industries become increasingly consolidated and powerful, workers' ability to band together and advocate for their rights is integral. Recent victories in labor rights have not yet made their way to the industrial animal agricultural sphere. This is unfortunate, as the conditions at slaughterhouses and concentrated animal feeding operations are extractive and abusive towards workers and animals alike. In the past, strong union presence in slaughterhouses aided workers in achieving wage increases and job stability. However, this resulted in extreme industry pushback, from which these unions have yet to recover. While labor conditions at slaughterhouses are bad, conditions experienced by other animal agricultural workers are worse due to a lack of federal labor rights protections. The National Labor Relations Act (NLRA), the legislation providing the federally protected right to collectively bargain to American employees, has exemptions that capture entire swaths of the animal agricultural workforce. This exclusion has powerful consequences: workers can be fired for simply discussing their working conditions with colleagues. This Article argues that the agricultural exemption should be removed from the NLRA to give workers in industrial animal agriculture a long-overdue seat at the bargaining table. Due to the unlikelihood of achieving a revision of the NLRA, this Article explores other approaches for ameliorating the harm wrought by the agricultural exemption, such as instituting protections for exempted workers at the state level. It concludes with a number of suggestions for how legal advocates can empower industrial animal agricultural workers.

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I. INTRODUCTION

Since the eighteenth century, unionization has been an essential tool in the arsenal of America's workforce.¹ Unions allow individual employees to join together and bargain for better working conditions relating to hours, pay, and benefits, and to gain recompense from employers' unfair labor practices. Despite its fundamental importance, especially to low-wage workers operating in dangerous conditions, the right to unionize

¹ The earliest recorded strike in the United States dates back to 1768, when New York tailors protested a wage reduction. Another foundational event in this country's history of collective action dates back to 1794, when the first union in the United States, the Federal Society of Journeymen Cordwainers, was formed by shoemakers in Philadelphia. *Labor Movement*, HISTORY (Mar. 31, 2020), <https://www.history.com/topics/19th-century/labor> (accessed Jan. 15, 2025).

has not yet been secured for all workers in the United States.² Many workers in concentrated animal feeding operations (CAFOs) can be fired for simply mentioning the desire to unionize to their fellow workers.³

By contrast, laborers at slaughterhouses and processing plants⁴ possess the federally protected right to unionize.⁵ Despite this protection, these workers face other barriers preventing collective action every step of the way, from forming a union, to negotiating for a collective bargaining agreement, to winning re-election campaigns.

From the 1980s until very recently, unionization in the United States has been on the decline, with more than forty years of “legislative assaults on union power and collective bargaining rights.”⁶ Fortunately though, there has since been a rise in public support for unionization.⁷

In 2022, the approval rate for unions was the highest it has been in years, clocking in at 71%.⁸ This approval rate parallels a recent increase in pro-labor activity. Take, for example, the Fight For \$15 movement,⁹ in which low-wage workers such as fast-food employees went on strike in pursuit of \$15 per-hour pay and union representation.¹⁰ Unionization has been—and continues to be—a vitally important strategy for workers with less social capital, who find strength in numbers to secure a place at the bargaining table. Harnessing current public support for unions could revitalize the fight for extending collective bargaining rights to previously excluded workers and ensuring that CAFO employees and slaughterhouse workers alike have the ability to exercise their rights without fear of employer retaliation.

The National Labor Relations Act (NLRA) was introduced to promote the practice of collective bargaining as a means of giving workers a

² National Labor Relations Act, 29 U.S.C. § 152(3) (2024). As this Article will discuss, the NLRA, while granting the right to unionize to employees, has problematic exemptions from its protection, such as the agricultural exemption.

³ Dustin J. Coffman, *The Excluded Workers: The NLRA, Farm Laborers, and a Lineage of Exploitation*, 27 DRAKE J. OF AGRIC. L. 85, 101 (June 12, 2022), https://aglawjournal.wp.drake.edu/wp-content/uploads/sites/66/2023/01/220531_Coffman_Final_Macro1.pdf (accessed Jan. 15, 2025).

⁴ Slaughterhouses, processing plants, and packing houses all connote the same business of the slaughter and process of farmed animals for food production.

⁵ NLRA 29 U.S.C. § 151, 152(3); Roger Horowitz, *The Decline of Unionism in America's Meatpacking Industry*, 32 Soc. POL'Y 1, 32 (2002).

⁶ Megan Dunn & James Walker, *Union Membership in the United States*, U.S. BUREAU OF LABOR STATISTICS (Sept. 2016), <https://www.bls.gov/spotlight/2016/union-membership-in-the-united-states/> (accessed Jan. 23, 2025); Gosia Wozniacka, *Less than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIVIL EATS (May 7, 2019), <https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/> (accessed Jan. 18, 2025).

⁷ Nathan Bomey, *Unionization Rate Hit All-time Low in 2022 Despite Growth in Overall Members*, AXIOS (Jan. 19, 2023), <https://www.axios.com/2023/01/19/union-membership-rate-2022-all-time-low> (accessed Jan. 18, 2025).

⁸ *Id.*

⁹ Wozniacka, *supra* note 6.

¹⁰ *About*, FIGHT FOR A UNION, <https://fightforaunion.org/about/> (accessed Jan. 18, 2025).

voice in determining their own working conditions.¹¹ The federally protected right to unionize empowers workers to join together in collective negotiations relating to workplace conditions such as wages, benefits, and safety.¹² In the original proposal for the Act, there were no categorical exemptions.¹³ However, by the time of its enactment, Congress had added the agricultural exemption to the NLRA, excluding millions of Black workers from its protections.¹⁴ This exclusion was the product of political compromise meant to appease Southern Democrats who would not otherwise support this New Deal legislation without a facially “race-neutral proxy” that in practice denied bargaining power to Black agricultural workers.¹⁵ The agricultural exemption’s “lineage of exploitation” continues to this day,¹⁶ as the country’s agricultural workforce is disproportionately comprised of minority workers.¹⁷ The agricultural exemption encompasses many of the workers in industrial animal agriculture. Although the demographic makeup of America’s animal agricultural workforce has changed over time, the injustice of excluding agricultural workers from the federally protected right to unionize endures.¹⁸ Without the federally protected right to unionize, industrial animal agricultural workers are at an extreme disadvantage, as employers can fire such workers for attempts to better their working conditions.¹⁹

This Article explores the interplay of labor law and industrial animal agriculture, emphasizing the importance of unions in this dangerous and exploitative field of work. Part II of this Article details the ebb and flow of union power in America’s slaughterhouses, a continuing conflict between industry and workers that has intensified along with the industrialization of animal processing. Part III details the atrocious working conditions that are commonplace in slaughterhouses and CAFOs. These workplaces are rife with devastating injuries, long-term health impacts, and abusive management practices. There is a vast power differential in industrial animal agriculture due to the workforce’s largely immigrant makeup. Part IV discusses the NLRA, detailing the rights and protections that it grants covered employees and denies those it excludes. It also explores the contours of the agricultural exemption that the National Labor Relations Board (NLRB), the agency tasked with the NLRA’s interpretation,²⁰ and courts use to classify different jobs within the ambit of industrial animal agriculture.

¹¹ Coffman, *supra* note 3, at 92–93.

¹² *Id.* at 105.

¹³ *Id.* at 94.

¹⁴ *Id.* at 97.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 101.

¹⁸ *Id.*

¹⁹ *Id.* at 106.

²⁰ Samantha J. Walter, *Flip Flops Should Be Limited to Footwear: An Analysis of the NLRB’s Ever-Changing Interpretations of Concerted Activity Under the NLRA*, 127 PENN.

Part V discusses the steps that some states have taken to remedy the harms of the agricultural exemption, passing statewide legislation granting the right to unionize to federally excluded workers, as well as the barriers preventing other states from doing the same. Part VI evaluates the struggles and successes of union activity in industrial animal agriculture, exploring unions' limitations, such as dwindling membership and the insufficient response of unions in slaughterhouses during the pandemic,²¹ and strengths, such as in advocating for the interests of workers through line speed litigation.²² Part VII gives recommendations for reckoning with the agricultural exemption. It starts with the most diffuse but doable approaches, such as localized responses like supporting worker solidarity and advocating for statewide legislative change, and also includes the more direct but daunting remedy of amending the NLRA itself, by removing the agricultural exemption at the federal level or bringing an equal protection challenge. Finally, Part VIII concludes this Article, re-emphasizing the importance of issues explored throughout.

II. A BRIEF HISTORY OF UNIONIZATION IN SLAUGHTERHOUSES

The story of the rise and fall of union power in the nation's slaughterhouses is a dance between collective bargaining and industry push-back. This section focuses on historical unionization in slaughterhouses rather than CAFOs because there is no past—or present—union activity in CAFOs due to the agricultural exemption. However, the history of unionization in slaughterhouses illustrates the imbalanced power dynamics at play between employer and employee that are common to all parts of industrial animal agriculture and shows how collective action enables workers to ameliorate their working conditions.

A. BEGINNINGS

The development of unionization in slaughterhouses is just one story set on the broader backdrop of capitalism.²³ The top meatpacking players today are the companies that were the most successful at disenfranchising their workers.²⁴ Beyond the meatpacking industry, there has been an ebb and flow of the success of unions in America's

STATE L. REV. 539, 541 (2023), <https://elibrary.law.psu.edu/pslr/vol127/iss2/7> (accessed Feb. 1, 2025).

²¹ Lisa Held, *What a Surge in Union Organizing Means for Food and Farm Workers*, CIVIL EATS (Mar. 17, 2022), <https://civileats.com/2022/03/17/what-a-surge-in-union-organizing-means-for-food-and-farm-workers/> (accessed Jan. 16, 2025).

²² See generally *United Food & Commer. Workers Union, Local No. 633 v. U.S. Dep't of Agric.*, 532 F. Supp. 3d 741 (D. Minn. 2021) (discussing labor unions suing on behalf of slaughterhouse employees to stop the elimination of line speed regulations).

