STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CRISPIN HERNANDEZ, WORKERS' CENTER OF CENTRAL NEW YORK, and WORKER JUSTICE CENTER OF NEW YORK,

Plaintiffs,

v.

Index No.: 02143-16
RJI: 01-16-121237

THE STATE OF NEW YORK and GOVERNOR ANDREW CUOMO, in his official capacity,

Defendants,

NEW YORK FARM BUREAU, INC.,

Intervenor-Defendant.

[PROPOSED] MEMORANDUM OF LAW BY PACIFIC LEGAL FOUNDATION, *AMICUS CURIAE*

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Pacific Legal Foundation submits this memorandum *amicus curiae* in support of the constitutionality of New York's State Labor Relations Act (Labor Law). That statute generally encourages unionization and collective bargaining by protecting employees from employer efforts to restrict unionization. *See* N.Y. Labor Law §§ 700, 703-704. However, like the federal statute on which New York's Labor Law was based, it limits the types of employees covered. *See id.* § 701. It excludes, for instance, "any individuals employed as farm laborers." *Id*. § 701.3(a).

In this case, a farm laborer and two nonprofit groups seek to have this exclusion declared unconstitutional. They contend that, apparently without being noticed, it has been unconstitutional since 1938, when the state constitution first included a guarantee that "[e]mployees shall have the right to organize and to bargain collectively[.]" N.Y. Const. art. I, § 17. However, contrary to the Plaintiffs' contentions, and the State's concession, this provision did not void the statute. Rather, as the record of the 1938 Constitutional Convention emphatically demonstrates, the provision was intended "to restate the established law of this State[,]" *i.e.* the Labor Law. *See* Revised Record of the Constitutional Convention of 1938, Vol. II, at 1218 (statement of Mr. Gootrad, the proponent of the provision that became Art. 1, Section 17). In particular, the term "employees" was chosen because "the term 'employees' . . . is now defined by the Labor Law." *See id*. at 1224.

This case is nothing more than an end-run around the political process. Plaintiffs should direct their concerns to the Legislature. It, and not the courts, is in the best position to decide whether and how to promote unionization

among farm laborers while minimizing adverse impacts to farms, especially small family farms.

I

ARTICLE I, SECTION 17, CONSTIUTIONALIZES THE LABOR LAW; IT DOES NOT VOID IT

The Labor Law was enacted in 1935, guaranteeing "employees" the right to "self-organization" and "to bargain collectively through representatives of their own choosing." *See* N.Y. Labor Law § 703. The statute defines "employees" to exclude: home childcare workers; those providing home care to the sick, elderly, or disabled; those working at a rehab facility while receiving treatment; and, relevant here, "any individuals employed as farm laborers[.]" *Id*. § 701.3(a). The Labor Law also excludes state and local government employees. *Id*. § 715. It formerly excluded employees of charitable and educational corporations as well. *See Trustees of Columbia Univ. v. Herzog*, 53 N.Y.S.2d 617 (1945).

Three years later, delegates to the Constitutional Convention of 1938 enshrined the rights guaranteed by the Labor Law into the state constitution. Article I, Section 17, of the New York Constitution guarantees "[e]mployees . . . the right to organize and to bargain collectively through representatives of their own choosing." Contrary to Plaintiffs' and the State's assertions, the textual similarities between the constitutional provision and the Labor Law were no accident. The constitutional provision mirrors the language of the statute because it was intended to constitutionalize the Labor Law, including its definition of employees. This insulated the Labor Law from challenge in the courts and weakening by subsequent legislatures.

The Reports of the State Constitutional Convention Committee explain that, despite the recently enacted legislation, a constitutional provision guaranteeing the right to unionize and collectively bargain was necessary. *See* New York State Constitutional Convention Committee Report, 1938, Problems Relating to the Bill of Rights (Poletti Report), Vol. VI at 290. Early labor legislation had been struck down by the state courts as unconstitutional and the Committee feared that the same could happen to the Labor Law. *See id.* (discussing a case in which the state's first workmen's compensation regime was declared unconstitutional under the state's Due Process Clause); *id*. at 291-92 (discussing constitutional challenges to the state's first wage and hour laws); *see also Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271 (1911) (declaring the workmen's compensation regime unconstitutional); *People ex rel. Rodgers v. Coler*, 166 N.Y. 1 (1901) (declaring the wage and hour laws unconstitutional). Although subsequent court decisions made that less likely, the Committee recognized that "the recurrence of the earlier attitude of the New York courts . . . is a possibility." *See* Poletti Report, Vol. VI, at 296. In addition to insulating the Labor Law from judicial challenge, constitutionalizing its protections was necessary to prevent later legislatures from repealing it. *See id*. at 302. Thus, the rights guaranteed by the Labor Law would not change with the political wind "due to the generally greater difficulty in amending the provisions of the Constitution[.]" *See id*. at 300.