²³ Horowitz, *supra* note 5, at 36.

²⁴ *Id.*

industrialized workforce, as unions and employers have responded to a miasma of political, technological, and structural changes.²⁵

Unionization efforts in the meatpacking sector have been underway since the Civil War, with meaningful success being achieved in the 1940s thanks to the efforts of the United Packinghouse Workers of America (UPWA).²⁶ Building on this momentum, unions in meatpacking plants were quite successful in signing national contracts that standardized wages and working conditions in the mid-twentieth century.²⁷ These unions won their members' entry into the middle class, standardizing wages for approximately 70,000 workers.²⁸

B. TRANSFORMATIVE TECHNOLOGIES

Unfortunately, the state of affairs took a turn for the worse once technological advances enabled non-unionized companies to enter the market.²⁹ As the process of food animal dis-assembly became increasingly mechanized, the requisite skill and number of laborers decreased.³⁰ Boning and cutting beef, formerly performed in supermarkets, were now accomplished in slaughterhouses along conveyor belts.³¹ These mechanistic processes were perfected by industry newcomers such as Iowa Beef Processors (IBP).³² Along with technological changes within slaughterhouses, the development of America's transportation system transformed the meat industry. Highways made it possible for packing plants to be built in the countryside, allowing companies to distance themselves and their workers from unionized hubs such as Memphis, Los Angeles, and Chicago.³³ From 1963 to 1984, the number of workers in rural plants increased to half of the meatpacking workforce.³⁴ At these rural plants, laborers were sourced from an international labor market rather than the comparatively unionized domestic American industrial labor market.³⁵ Thanks to rapid technological change, union power within the industry was fragmented by distance and a newly diversified workforce, and efforts to unionize new, unorganized plants proved to be futile.³⁶

²⁵ UNIONIZING THE JUNGLES: LABOR AND COMMUNITY IN THE TWENTIETH-CENTURY MEATPACKING INDUSTRY 9-11 (Shelton Stromquist and Marvin Bergman eds., 1997) [hereinafter UNIONIZING THE JUNGLES].

²⁶ Horowitz, *supra* note 5, at 32.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 32-33.

³⁰ *Id.* at 33.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 32-33.

³⁴ *Id.* at 33.

³⁵ *Id.*

³⁶ *Id.* at 33, 35.

C. THE INDUSTRY FIGHTS BACK

Capitalizing on these structural changes, the meatpacking industry seized the opportunity to aggressively attack established unions. Companies sold off unionized plants to new owners such as ConAgra, which re-opened the plants without unions and with lower wages.³⁷ In the 1970s, Perdue purchased a number of union-represented poultry plants in Delaware, Maryland, and Virginia, only to close the plants and reopen them after firing all unionized workers.³⁸

In the same vein, IBP had a simple anti-union approach: shut down unionized facilities and open unorganized ones.³⁹ Other IBP tactics were to force unionized plants into strikes which IBP could then outlast and to pressure unions into making concessions through increasingly unfavorable contracts.⁴⁰ These union-busting activities devastated local communities. In Storm Lake, Iowa, IBP renovated and reopened a unionized plant previously owned by Hygrade.⁴¹ When the workers formerly employed by Hygrade applied to work at the new IBP plant, IBP did not hire them, turning instead to immigrant laborers who lacked the inconvenient baggage of prior union membership.⁴²

With Ronald Reagan's presidency and correlative economic recession, the challenges faced by unions throughout all sectors of the American workforce intensified.⁴³ The 1980s were challenging for the labor movement due to "[s]tructural changes in the corporate economy, the increased mobility of capital, and a more hostile political climate."⁴⁴ While meatpacking wages exceeded the manufacturing average by 15% in the 1970s, by the 1990s, meatpacking wages had sunken to 20% below the mean.⁴⁵ The systematic attack on organized workforces and the consolidation of industry power has shaped the meatpacking industry as we now know it, leaving union power in this space a shadow of its former self.⁴⁶

D. WHERE ARE WE NOW?

Today, the United Food and Commercial Workers International Union (UFCW) continues to negotiate for some meatpacking workers.⁴⁷

³⁷ *Id.* at 35.

³⁸ HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS 77 (2004) [hereinafter BLOOD, SWEAT, AND FEAR].

³⁹ Horowitz, *supra* note 5, at 34.

⁴⁰ *Id.*

⁴¹ MARK A. GREY, *Meatpacking in Storm Lake, Iowa: A Community in Transition, in PIGS, PROFITS, AND RURAL COMMUNITIES* 57, 59 (Kendall M. Thu & E. Paul Durrenberger eds., 1998).

⁴² *Id.* at 60–61.

⁴³ Horowitz, *supra* note 5, at 35.

⁴⁴ UNIONIZING THE JUNGLES, *supra* note 25, at 10.

⁴⁵ Horowitz, *supra* note 5, at 35.

⁴⁶ GREY, *supra* note 41, at 68.

⁴⁷ Horowitz, *supra* note 5, at 35.

However, there is no longer a national system of collective bargaining in the industry, which leads to extreme variability in wages, even amongst plants owned by the same company.⁴⁸ The absolute gutting of slaughterhouse unions' power has resulted in low wages, large workforce turnover, and deplorable conditions.⁴⁹ However, the story is far from over. The decades-long pushback against meatpacking unions proves that a unionized workforce is something the industry fears and will go to great lengths to quash. The industry sees unions as a threat, because when workers band together, they have a fighting chance to better their conditions.

III. WORKING CONDITIONS IN INDUSTRIAL ANIMAL AGRICULTURE

The purpose of this section is to show the stakes: the right to engage in collective action is imperative in industrial animal agriculture because of the working conditions workers face. The work in CAFOs and slaughterhouses is fast-paced, grueling, and dangerous. Workers suffer physical and emotional harm as a result of their work, and as this section will go on to describe, the industry intentionally sources workers from marginalized communities who are more vulnerable to exploitation.

A. WORKING CONDITIONS IN CAFOS

First of all, CAFO employees are overworked and outnumbered. At the CAFO Kinlaw Farms in North Carolina, one employee alone was responsible for managing 14,000 hogs housed in twelve sheds.⁵⁰ In dairies, CAFO workers are exposed to dangerous chemicals leading to irritation and inflammation of the eyes, skin, and lungs, as well as life-long health conditions that only become apparent years later, including permanent nervous system damage and cancer.⁵¹ Furthermore, keeping vast quantities of animals crammed together causes poor air quality.⁵² CAFO workers encounter a variety of air pollutants, from poisonous gases to endotoxins, and the percentage of occupational respiratory diseases can be up to 30% at factory farms.⁵³ Workers in CAFOs are at a greater risk of catching infectious disease when compared to the general population, with one publication comparing work in a hog shed to

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *McKiver v. Murphy-Brown, L.L.C.*, 980 F.3d 937, 983 (4th Cir. 2020).

⁵¹ CARLY FOX ET AL., WORKERS' CTR. OF CENT. N.Y. & WORKER JUST. CTR. OF N.Y., MILKED: IMMIGRANT DAIRY FARMWORKERS IN NEW YORK STATE 48 (2017).

⁵² *McKiver*, 980 F.3d at 979.

⁵³ Charity Isley, *Earth Watch: CAFO Farmworkers Lack Basic Job Safety Protections*, NATURAL GROCERS, <https://www.naturalgrocers.com/health-hotline-article/earth-watch-cafo-farmworkers-lack-basic-job-safety-protections> (accessed Jan. 18, 2025).

“standing in an amphitheater of infected persons.”⁵⁴ Oftentimes in public health crises, CAFO workers are the first to be infected before going home and passing on diseases to their family members and the broader community.⁵⁵ Working at CAFOs is not just making people sick—it is killing them. Gruesome fatalities in the animal agriculture industry have been reported to OSHA, with workers “drowning in manure pits, being gored by bulls, and suffocating in grain bins.”⁵⁶

B. WORKING CONDITIONS IN SLAUGHTERHOUSES

The raising of animals for consumption is not the only part of the process posing dangers to animal agricultural workers. A report by the Human Rights Watch studied working conditions in the United States’ slaughterhouses⁵⁷ and concluded that this country is violating international human rights standards in its treatment of workers in the meat and poultry industries.⁵⁸ The report drew its findings from visiting beef, pork, and poultry slaughterhouses in Omaha, Nebraska; Tar Heel, North Carolina; and Northwest Arkansas, respectively.⁵⁹ Injuries at these facilities include “amputations and crushings of body parts . . . lacerations, contusions, burns, fractures,” and “punctures.”⁶⁰ Slaughterhouse employees have suffered horrific deaths at work, such as beheading by a dehiding machine and asphyxiation from hydrogen sulfide fumes while cleaning a blood collection tank.⁶¹ Long shifts increase the risk of injury, which more than doubles by the end of a twelve-hour shift.⁶² Despite the high risk and frequency of injury, workers fear reporting when they get hurt, because, in the words of an employee at Nebraska Beef, employers “love you if you’re healthy and you work like a dog, but if you get hurt you are trash . . . They will find a reason to fire you.”⁶³

Along with dramatic lacerations and deadly incidents, workers face less blatantly horrific injuries that still have lifelong, debilitating impacts. In meat processing plants, hour after hour of repetitive movement can lead to hands freezing in a curled position.⁶⁴ One worker from a poultry slaughterhouse in Northwest Arkansas described his experience with chronic injury: “I hung the live birds on the line. Grab, reach, lift, jerk. Without stopping for hours . . . But after a time, you see what

⁵⁴ ANN LINDER ET AL., CTR. FOR ENV’T & ANIMAL PROT. AT N.Y.U., ANIMAL MARKETS AND ZOONOTIC DISEASE IN THE UNITED STATES 85 (2023).

⁵⁵ *McKiver*, 980 F.3d at 980.

⁵⁶ Isley, *supra* note 53.

⁵⁷ See generally BLOOD, SWEAT, AND FEAR, *supra* note 38.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.* at 31.

⁶¹ *Id.*

⁶² *Id.* at 42.

⁶³ *Id.* at 52–53.

⁶⁴ *Id.* at 36.

happens. Your arms stick out and your hands are frozen . . . I'm twenty-two years old, and I feel like an old man."⁶⁵

With the industry's incessant push for profit, the situation for workers is only getting worse. Line speeds are accelerating, and as will be discussed further in Part VI of this Article, there is no functioning regulatory oversight to stop this trend.⁶⁶ Federal regulation of line speed is not concerned with worker safety, but rather is focused on maximizing companies' profits, and secondarily, preventing the adulteration of meat.⁶⁷ In the words of a Northwest Arkansas poultry worker, cutting chicken is more an art than a science: "[s]ometimes it's like butter, sometimes it's like leather . . . [s]ometimes the only way to make the cut is toward yourself."⁶⁸ This same worker reported that because of the rapid speed of their work, employees unintentionally "stick themselves with injection needles [for marinade injection]. Blood and flesh fall into the meat."⁶⁹ Despite the viscera, gore, and chemicals that workers come into contact with, companies are "stingy" with protective equipment.⁷⁰ Some plants require workers to pay for their own personal safety equipment, and what counts as training may be watching a video paired with the instruction to observe and mimic the movements of the worker next to you.⁷¹ Learning by doing can come at quite the cost: one worker at a chicken processing plant from Arkansas shared, "I know the chemicals are dangerous because I saw a coworker lose his sight when the chemicals sprayed in his eye, not because my supervisors told me of the dangers."⁷²

Making matters worse, workers toil in treacherous conditions for extremely long hours. Employers can require mandatory overtime, with no limit as to the amount of overtime they can mandate.⁷³ Due to the industry's high turnover rate, employers save money by requiring heavy overtime from their existing workforce rather than paying the insurance, benefits, and training costs for new hires.⁷⁴ Along with the increased risk of injury that comes with longer shifts, a health care provider serving poultry workers reported psychological ramifications from constant overtime: "A lot of them feel guilty because they don't think they are taking good care of their children. And they're right. But they have to live with mandatory overtime or they get fired . . . and all the social costs get passed on to the community."⁷⁵ Workers

⁶⁵ *Id.*

⁶⁶ *Id.* at 24.

⁶⁷ *Id.*

⁶⁸ *Id.* at 38.

⁶⁹ *Id.* at 39.

⁷⁰ *Id.* at 43.

⁷¹ *Id.* at 44.

⁷² *Id.* at 45–46.

⁷³ *Id.* at 43.

⁷⁴ *Id.*

⁷⁵ *Id.*

also report psychological distress resulting from the nature of the work itself, with a kill floor manager recounting, “The worst thing, worse than the physical danger, is the emotional toll . . . Pigs down on the kill floor have come up and nuzzled me like a puppy. Two minutes later I had to kill them—beat them to death with a pipe. I can’t care.”⁷⁶ Witnessing and enacting animal suffering and death for hours on end is psychologically harmful. To summarize, the conditions in slaughterhouses are dangerous, draining, and depressing.

C. PROBLEMS FACED BY IMMIGRANT WORKERS

Immigrant workers are acutely vulnerable to employers’ intimidation tactics. Immigrants fear voicing concerns about working conditions to management or engaging in collective action because their employers can—and often do—retaliate.⁷⁷ At Nebraska Beef, for example, a raid by Immigration and Naturalization Services (INS) initiated by management during an organizing effort resulted in the deportation of more than two hundred workers.⁷⁸ With the threat of deportation hanging over their heads, immigrant workers have a lot to lose.

A worker at Nebraska Beef described the “scare tactic[s]” used by a supervisor who claimed that a union contract would not allow workers to go home to Mexico in order to influence a union election: “For us family is everything. If my grandmother dies or my sister gets married I have to go home . . . When they told us the union contract would not let us go home, that frightened a lot of people who supported the union.”⁷⁹ There is no factual basis for the manager’s claim that a union contract would not allow its members time off to travel home.⁸⁰ Rather, unionized plants with a high immigrant population often have provisions in their collective bargaining agreements guaranteeing workers the ability to take leaves for familial obligations.⁸¹ Management capitalizes on immigrant workers’ vulnerability and their unfamiliarity with labor law to keep them from exercising their rights.⁸²

While all employees have the right to organize and bargain collectively, no matter their immigration status, thanks to jurisprudence, this proclamation lacks teeth.⁸³ The Supreme Court held in *Hoffman Plastic Compounds, Inc. v. NLRB* that undocumented workers are not entitled

⁷⁶ *Slaughterhouse Workers*, FOOD EMPOWERMENT PROJECT, <https://foodispower.org/human-labor-slavery/slaughterhouse-workers/> (accessed Jan. 12, 2025).

⁷⁷ BLOOD, SWEAT, AND FEAR, *supra* note 38, at 112–13.

⁷⁸ *Id.*

⁷⁹ *Id.* at 86.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (affirming that backpay relief for retaliation by employers for unionizing employees was not available to undocumented immigrant without work authorization under the Immigration Reform and Control Act).

to backpay for lost wages in response to the unfair labor practices of their employer because federal immigration policy forecloses the Board from awarding relief to workers who lack authorization to work in the United States.⁸⁴ To provide context, the facts are as follows: in *Hoffman*, Jose Castro was fired after supporting a union organizing campaign at his plant.⁸⁵ The NLRB found that the layoff violated the NLRA, and required the employer to award Castro backpay.⁸⁶ Unfortunately, this was not the end of the story: testimony given by Castro revealed he had never been authorized to work in the United States, as he gained employment by presenting a friend's birth certificate to his employer.⁸⁷ Because of this, the administrative law judge (ALJ) found on review that the Board was not authorized to grant Castro relief, due to the preclusive effect of the Immigration Reform and Control Act.⁸⁸ The Supreme Court agreed with the ALJ's assessment, stating, "[W]here the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may have to yield."⁸⁹ Although the Court's holding in *Hoffman* was intended to promote compliance with federal immigration law, it really does the opposite.⁹⁰ Perversely, *Hoffman* incentivizes employers to hire undocumented workers, because even if the NLRB finds that the employer has committed an unfair labor practice, such as an illegal firing, there will be no meaningful (i.e., financial) remedy.⁹¹ Instead, under *Hoffman*, undocumented workers must bear the burden of their employer's unfair labor practices.

D. WORKING CONDITIONS IN THE DAIRY INDUSTRY

The same sort of inequities characterize the country's dairy industry, which runs in large part—an estimated 51% minimum—on the labor of immigrants.⁹² The dairy industry has grown exponentially since the early 1990s, and immigrant workers have paid the price.⁹³ As the industry has consolidated into a smaller number of “more efficient” farms, dairy farmers rely on Latino immigrants to staff twenty-four-hour milking parlors.⁹⁴ If the United States' immigrant dairy workers

⁸⁴ *Id.* at 149.

⁸⁵ *Id.* at 138.

⁸⁶ *Id.* at 138, 142.

⁸⁷ *Id.* at 142.

⁸⁸ *Id.*

⁸⁹ *Id.* at 146.

⁹⁰ BLOOD, SWEAT, AND FEAR, *supra* note 38, at 119–20.

⁹¹ *Id.*

⁹² FOX ET AL., *supra* note 51, at 20.

⁹³ *Id.* at 10.

⁹⁴ *Id.*

all left tomorrow, the industry would collapse.⁹⁵ This would result in the loss of over 200,000 jobs and a 90% surge in milk prices.⁹⁶ Narrowing in on the state level, a report by the Workers' Center of Central New York and the Worker Justice Center of New York surveyed the conditions faced by workers in New York's dairy industry.⁹⁷ Undocumented immigrant dairy farmworkers in New York are in a precarious situation, as the region is heavily patrolled by border control agents and police by virtue of the state's proximity to the Canadian border.⁹⁸ In times where public and political opinion are acutely anti-immigrant, and national immigration policy includes aggressive detainment and deportation measures, undocumented immigrant workers are unlikely to have the bandwidth or security to advocate for better working conditions.⁹⁹ Now that Trump is back in the White House, deportation is very much a present fear for immigrant workers, both at dairies and at farms more generally.¹⁰⁰

New York's immigrant dairy workers are highly isolated, leaving the farm on average once every eleven days.¹⁰¹ Ninety-seven percent of respondents surveyed by the Workers' Center of Central New York lived in housing provided by employers, meaning that for the vast majority of these workers, their landlord and boss are one and the same.¹⁰² Employer-provided housing tends to be quite rudimentary.¹⁰³ Workers live in trailers, old farmhouses, or spaces constructed directly off of the milking parlor, which provide no relief from the sounds, smells, and methane production of cows.¹⁰⁴ A number of farm owners have rules prohibiting workers from having visitors in their housing, adding another hurdle to engaging in collective action.¹⁰⁵ Moreover, 57% of immigrant dairy workers in New York report no sense of community belonging, 62% report feelings of isolation, and 80% of the workers

⁹⁵ *Id.* at 20.

⁹⁶ *Id.*

⁹⁷ See generally FOX ET AL., *supra* note 51 (analyzing findings-based interviews with eighty-eight immigrant dairy farmworkers from fifty-three farms across New York State, supplemented by focus groups, primary documents, and published research, exploring workers' demographics, job conditions, housing, social integration, and organizing efforts).

⁹⁸ *Id.* at 10.

⁹⁹ *Id.*

¹⁰⁰ Amy Maxmen & KFF Health News, *U.S. Bird Flu Response Suffers as Farm Workers Fear Deportation*, SCI. AM. (Apr. 10, 2025), <https://www.scientificamerican.com/article/trumps-immigration-tactics-leave-u-s-vulnerable-to-bird-flu-spread/> (accessed Apr. 14, 2025).

¹⁰¹ FOX ET AL., *supra* note 51, at 12.