The debates during the 1938 Constitutional Convention confirm that the aim was to constitutionalize the Labor Law's particular protections. Mr. Gootrad, the proponent of the provision, explained that it was intended "to restate the established law of this State, setting down such laws in a more fundamental and permanent form for the future guidance of our judges and

legislatures." Revised Record of the Constitutional Convention of 1938, Vol. II, at 1218; *see id.* at 1222 (statement by Mr. Gootrad that "almost every provision in my proposal is today established by law, and because they are recognized by law to be so important and permanent, they should be put into the Constitution."). He explained that the Labor Law's protections should not be "subject to harmful modification or outright repeal by judicial decision or future act of Legislature." *Id.* at 1218; *see id.* at 1226 (There is a "grave danger that these important rights may be subjected to harmful changes both to the workers and the people of the State, if left entirely to legislative or judicial action."). "[T]he constitutionality of this fundamental law [the Labor Law] has not as yet been passed upon, and it is our duty to set at rest any doubt that may exist as to the constitutionality of these rights." *Id.* at 1219; *see* John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 Rutgers L.J. 983, 997-98 (2007) ("A principal motivation" for constitutionalizing the right to organize and collectively bargain was to "ensur[e] that legislators would not weaken statutory protection for union rights in the future" and "a desire to constrain courts from invalidating union rights statutes whose constitutionality was uncertain.").

Plaintiffs state that there is nothing in the history of Article I, Section 17, to support the argument that it incorporates, rather than voids, the limitations of the Labor Law. *See* Pl.'s Opp. Br. at 16 ("[T]here is also no indication in the record of the 1938 Constitutional Convention that its drafters intended to exclude farmworkers."). However, plaintiffs are mistaken. The Record of the Constitutional Convention emphatically shows that the constitutional provision's reach mirrors that of the Labor Law, including the definition of employees. As Mr. Gootrad explained, this provision "merely

restate[s] the established law of this state." Revised Record of the Constitutional Convention of 1938, Vol. II, at 1218. Because it was a mere restatement of the Labor Law, Article I, Section 17, uses nearly identical language. *See id.* at 1219 ("The language used in Section 1 of my proposal is almost identical with that used in Section 703 of the Labor Law."). In particular, Mr. Gootrad explained, the constitutional provision's use of the term "employees" incorporates the Labor Law's definition. *See id*. at 1224 (statement of Mr. Gootrad that "the term 'employees' . . . is now defined by the Labor Law"); *id*. Vol. III, at 2246 (explaining the effect of the proposed amendment by reference to the Labor Law); *see also* William A. Herbert, *Card Check Labor Certification: Lessons From New York*, 74 Alb. L. Rev. 93, 104 n.25 (2010) (noting that Article I, Section 17, implicitly incorporated the Labor Law's exclusion of public employees).

The delegates to the convention considered an alternative proposal which would not have included the exemptions of the Labor Law and firmly rejected it. That proposal would have guaranteed the right to organize and collectively bargain to "labor" instead of "employees" and was rejected over uncertainty whether it incorporated the Labor Law's exceptions. *See* Revised Record of the Constitutional Convention of 1938, Vol. III, at 2244-45 (Statement of Mr. Kleinfeld: "If that term 'labor' is generally understood to mean employee, then I would be in favor of this amendment. If, on the other hand, there is a doubt as to the meaning of that word 'labor,' as used in that proposal, I would have to oppose it."); *id*. at 2246.

As this history shows, Article I, Section 17's, guarantee of the right of "employees" to organize and bargain collectively mirrors the right protected by

the Labor Law. *See id*. at 1218-19, 1222. The Constitution does not define "employees" because the choice of that term was understood to incorporate the Labor Law's definition. Thus, far from silently voiding the farm laborer exemption, Article I, Section 17, incorporates it by using that term.