¹⁰² *Id.* at 1, 54.

¹⁰³ *Id.* at 54.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 56.

feel depressed.¹⁰⁶ Summarily, in CAFOs, dairies, and slaughterhouses, workers face a slew of subpar working conditions day in and day out.

IV. THE NATIONAL LABOR RELATIONS ACT

Keeping the working conditions experienced by industrial animal agriculture workers in mind, this Article now turns to the legislative framework that can be a catalyst for positive change. The National Labor Relations Act (NLRA) grants employees the right to “organize and bargain collectively” in an attempt to ameliorate the structural imbalance “of bargaining power” between employer and employee.¹⁰⁷ The NLRA aims to preserve economic peace and promote the “flow of commerce” by encouraging employers and employees to resolve disputes over “wages, hours, or other working conditions” through the collective bargaining process.¹⁰⁸ The Act’s declaration of policy concludes thusly:

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.¹⁰⁹

However, baked-in exemptions have thus far prevented the NLRA from reaching its full potential.

A. THE AGRICULTURAL EXEMPTION

To qualify for the rights the NLRA guarantees, one must be an “employee,” a statutorily defined term with broad exemptions.¹¹⁰ For instance, an employee “shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor . . .”¹¹¹ That means, for agricultural laborers, there is no federally protected right to unionize, placing a primary method for seeking remedies against the unfair labor practices of employers out of reach.¹¹²

¹⁰⁶ *Id.* at 12.

¹⁰⁷ NLRA 29 U.S.C. § 151.

¹⁰⁸ NLRA 29 U.S.C. § 151.

¹⁰⁹ NLRA 29 U.S.C. § 151.

¹¹⁰ See NLRA 29 U.S.C. § 152(3) (defining employee as any employee or individual whose work has ceased due to, or as a result of, a labor dispute, unless an exception is provided by the statute).

¹¹¹ NLRA 29 U.S.C. § 152(3).

¹¹² Chase Dean, *Protecting Undocumented Workers Through Labor Arbitration: The Need to Repeal the Agricultural and Domestic Worker Exemption under the NLRA*,

The exclusion of agricultural laborers from the NLRA dates back to its 1935 iteration,¹¹³ also known as the Wagner Act.¹¹⁴ The exemption was a political move to appease Southern Democrats who would otherwise not have passed such sweeping legislation.¹¹⁵ As a compromise, the Act in its final form was crafted to exclude Black agricultural workers from the rights and protections it was designed to grant.¹¹⁶ Workers who are excluded from the NLRA's coverage can be fired for unionization attempts or other concerted action, effectively punishing these workers for "trying to fight for a just workplace."¹¹⁷

While the industrial animal agricultural complex is a far cry from the family farms of 1935, the Act's original exemptions endure. Today, the agricultural exemption from the definition of employee continues to exclude marginalized populations, such as undocumented immigrants, from the right to collectively bargain.¹¹⁸ Although the agricultural exemption as written excludes a facially neutral category of workers, in practice, the exemption has discriminatory impacts on marginalized groups. Because of this, understanding the agricultural exemption's contours is key in determining how to advocate for the rights of those that fall into the exemption's grasp.

B. CONSTRUCTING THE AGRICULTURAL EXEMPTION

As illustrated by the discussion of working conditions in Part III of this Article, industrial animal agriculture involves many different types of work. Some of these jobs are protected under the NLRA, and others are not, due to the applicability of the agricultural exemption or another exemption such as that for independent contractors. Workers at dairy and chicken farms are agricultural workers who are exempted from coverage,¹¹⁹ while slaughterhouse employees are protected.¹²⁰ As will be discussed at length in the following paragraphs, there are jobs that are more difficult to classify, such as poultry live-haul workers, who the Supreme Court has decided are included in the NLRA's coverage in *Holly Farms Corp. v. NLRB*,¹²¹ and animal care auditors, who fall into the agricultural exemption.¹²² If this piecemeal, job-by-job analysis feels arbitrary and confusing to the reader, that is because it *is*. The agricultural exemption is a clunky framework that the NLRA would be much better off without, and the arbitrariness of the exemption has

36 OHIO STATE J. ON DISP. RESOL. 369, 370 (2020), <https://kb.osu.edu/server/api/core/bitstreams/95825e90-4031-4df4-8546-7a373ebecd45/content> (Accessed Jan.16, 2025).

¹¹³ *Id.* at 376; Walter, *supra* note 20, at 543.

¹¹⁴ Walter, *supra* note 20, at 543.

¹¹⁵ Dean, *supra* note 112, at 376.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Fair Labor Standards Act, 29 U.S.C. § 203(f) (1938).

¹²⁰ NLRA 29 U.S.C. § 152(3).

¹²¹ *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 395–96 (1996).

¹²² *Bills v. Cactus Family Farms, LLC*, 5 F.4th 844, 845–46 (8th Cir. 2021).

only grown clearer as industrial animal agriculture has evolved into the mechanized, consolidated model that it is today.

In navigating the issue of whether or not a certain job falls into the NLRA's agricultural exemption, Congress has instructed the National Labor Relations Board (NLRB) to give "agriculture" the same meaning in section 152(3) of the NLRA as does section 3(f) of the Fair Labor Standards Act of 1938, a directive which is provided in annual riders to Appropriations Acts.¹²³ The Fair Labor Standards Act, which lends its definition of "agriculture" to the NLRA, defines agriculture as follows:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.¹²⁴

The U.S. Supreme Court has interpreted this definition to include "farming in both a primary and a secondary sense."¹²⁵ "Primary farming" includes activities that one might intuitively understand to be agricultural, such as "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities...[and] the raising of livestock, bees, fur-bearing animals, or poultry."¹²⁶ "Secondary farming" sweeps much more broadly, and includes "any practices...performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."¹²⁷ The potentially expansive reach of secondary farming is cabined by the Board's discretion, as well as the policy to narrowly construe exemptions to the NLRA so as not "to deny protection to workers the Act was designed to reach."¹²⁸ This caveat feels quite ironic given that the Act was originally intended to protect all workers before the exemptions were crafted to strategically exclude large sections of the workforce.

C. CASELAW AND THE AGRICULTURAL EXEMPTION

In *Holly Farms Corp. v. NLRB*, the Supreme Court took up the question as to whether poultry live-haul workers were employees protected by the NLRA, or rather, if they were not covered due to the agricultural

¹²³ *Holly Farms Corp.*, 517 U.S. at 397.

¹²⁴ Fair Labor Standards Act, 29 U.S.C. § 203(f).

¹²⁵ *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298, 300 (1977).

¹²⁶ *Holly Farms Corp.*, 517 U.S. at 398 (quoting Fair Labor Standards Act, 29 U.S.C. § 203(f)).

¹²⁷ *Id.* (quoting Fair Labor Standards Act, 29 U.S.C. § 203(f)).

¹²⁸ *Id.* at 399.

exemption,¹²⁹ specifically by falling into the category of secondary farming.¹³⁰ Live-haul crews are comprised of chicken catchers, forklift operators, and truck drivers who together collect and transport the chickens raised by independent contract growers for slaughter.¹³¹ For context, live-haul crew workers wished to join the union representing other workers at Holly Farms' Wilkesboro, North Carolina facility.¹³² Holly Farms is a subsidiary of Tyson Foods and is a vertically integrated poultry producer engaged in all stages of producing broiler chickens.¹³³ The subsidiary's operations include "hatcheries, a feed mill, an equipment maintenance center, and a processing plant."¹³⁴ Holly Farms hatches its own chicks and then promptly delivers the chicks to independent contract farmers, who raise the chicks until they are seven weeks old.¹³⁵ At this point, Holly Farms' live-haul crews collect the chickens from the farms and bring them to the slaughterhouse.¹³⁶ While the farmers raising the chicks are engaged in primary farming, and thus plainly fall into the agricultural exemption to the NLRA's statutory coverage (and even if the agricultural exemption did not apply, these workers would still be exempted because they are independent contractors), the live-haul crews—specifically the chicken catchers and forklift operators—operate within an area of ambiguity.¹³⁷ Before the Supreme Court decided *Holly Farms*, there was a division of authorities over how best to classify live-haul crews, with the Fourth and Eighth Circuits finding them to be employees, and other Federal Courts of Appeals holding that live-haul crews are engaged in secondary farming, and thus, are not employees for the purposes of the NLRA.¹³⁸

After disposing of the idea that the truck drivers could be engaged in secondary farming, as the majority of their time working is spent on the road transporting chickens to the slaughterhouse, the Court turned to the narrower issue of classifying chicken catchers and forklift operators.¹³⁹ Holly Farms, the employer, argued that catching and loading chickens for transport were secondary farming activities, because they are "performed 'on a farm as an incident to' the raising of poultry."¹⁴⁰ Although the Court believed that Holly Farms' characterization of the chicken catchers and forklift operators was "plausible," the Court's analysis instead turned on whether the Board's application of section 3(f)

¹²⁹ *Id.* at 394.

¹³⁰ *Id.* at 400.

¹³¹ *Id.* at 394.

¹³² *Id.*

¹³³ *Id.* at 395.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 400.

¹³⁸ *Id.* at 396–97.

¹³⁹ *Id.* at 401.

¹⁴⁰ *Id.*

to the live-haul crews was reasonable in light of the NLRA's statutory framework and the Board's prior holdings.¹⁴¹ The Board argued that even though the work of chicken catchers and forklift operators occurred *on* a farm, what mattered more was that these activities were not "incidental to farming operations," and rather were "tied to Holly Farms' slaughtering and processing operations."¹⁴² The Board reasoned that secondary farming must be "incidental to, or conjoined with, primary farming" in order to fall into the agricultural exemption.¹⁴³ The Court found that this characterization was reasonable, as there is no contractual relationship between the chicken growers and the live-haul crews, who instead both have separate contractual relationships with Holly Farms.¹⁴⁴

The Court also examined the record for overlap between the live-haul crew and the growers, but found little beyond the growers moving equipment from the coops in preparation for the live-haul crew's arrival and both groups being on the farm at the same time.¹⁴⁵ Finally, the Court found the work of the live-haul crews to be more intimately linked with "the slaughter and processing of chickens" at Holly Farms' plant than any of the activities on the farm,¹⁴⁶ noting that the workers began and ended their shifts by clocking into the slaughterhouse, and Holly Farms' management described "catching and delivery of grown broilers as the first step in...processing operations."¹⁴⁷ In conclusion, the Court held that chicken catchers, forklift operators, and live-haul crews did not fall into the agricultural exemption, and thus were employees under the NLRA, fully entitled to all of its protections and benefits.¹⁴⁸

The important takeaway of this case is that the Court gave significant leeway to the Board's determination in deciding whether or not workers fall into the agricultural exemption, so long as that determination was based on a reasonable application of the statutory text to the particular job at hand. Thus, the Board's determination was significant: if the Board determined that a type of work fell within the agricultural exemption, a worker performing that job most likely would not qualify for the NLRA's protection.

Though deference to the Board carried the day in *Holly Farms*, it is important to note that Justice O'Connor's dissent, which garnered the support of three other Justices, would have overturned the agency's interpretation, finding instead that chicken catchers and forklift operators were engaged in secondary agriculture, and thus exempted from the NLRA's protections.¹⁴⁹ Perhaps this would have been the outcome

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 402.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 402-03.

¹⁴⁶ *Id.* at 407.

¹⁴⁷ *Id.* at 404.

¹⁴⁸ *Id.* at 409.

¹⁴⁹ *Id.* at 409-10.

in today's post-*Chevron* era. Justice O'Connor believed the majority's categorization of chicken catchers and forklift operators ran "contrary to common sense" and found no textual support in her reading of the statute for the Board's determination.¹⁵⁰ The dissenting Justice did not defer to the agency's interpretation because she believed there was no ambiguity here for the Board to interpret: "the Board's position...is directly contrary to the plain language of the relevant statute."¹⁵¹ Justice O'Connor argued that the majority read additional steps into the analysis for determining whether a certain occupation falls into secondary farming activities, steps that are not found in the statutory text.¹⁵² To the contrary, the majority opined that secondary farming activities "must not only be 'incident' to the independent farmer's primary farming activities, but must be 'mainly' or 'most tightly' tied thereto," and focused their analysis on the employment relationships amongst the parties instead of looking at the "nature of the work performed" alone, as Justice O'Connor thought to be the right approach.¹⁵³

Although courts applied a deferential *Chevron* analysis to the Board's determination of whether or not a particular job category fell within the agricultural exemption, with the overturning of *Chevron*, courts will not be as deferential to agency determinations.¹⁵⁴ In the post-*Chevron* era, a court reviewing the Board's classification of a certain type of work "may not defer to an agency interpretation of the law simply because a statute is ambiguous."¹⁵⁵ Therefore, the Board's determination of whether a particular job is within the exemption's ambit now holds less weight, a fact that might encourage litigants to bring challenges against Board determinations with which they disagree.

Ultimately, setting aside the question of deference, this piecemeal, occupation-by-occupation analysis of who falls within the agricultural exemption is ludicrous. It is an exercise in "irrational and arbitrary line-drawing."¹⁵⁶ Take, for example, dairy workers:

[A] worker who connects a cow to a mechanized milking machine or who manages manure storage and disposal does not enjoy the statutory right to organize, but a worker employed in a plant that processes milk or converts the milk to cottage cheese or yogurt does; a worker who manages the equipment that delivers the milk to a transportation truck does not enjoy the statutory right but the truck driver generally does (as long as he is not employed by the dairy).¹⁵⁷

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 410.

¹⁵² *Id.* at 411.

¹⁵³ *Id.*

¹⁵⁴ See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.>").

¹⁵⁵ *Id.*

¹⁵⁶ Complaint at 75, *Hernandez v. State of N.Y.*, 99 N.Y.S.3d 795(App. Div. 2019) (No. 526866), [hereinafter *Hernandez Compl.*].

¹⁵⁷ *Id.* at 77.

The determination of whether a particular worker is exempted from the Act's purview is not guided by any consistent or legible principle. With such important protections on the line, such an arbitrary test is inappropriate. These piecemeal, straining analyses are just continuing efforts to administer a statutory exemption that lacks any compelling policy rationale in the first place. As will be discussed in Part VII of this Article, the NLRA should be amended to remove the agricultural exemption. However, in the meantime, statewide legislative responses can negate the exemption of agricultural laborers within their individual borders, as will be discussed next.

V. STATE-LEVEL LEGISLATIVE CHANGE

In the absence of NLRA coverage at the federal level, some states—fourteen thus far—have elected to grant exempted agricultural workers the right to collectively bargain.¹⁵⁸ In California, farmworkers have possessed this right since 1975.¹⁵⁹ New York State has had recent progress on this front and illustrates the challenges involved with extending the right to protected collective action to previously excluded workers, challenges which persist even after the right has been legislatively enshrined. This part will also contrast the progress made in New York to the opposition that has prevented the passage of similar legislation in Maine.

A. ENDING THE AGRICULTURAL EXEMPTION IN NEW YORK

Crispin Hernandez, a worker at a New York dairy farm, challenged the agricultural exemption in state court.¹⁶⁰ Hernandez was fired after discussing his concerns about working conditions and attempting to create a workers' committee with his fellow laborers.¹⁶¹ Hernandez sought to end the exclusion of agricultural workers from New York State's labor laws on the basis that the failure to protect their right to organize violated a provision of the State Constitution that guarantees all employees the right to organize and collectively bargain.¹⁶²

Article I Section 17 of the New York State Constitution reads as follows: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."¹⁶³ The New York State Employment Relations Act (SERA), the specific law Hernandez

¹⁵⁸ Samantha Mikolajczyk, *Collective Bargaining Rights for Farmworkers*, THE NAT'L AGRIC. L. CTR. (July 14, 2022), <https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/> (accessed Jan. 20, 2025).

¹⁵⁹ Agricultural Labor Relations Act of 1975, CAL. LAB. CODE §§ 1140–1166.3 (West 2024).

¹⁶⁰ Hernandez Compl., *supra* note 156, at 6–10.

¹⁶¹ *Id.* at 6–7.

¹⁶² *Id.* at 8–10.

¹⁶³ N.Y. CONST. art. I, §17.

challenged in his suit, resembled the NLRA in that it duplicated the statutory exemption of agricultural workers.¹⁶⁴ SERA purported that the public policy of the State was to:

encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers[.]

However, SERA did not extend these opportunities to agricultural workers.¹⁶⁵

When Hernandez brought suit, the State publicly declared that it would not defend the constitutionality of SERA's agricultural exemption, and joined the plaintiffs in arguing for its unconstitutionality.¹⁶⁶ However, the case was not resolved so easily, as the Farm Bureau successfully moved to intervene as a defendant, due to its vested interest in maintaining the agricultural exemption.¹⁶⁷ The Farm Bureau's motion to dismiss was granted by the trial court, who found that the rights to organize and collectively bargain in the New York Constitution did not extend to farm laborers, a decision that was appealed by both the plaintiffs and the State.¹⁶⁸ On appeal, the reviewing court found that the New York Constitution affords expansive protection to *all* employees, including agricultural laborers.¹⁶⁹ Therefore, the court held that the exclusion of farm laborers from SERA was unconstitutional.¹⁷⁰ In 2019, New York State legislators responded to the court's holding and passed the Farm Laborers Fair Labor Practices Act.¹⁷¹ This Act extended the right to engage in collective action to previously excluded agricultural workers, and guaranteed one day of weekly rest and overtime compensation to agricultural workers.¹⁷² However, as will be discussed in the next section, the situation in New York is in flux, and this will definitely be a space to watch in the upcoming months.

B. CONTINUING CHALLENGES

Even in states whose legislatures have extended collective bargaining rights to agricultural workers, further impediments to unionization remain. In 2021 in California, the Supreme Court struck down a regulation that granted unions access to the property of agricultural

¹⁶⁴ Hernandez Compl., *supra* note 156, at 23.

¹⁶⁵ *Id.* at 23–24.

¹⁶⁶ Hernandez v. State of New York, 99 N.Y.S.3d 795, 798 (N.Y. App. Div. 2019).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 800–01.

¹⁷⁰ *Id.* at 803.

¹⁷¹ Farm Laborers Fair Labor Practices Act, A8419, Gen. Assemb., Reg. Sess. (N.Y. 2019).

¹⁷² *Id.*

employers in order to canvass for union support as an unconstitutional physical taking in conflict with employers' property rights.¹⁷³ In late 2023 in New York,¹⁷⁴ a lawsuit, *New York Vegetable Growers Association v. Hochul*, was brought by growers that "challenge[d] the right of farmworkers on H-2A visas to unionize," alleging workers on these visas are excluded from the Farm Laborers Fair Labor Practices Act, which extends the right to collectively bargain to New York's agricultural workers.¹⁷⁵ While the suit focused on H-2A workers, it directly impacted the unionizing efforts of all New York farmworkers, because the New York Attorney General's office issued an injunction that put farmworker organizing on hold pending the outcome of the lawsuit.¹⁷⁶

From October 2023 through February 2024, New York agricultural workers who were in the midst of organizing lacked the government support they had only just gained.¹⁷⁷ The processing of union petitions and unfair labor practice charges ground to a halt, and there were no negotiations for collective bargaining agreements even after successful union certifications.¹⁷⁸ Although the growers' suit was largely unsuccessful,¹⁷⁹ the employers could further incapacitate unionization efforts by appealing the adverse decision: "[a] suit need not have merit to work as a delay tactic, and given workers' precarity, such an obstruction can provide enough time to hamper a union effort, or even destroy it."¹⁸⁰ For now, the farmworkers who unionized before the suit can continue to bargain for a union contract, thanks to the lift of the Attorney General's stay.¹⁸¹

C. STRUGGLING TO END THE AGRICULTURAL EXEMPTION IN MAINE

Maine provides a point of contrast to the progress made in New York and California. In 2022, the state's Governor vetoed L.D. 151, *An Act to Protect Farm Workers by Allowing Them to Organize for the Purposes of Collective Bargaining*.¹⁸² This Act would have protected Maine's

¹⁷³ *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 143–44, 162 (2021).