Prior cases also reflect this understanding of Article I, Section 17. According to precedent, the constitutional provision is "only a guarantee, in the form of [a] fundamental right, of something that both legislative policy and prevailing court decisions had previously recognized." *Domanick v. Triboro Coach Corp.*, 18 N.Y.S.2d 650, 653 (1940). The constitution "accords recognition to the right of labor to organize and bargain collectively which, in 1935, had found expression in the Labor Relations Act." *Trustees of Columbia Univ.* 53 N.Y.S.2d at 622. It was "not intended to invalidate existing legislation" which included "certain exemptions or exceptions[.]" *Id.* "If the constitutional provision were interpreted otherwise, it would inevitably nullify every limitation on the duty of employers to bargain collectively, including all the provisions of [Labor Law Section 715]." *Id.*; *see Railway Mail Ass'n v. Corsi*, 293 N.Y. 315, 322-23 (1944) (applying the labor law's exemptions in a constitutional challenge to the statute); *O'Reilly v. Cahill*, 280 N.Y.S.2d 338 (1967) (upholding the constitutionality of the Labor Law's exemption for employees of charitable, educational, or religious associations).

II

THE LEGISLATURE, NOT THE COURTS, SHOULD DECIDE WHETHER TO CHANGE THE LABOR LAW

Plaintiffs' arguments on this point lack any constitutional basis. Instead, this lawsuit is an attempt to make an end-run around the ongoing political

consideration of amending the Labor Law. The Legislature has several times considered legislation to repeal or modify the farm laborer exemption. The most recent is the Farmworkers Fair Labor Practices Act, S. 1291 (2015-2016 Leg. Sess.).[1] The Legislature has not yet found a proper compromise on this issue that it is willing to enact.

Plaintiffs' interpretation of Article I, Section 17, is so extreme that it would render the proposed legislation to remove the farm laborer exemption itself unconstitutional. Although that legislation would modify the definition of "employees" to remove the farm laborer exemption, it would expressly retain the other exclusions. *See* S. 1291, § 1. That proposed legislation would also exclude small, family-run farms from its reach. *See id*. § 3.

But if Plaintiffs' interpretation was correct, the Legislature would have no ability to retain any exemption to the Labor Law or to modify them in any way short of an outright repeal. That would preclude any protection for small family farms, even if unqualified unionization would cause severe harms due to the time-sensitive nature of their work. Several members of the Legislature have sharply criticized this lawsuit for attempting to circumvent the political process and bar compromise. *See Nojay and colleagues blast governor's plan to allow unionization of farmworkers*, Livingston County News, May 23, 2016.

Instead of circumventing the political process, this issue would best be resolved by allowing that process to play out in the representative branches,

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[1] Links to prior examples of proposed legislation on this subject are available on the State Senate's webpage discussing the Farmworkers Fair Labor Practices Act. *See* New York State Senate, *Senate Bill S1291*, https://www.nysenate.gov/legislation/bills/2015/S1291 (last visited Jan. 19, 2017).

as earlier controversies about exceptions to the Labor Law have done. For instance, the Legislature adopted legislation in 1967 to expand the right to organize and collectively bargain among public employees, who were previously excluded from the Labor Law. *See* N.Y. Civ. Serv. Law §§ 202-203 (1967). Although legislation may take time, as the political branches decide whether and how much to change the status quo, that deliberation is a feature, not a bug, of representative government.

Due regard for the separation of powers further shows that the result Plaintiffs seek must come from the Legislature, not the courts. By granting distinct powers to each of the coordinate branches of government, the Constitution establishes a principle of separation of powers. *See Bourquin v. Cuomo*, 85 N.Y.2d 781, 784-85 (1995). According to that principle, the Legislature must make "the basic policy decisions," which will be executed by the Governor. *See id.* at 785 (quoting *New York State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340, 348 (1991)). Although the Governor has "great flexibility" in deciding how to execute the Legislature's policy, "when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, . . . the doctrine of separation is violated." *Bourquin*, 85 N.Y.2d at 785 (quoting *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985)). Thus, a Governor's choice not to defend a law for political reasons is improper when there is a good-faith constitutional basis for defending it. *Cf.* Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 Ind. L.J. 513 (2015) (the Executive Branch has a duty to defend statutes unless clearly constitutional). Similarly, judges should not usurp the Legislature's authority by scuttling statutes they view as unwise. *See People v. Kupprat*, 6 N.Y.2d 88, 90 (1959) ("We must read statutes as they are written and, if the consequence seems unwise, unreasonable or

undesireable, the argument for change is to be addressed to the Legislature, not to the courts."); *Tormey v. La Guardia*, 278 N.Y. 450, 451-52 (1938).

CONCLUSION

The history behind Article I, Section 17, of the New York Constitution plainly demonstrates that Plaintiffs' arguments are misplaced. Rather than silently voiding the Labor Law, and its limitations, the provision was explicitly based on the statute and incorporated its protections and limitations. Far from undermining the Labor Law's constitutionality, the provision was intended to insulate it from constitutional challenge. Consequently, Plaintiffs' Article I, Section 17, claim should be dismissed.

DATED: January __, 2017. Respectfully submitted,

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