¹⁷⁴ Jocelyn Sherman, *UFW Welcomes Restoration of Farm Worker Labor Rights in New York; Calls on Growers to Negotiate Union Contracts*, UNITED FARM WORKERS (Feb. 23, 2024), <https://ufw.org/ufw-welcomes-restoration-of-farm-worker-labor-rights-in-new-york-calls-on-growers-to-negotiate-union-contracts/> (accessed Jan. 21, 2025).

¹⁷⁵ Alex N. Press, *New York Growers Are Fighting Farmworkers' Right to Organize*, JACOBIN (Feb. 9, 2024), <https://jacobin.com/2024/02/new-york-growers-farmworkers-unionize> (accessed Jan. 21, 2025).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*; Sherman, *supra* note 174.

¹⁷⁸ Press, *supra* note 175.

¹⁷⁹ Sherman, *supra* note 174.

¹⁸⁰ Press, *supra* note 175.

¹⁸¹ Sherman, *supra* note 174.

¹⁸² Letter from Janet Mills, Governor of Maine, to 130th Legislature of State of Maine (Jan. 7, 2022) [hereinafter Mills letter].

farmworkers from employer retaliation to collective action, and its veto was a demoralizing stoppage of momentum built by dairy workers and the bill's sponsor, Representative Thom Harnett.¹⁸³ In a letter to the members of Maine's legislature, Governor Janet Mills explained her decision to veto the bill:

Maine's farms are confronting a series of significant challenges, some of which are longstanding in nature while others have been worsened by the pandemic, but all of which present dire threats to the livelihoods of our farmers. For example, our dairy industry has long been under pressure from low milk prices, inconsistent Federal regulations, and competition from nondairy products.¹⁸⁴

Mills also bemoaned the labor shortages faced by Maine's farmers: "I have heard directly from local farmers who describe the painstaking difficulty they are experiencing in attracting and retaining the workers they need to sustain operations."¹⁸⁵ Mills also referenced increasing droughts due to climate change.¹⁸⁶ In the face of these challenges, Mills claimed she "cannot, in good conscience, allow a bill to become law that would subject our farmers to a complicated new set of laws that would require them to hire lawyers just to understand."¹⁸⁷

In her letter, Governor Mills employed the compelling imagery of the bill's potential impact on small family farms that are all but a foregone relic to further her primary purpose: to encourage "the growth of farms in Maine," no matter the cost.¹⁸⁸ The final paragraphs of her letter finally acknowledged the workers employed by the farmers that Mills was so concerned about: "I am a committed supporter of collective bargaining rights for workers generally," but apparently not here: "legislation should be tailored to the unique circumstances of our agricultural sector, which this bill is not."¹⁸⁹ Mills prioritized the interests of a small handful of her more powerful constituents rather than furthering the interests of the general public that elected her to serve. Maine is illustrative of how difficult change can be, even when there is widespread public support, in the face of industrial animal agriculture's political clout.

¹⁸³ Nathan Bernard, *Dairy Workers Rally for More Rights After Mills Vetoes Farmworker Unionization Bill*, BEACON (Feb. 15, 2022), <https://mainebeacon.com/after-mills-vetoes-farmworker-unionization-bill-dairy-workers-rally-for-more-rights/> (accessed Jan. 23, 2025).

¹⁸⁴ Mills letter, *supra* note 182.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

VI. UNION SHORTCOMINGS AND STRENGTHS

Although this Article advocates for unionizing as a method by which the conditions of industrial animal agriculture could be improved, it would be remiss to not provide a critique of unionization in this sphere. Collective bargaining is an imperfect tool, as evidenced by the historical ebb and flow of union power and influence. This section of the Article will discuss the current challenges faced by unions, such as dwindling membership, employer-backed anti-union campaigns, and limited power, but it will also highlight the strengths that unions nevertheless possess for improving working conditions, as evidenced by line speed litigation and statewide legislative change.

A. *SHORTCOMINGS: LOSING NUMBERS AND CAMPAIGNS*

Less than 1% of farmworkers in the United States currently belong to a union, and only four farmworker unions exist.¹⁹⁰ The United Farm Workers' (UFW) membership has fallen from 70,000-strong in the 1970s to approximately 8,000 today, and the total number of UFW contracts has fallen from over 200 to 33.¹⁹¹ Right-to-work groups such as the National Right to Work Foundation help employers win decertification elections in unionized plants.¹⁹² These groups accomplish large victories, such as the recent votes for decertification of unions in Delaware's Mountaire poultry processing plants.¹⁹³ This decertification campaign impacted 41,000 workers, with the final Mountaire plant in Selbyville becoming union-free for the first time since 1977 in 2022.¹⁹⁴

Employers spend 340 million dollars annually on "union avoidance" consultants who advise employers on how to leverage labor law to their advantage and dissuade workers from exercising their right to collectively bargain.¹⁹⁵ These consultants inform employers about how to effectively deploy anti-democratic—yet completely legal—strategies such as captive audience meetings, in which employees are forced to attend anti-union lectures and can be fired for asking questions; plastering their facilities with anti-union signage; coaching employers on

¹⁹⁰ Wozniacka, *supra* note 6.

¹⁹¹ *Id.*

¹⁹² Jacob Owens, *Selbyville Mountaire Plant Votes Out Last Union*, DEL. BUS. TIMES (Mar. 18, 2022), <https://delawarebusinesstimes.com/news/mountaire-teamsters-vote/> (accessed Jan. 22, 2025). A decertification election is the process by which workers vote out an existing union, in some cases to replace it with a different union, or in other cases in favor of having no union at all. A majority of the workers must vote to decertify the union in the election. Decertification elections are not allowed within the first year after a union has been certified by the NLRB, and not for three years after a collective bargaining agreement is in place. *Decertification Election*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/decertification-election> (accessed Jan. 22, 2025).

¹⁹³ Owens, *supra* note 192.

¹⁹⁴ *Id.*

¹⁹⁵ Coffman, *supra* note 3, at 105.

how to hold one-on-one talks with employees about the futility of organizing...the list goes on.¹⁹⁶ It can be challenging for workers to effectively leverage their rights when employers actively weaponize labor law, especially because many workers' knowledge of labor law is comparatively limited.¹⁹⁷ Even when employers engage in an illegal practice, such as a workplace policy that prohibits salary discussions, they are likely to get away with it because employees do not know that such practices are illegal and are unaware of what to do in response to an employer's illegal practice.¹⁹⁸

To end on a brighter note, anti-union consultants have faced recent struggles in their attempts to prevent organizing campaigns at Amazon, Starbucks, REI, and more.¹⁹⁹ Younger workers are using social media and worker-to-worker communication to challenge the anti-union messages spread by these consultants.²⁰⁰ At an Amazon warehouse in Staten Island, organizers exposed the identity of anti-union consultants—who were walking the warehouse floor to dissuade workers from voting pro-union—on social media.²⁰¹ The organizers highlighted the irony of the situation: Amazon chose to spend money on hiring anti-union consultants rather than raising workers' salaries.²⁰² Social media has proven to be a powerful tool for workers to “inoculate” against the fear-mongering, anti-union tactics of such firms, and hopefully these firms will continue to lose their influence as workers become more savvy to their rights.²⁰³

B. SHORTCOMINGS: COVID AND CORPORATE COZINESS

In comparison to CAFOs, where there is low union representation, the union presence in slaughterhouses is quite high.²⁰⁴ In fact, close to 70% of beef and pork in the country is processed at plants represented by the United Food and Commercial Workers International Union (UFCW).²⁰⁵ While the numbers themselves suggest high union power in slaughterhouses, in practice, there is still much to be done to

¹⁹⁶ GORDON LAFER & LOLA LOUSTAUNAU, ECON. POL'Y INST., *FEAR AT WORK: AN INSIDE ACCOUNT OF HOW EMPLOYERS THREATEN, INTIMIDATE, AND HARASS WORKERS TO STOP THEM FROM EXERCISING THEIR RIGHT TO COLLECTIVE BARGAINING 1–2* (2020), <https://files.epi.org/pdf/202305.pdf> (accessed Jan. 31, 2025).

¹⁹⁷ Alison Green, *No One Knows Their Legal Rights at Work*, SLATE (Sept. 14, 2020, 5:55 AM), <https://slate.com/human-interest/2020/09/labor-law-usa-know-your-workers-rights.html> (accessed Jan. 26, 2025).

¹⁹⁸ *Id.*

¹⁹⁹ Steven Greenhouse, *Wave of Union Victories Suggests Union-Busting Consultants May Have Lost Their Sway*, THE GUARDIAN (Apr. 13, 2022, 6:00 AM), <https://www.theguardian.com/us-news/2022/apr/13/union-victories-busting-consultants-amazon-tactics> (accessed Jan. 20, 2025).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Held, *supra* note 21.

²⁰⁵ *Id.*

strengthen unions in this sector. For example, the COVID crisis showcased the UFCW's struggle to effectively advocate for its members.²⁰⁶ Fifty-nine thousand meatpacking workers fell ill with COVID during the pandemic's first year, and there were 269 reported deaths.²⁰⁷ Bargaining is a slow process, ill-suited to times of crisis, and it took time for the UFCW to negotiate for pay increases and COVID protections.²⁰⁸ Ultimately, though, the pandemic exposed to the public eye just how dangerous work in slaughterhouses can be and underlined the importance of collective action. If unions had not been in place at the slaughterhouses during COVID, one can only imagine how much deadlier the situation might have been.

On another note, critics fault established unions for “becom[ing] too cozy” with the companies in which they are situated.²⁰⁹ However, it is important to consider the power dynamics that may require unions to play nice with their corporate counterparts at the bargaining table. JBS, the world's largest meat processing company, has an annual revenue exceeding 52 billion dollars.²¹⁰ Confronted with titans, and given organizational challenges such as heavy turnover and a diverse workforce, unions lack the power they once had to stick to hardline positions on issues.²¹¹ Despite such drawbacks and limitations, the situation would undoubtedly be much worse without unions.

C. STRENGTHS: LITIGATING LINE SPEED

United Food & Commercial Workers Union, Local No. 663 v. United States Department of Agriculture is an apt illustration of how unions litigate for the workers they represent, with positive—albeit sadly limited—consequences flowing to the animals that are killed in this system.²¹² In this case, three local chapters of the UFCW and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) joined the UFCW in challenging a final rule passed by the United States Department of Agriculture (USDA) that eliminated line speed limits at pig slaughterhouses.²¹³ Eliminating caps on line speed is a gold mine for the industry, as it enables the processing of larger quantities of animals at fewer facilities, cutting operating costs and increasing

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Held, *supra* note 21.

²¹² See generally *United Food & Commer.*, 532 F. Supp. 3d 741 (D. Minn. 2021) (labor unions representing slaughterhouse employees successfully challenged a USDA final rule eliminating production line speed limits where the agency's failure to consider worker safety violated APA's requirement of reasoned decision-making).

²¹³ *Id.* at 749.

profits.²¹⁴ However, an increase in line speed is not good for anyone else: workers, animals, or consumers.

As discussed in Part III of this Article, increases in line speed are dangerous. On slaughter lines, crowds of relatively untrained workers stand shoulder-to-shoulder wielding sharp knives, and increased speed is a recipe for disaster.²¹⁵ The welfare of animals is negatively impacted by increased line speeds because workers' rushed handling of animals will lead to mistreatment and improper stunning prior to slaughter.²¹⁶ If improperly stunned, there is a likelihood that animals will regain consciousness, and a faster line speed decreases the chances that workers will notice signs of consciousness or be able to intervene in time to prevent an animal being slaughtered whilst fully aware of her own throat being cut.²¹⁷ An increase in line speed also heightens the chances of food safety risks, as a faster speed will necessitate workers cutting corners to keep up.²¹⁸

In *UFCW*, the union challengers were successful in their argument that the elimination of line speed limits was arbitrary and capricious and thus in violation of the Administrative Procedure Act.²¹⁹ The challenged rule was part of the New Swine Inspection System (NSIS), a program intended to modernize—read, industrialize—swine slaughter.²²⁰ The NSIS placed more inspection duties on slaughterhouse workers rather than federal inspectors and increased maximum line speeds.²²¹ Although the case focused on the issue of line speed, the NSIS had a number of problematic implications. The decrease of federal oversight in exchange for industry self-policing was akin to “the fox guarding the proverbial hen (or hog) house.”²²² In the rulemaking process for the NSIS, USDA's Food Safety and Inspection Service (FSIS) solicited comments centered on the issue of worker safety and line speed: “FSIS is requesting comments on whether line speeds for the NSIS should be set at the current regulatory limit of 1,106 hph [heads per hour] or

²¹⁴ Eric Schlosser, *The Chain Never Stops*, MOTHER JONES (July/Aug. 2001), <https://www.motherjones.com/politics/2001/07/dangerous-meatpacking-jobs-eric-schlosser/> (accessed Jan. 21, 2025).

²¹⁵ *Id.*

²¹⁶ Deborah Berkowitz & Suzanne McMillan, *High-Speed Pig Slaughter Will Be Destructive for Everyone Involved*, THE GUARDIAN (Apr. 17, 2018, 10:13 AM), <https://www.theguardian.com/commentisfree/2018/apr/17/trump-administration-usda-swine-slaughter-rule-pigs-pork> (accessed Jan. 20, 2025).

²¹⁷ *Id.*

²¹⁸ *Id.*; Kelsey Piper, *A new USDA rule gives pork producers more control. That could endanger consumers.*, VOX (Sept. 18, 2019, 5:00AM), <https://www.vox.com/future-perfect/2019/9/18/20869186/trump-administrations-slaughterhouse-rules-usda-pigs> (accessed Feb. 7, 2025).

²¹⁹ *UFCW*, 532 F. Supp. 3d at 776.

²²⁰ *Id.* at 748–49 (citing Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,315 (Oct. 1, 2019)).

²²¹ *Id.* at 750.

²²² Berkowitz & McMillan, *supra* note 216.

some other number.”²²³ This solicitation resulted in a slew of comments opining that increased line speeds would lead to higher incidences of injury and lower-quality products.²²⁴ Despite commenters’ valid concerns, FSIS pushed onward, adopting the proposed regulations, eliminating the cap on line speed, and claiming it lacked the authority and expertise to regulate in regards to worker safety.²²⁵

As part of the UFCW suit, workers at pork processing plants submitted affidavits recounting their firsthand experiences with line speed and safety.²²⁶ One Smithfield worker testified that due to the increased line speed, he hooked himself, had hogs fall on him, and saw hogs fall on other workers.²²⁷ Another worker at the same plant testified, “[E]verything I do is affected by the line speed.”²²⁸ The workers’ accounts, along with responses submitted during the notice and comment period for the proposed rule, aided the court in reaching its decision that the elimination of line speed limits was arbitrary and capricious, as FSIS did not adequately consider or respond to the legitimate safety concerns implicated by the NSIS.²²⁹ Due to the industry’s financial investment in switching to the NSIS, and the potentially disruptive impacts of a total vacatur, the court granted a temporary stay of vacatur for ninety days to allow USDA and FSIS to provide further consideration for the elimination of line speed limits.²³⁰

Important to note is the limited nature of the remedy: the court did not find ridding line speed limits in and of itself to be arbitrary and capricious. Instead, FSIS’s failure to address the substance of the comments and disclaiming their authority to act in regards to worker safety was where the agency erred.²³¹ The purpose of the court’s remedy was only “to ensure that the agency meaningfully considers the comments it disregarded and weighs the significant policy issues,” not to require a different outcome.²³² The court opined that they did not expect for the agency to be able to address the rule’s flaws “without coming up with new reasons for its decision.”²³³ At the very least, the court’s holding forces the agency to come up with a reason that is a bit more compelling

²²³ *UFCW*, 532 F. Supp. 3d at 750–51.

²²⁴ *Id.* at 751.

²²⁵ *Id.* at 749, 751.

²²⁶ *Id.* at 755. A quick note: In *UFCW*, the plaintiffs’ arguments centered on workers’ experiences and interests. The opinion did not include a discussion of the animal welfare or public health implications of an increase in line speed. Future lawsuits in this vein could be strengthened by engaging a broad coalition of stakeholders in the litigation process.

²²⁷ *UFCW*, 532 F. Supp. 3d at 755.

²²⁸ *Id.*

²²⁹ *Id.* at 776.

²³⁰ *Id.* at 781–82.

²³¹ *Id.* at 779.

²³² *Id.*

²³³ *Id.*

than “we don’t feel like it” to justify the endangerment of worker safety that an increased line speeds portends.

After the District Court’s ruling, all NSIS plants could not exceed line speeds of 1,106 heads per hour starting June 30, 2021.²³⁴ However, in November of the same year, FSIS and OSHA “invited” plants to participate in a time-limited trial (TLT) in which plants could operate at faster line speeds, so long as they collected and shared with FSIS and OSHA “data that would be used to evaluate the impact of increased line speed on workers.”²³⁵ This trial period has been periodically extended, with the data submitted repeatedly deemed insufficient for determining the impact of line speed on worker safety.²³⁶ Although this delay was frustrating enough, recently the situation has taken a turn for the worse: Trump’s Secretary of Agriculture Brooke Rollins threw all of this deliberation and information gathering out the window with a directive instructing FSIS to extend the line speed waivers and commence rulemaking to formalize line speed increases.²³⁷ A USDA press release announcing this unfortunate news also shared that “FSIS will no longer require plants to submit redundant worker safety data, as extensive research has confirmed no direct link between processing speeds and workplace injuries.”²³⁸ Of course, this is nonsense. A statement by Stuart Appelbaum, President of the Retail, Wholesale and Department Store Union (RWDSU), representing thousands of meatpacking and processing workers, accurately sums up the current situation:

Increased line speeds will hurt workers—it’s not a maybe, it’s a definite—and increased production speeds will jeopardize the health and safety of every American that eats chicken . . . Worker safety must be a priority, and these facilities cannot operate at these speeds without increased staffing, which cannot happen the way they are constructed now. Issuing waivers to a multi-billion dollar industry with no oversight to ensure it’s done safely and properly is a recipe for disaster. The USDA must make worker safety a priority, not profits.²³⁹

Although *UFCW* is not a resounding victory for organized labor, animal rights, and consumer protection, it at least shines a spotlight on the dangers faced by workers on the line and—for a time—held FSIS accountable in its rulemaking process. The persistent delays and pushbacks in the data-gathering period of the TLT program were certainly frustrating, but positively, they indicated that there simply was

²³⁴ *Modified Swine Time-Limited Trial and Worker Safety Study*, FOOD SAFETY & INSPECTION SERV. (Feb. 27, 2024), <https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-february-27-2024> (accessed Feb. 6, 2025).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Press Release, USDA, Secretary Rollins Takes Action to Streamline U.S. Pork and Poultry Processing (Mar. 17, 2025).

²³⁸ *Id.*

²³⁹ Press Release, RWDSU, USDA Line Speeds Waivers Will Harm Workers (Mar. 17, 2025).

not sufficient data on the industry's side to outweigh the competing concerns that high line speeds present to workers, consumers, and animals alike. Of course, data-informed decision-making has no place in Trump's regime, and no amount of proof can override USDA's current allegiance to industry.

D. STRENGTHS: GAINING RIGHTS AND ADVOCATING FOR CHANGE

Along with litigation, unions are providing for their constituents in various other ways. Despite a lack of expansive coverage, the efforts of the Pineros y Campesinos Unidos del Noroeste (PCUN) in Oregon and the Farm Labor Organizing Committee (FLOC) in North Carolina have been instrumental in achieving statewide policy wins.²⁴⁰ For example, PCUN helped Oregon's farmworkers gain "paid breaks and time off for meals" and ensured their inclusion in minimum wage increases.²⁴¹ The union's primary tactics have shifted away from traditional collective bargaining: PCUN focuses on providing services to farmworkers and their families such as translation assistance and legal aid on immigration matters.²⁴² North Carolina's FLOC ensures that workers from Mexico know their rights, and works to recover stolen wages and workers' compensation.²⁴³ From litigation to serving as a community resource, when workers collaborate they can protect one another.

VII. RECOMMENDATIONS

The previous sections of this Article outlined the current conditions in industrial animal agriculture and posited that unionization could act as a positive avenue for change. This section of the Article will explore a number of recommendations as to how we can work toward facilitating unionization in the sphere of industrial animal agriculture.

A. ACT LOCALLY

This is a time ripe with the possibility for change, but widespread pro-union public support must be channeled into real action. Although only fourteen states so far have eliminated the impacts of the NLRA's agricultural exemption by extending the right to unionize to previously excluded workers,²⁴⁴ more change is possible if voters contact their representatives and ask them to follow the lead set by other states. The situation in New York is representative of the potential for movement in this space, but extending rights to agricultural workers is still

²⁴⁰ Wozniacka, *supra* note 6.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Mikolajczyk, *supra* note 158.

an uphill battle, as evidenced by the disappointing veto in Maine. The strength of grassroots, bottom-up change is that solutions can be narrowly tailored to the unique needs of a particular area. In states where agricultural workers continue to be exempted from the NLRA and legislative action seems unlikely, there are other approaches available, such as forming worker centers that offer agricultural workers alternative types of aid and at the very least providing these workers the support of their broader community.²⁴⁵ Worker centers use grassroots organizing outside of traditional union frameworks to engage with and support their local communities, which gives them greater flexibility and inclusivity.²⁴⁶ Worker centers have achieved successes in preventing wage theft, protecting immigrant workers, and advocating for raising the minimum wage.²⁴⁷ Collaboration between worker centers and unions will allow the two to benefit from one another's strengths and make up for their respective limitations.

B. RECOGNIZE SHARED INTERESTS

Cross-issue collaboration is integral to making progress for industrial animal agricultural workers' rights. A focal point in bettering the conditions for industrial animal agricultural workers lies in advocating for greater protection of immigrants and preventing threats of immigration enforcement against workers who attempt to organize.²⁴⁸ Harnessing public support on these issues is important, as progress can be fleeting, depending on who happens to be in office. For instance, a November 2021 NLRB memo issued guidance on how immigrant workers could gain access to NLRB assistance in the face of an employer's unfair labor practices and focused on policies that would allow immigrants to exercise their statutory rights without fear of employer retaliation.²⁴⁹ This memorandum was released during Biden's presidential term, and as the Board is notorious for "flip-flopping" with changes in administration,²⁵⁰ a Trump Board will certainly not be concerned with protecting the rights of immigrant workers. Immigration advocates should recognize the importance of promoting workers' rights, and workers' rights advocates should take note of how they could provide greater support to immigrant-focused activism. Fruitful dialogues

²⁴⁵ Held, *supra* note 21.

²⁴⁶ Laine Romero-Alston & Sarita Gupta, *Worker Centers: Past, Present, and Future*, THE AM. PROSPECT (Aug. 30, 2021), <https://prospect.org/labor/the-alt-labor-chronicles-america-s-worker-centers/worker-centers-past-present-and-future/> (accessed Jan. 23, 2025).

²⁴⁷ *Id.*

²⁴⁸ Held, *supra* note 21.

²⁴⁹ See generally Jennifer A. Abruzzo, N.L.R.B., GC 22-01, ENSURING RIGHTS AND REMEDIES FOR IMMIGRANT WORKERS UNDER THE NLRA (2021) (policies solidifying that "all covered workers, regardless of their status as immigrants to this country" are afforded the statutory protections of the National Labor Relations Act in equal measures).

²⁵⁰ Walter, *supra* note 20, at 541.

must be had between these two interest groups to share methodologies and find prospects for collaboration.

In *McKiver v. Murphy Brown*, a nuisance action brought not by unions or workers, but by residents living next to CAFOs, the concurrence powerfully described the interrelation between the health of workers, the environment, and animals: “This triangular rotation among animals, workers, and homeowners is no fluke. It repeats again and again.”²⁵¹ This language underlines the importance of cross-interest group collaboration. It is encouraging that courts are beginning to pick up on the connection between animal, human, and environmental welfare, and hopefully this trend will continue to increase. Plaintiffs joining together to bring suit from a diverse array of interest groups can make these connections clearer to courts.

Perhaps encouragingly, because there is so much overlap between the well-being of farmed animals, workers, and the community at large, advocating for the good of one often has indirect impacts that benefit them all. For instance, providing more training for workers at slaughterhouses in handling and stunning animals will decrease animal suffering and better equip workers to do their jobs. To give another example, unions can advocate for better working conditions, such as enforcing breaks and instituting limits on shift lengths. If workers are in better physical, mental, and emotional states, then the ways they interact with animals will improve.

C. NAVIGATE THE AGRICULTURAL EXEMPTION THROUGH LITIGATION

The agricultural exemption can also be combatted through case-by-case litigation in determining what types of jobs are covered by the protections extended by the NLRA and what types of jobs are excluded. A narrow construction of the agricultural exemption was more likely under the comparatively labor-friendly Biden NLRB than under a Trump Board. A litigation-based approach would require identifying a specific job within industrial animal agriculture and crafting an argument as to why that particular job does not qualify as primary or secondary farming, thus falling outside the agricultural exemption. However, the drawback of this approach is that it is rather piecemeal and does nothing to challenge the underlying statutory framework. Also, a positive ruling that a certain type of job does not fall into the agricultural exemption might be challenged by an opposite determination made by a subsequent Board. Furthermore, it remains to be seen how much deference post-*Chevron* courts will give to agency determinations in the future, adding yet another element of uncertainty into the mix.

²⁵¹ 980 F.3d 937, 980 (4th Cir. 2020).

D. AMENDING THE NLRA

The most direct but perhaps least attainable way to combat the agricultural exemption is to amend the NLRA, re-writing section 152(3) and extending the definition of employee to include agricultural workers. The NLRA has ossified for decades, since its last major amendments in 1947 and 1959, which were motivated by fears that unions had been granted too much power in the original 1935 NLRA.²⁵² Given today's political climate, combined with decades of inaction, amending the NLRA is likely infeasible.²⁵³ This is especially true given agribusiness's political clout.²⁵⁴ With "the exorbitant amount of money that agribusinesses spen[t] on lobbying," eclipsing \$118 million dollars in the 2016 presidential cycle, for politicians, it pays to maintain the status quo.²⁵⁵ In the case that a complete removal of the agricultural exemption is impossible, perhaps a more realistic adjustment would be to revise the agricultural exemption to apply only to family-owned farms of a small size, rather than applying to factory farms as well. At the very least, this would return the agricultural exemption to its original pre-industrial-agricultural scope, rather than the vast swath of workers that it swallows today.

E. BRING AN EQUAL PROTECTION CHALLENGE

Alternatively, a case could be made against the agricultural exemption as a whole through the courts. Arguably, the agricultural exemption is unconstitutional due to its disproportionate impact on racial minorities in the past and present paired with its historically documented discriminatory intent to exclude Black agricultural workers in the South.²⁵⁶ An equal protection challenge to the agricultural exemption could be brought under the Equal Protection Clause.²⁵⁷ Such a challenge requires proof of either a law's facial racial discrimination, or in the case of the agricultural exemption, a racially discriminatory purpose paired with a "racially disproportionate impact."²⁵⁸ Although the agricultural exemption is facially race-neutral, a compelling argument can be made that both its impacts and legislative intent are racially discriminatory.²⁵⁹ As discussed in Part IV of this Article, the agricultural exemption was motivated by the desire to preserve the legacy of slavery in the South, and as discussed in Part III of this Article, a disproportionate number of the individuals excluded from the NLRA's protection today due to the agricultural exemption are racial minorities.

²⁵² Walter, *supra* note 20, at 543–44.

²⁵³ Coffman, *supra* note 3, at 109.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Dean, *supra* note 112, at 387.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

However, the equal protection argument is complicated by the fact that the racial group the law originally intended to exclude is different from the broader group that currently feels its disparate impact.²⁶⁰ In other words, can “the intent to discriminate against the Black community” transfer to other communities?²⁶¹ The workforce’s demographic transition complicates a potential equal protection claim, but this route still has potential. At the very least, a constitutional challenge could bring greater awareness to the agricultural exemption, which could in turn lead to public pressure for statewide legislation or federal amendment of the NLRA.

VIII. CONCLUSION

The situation for workers in industrial animal agriculture has been and continues to be hugely exploitative, and positive change is long overdue. With contemporary widespread popular support for unions, there is enormous potential for change. This momentum is reflected in state-wide initiatives, such as the recent progress in New York. In critical discourse surrounding the industrial animal agricultural complex, it is important to remember not only the animals that suffer due to the system, but the workers as well. Labor law serves as a potential place of power for workers and activists to bring about positive change for a diverse array of stakeholders. Even if the most effective means of collective action in this space today are not the traditional union tactics of eras past, the general principles of collective action and the right to engage in collective action without employer retaliation remain essential. To this end, the removal of the NLRA’s agricultural exemption would enable more workers to exercise collective power.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 388.