THE CONSTITUTIONAL PATH TO DOMESTIC WORKER ORGANIZING AND COLLECTIVE BARGAINING RIGHTS UNDER NEW YORK STATE PRIVATE SECTOR LABOR LAW

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ABSTRACT

Many of the United States' foundational labor laws, as well as even obscure state statutes, devote one or two easily overlooked sentences to divesting an especially vulnerable class of laborers—domestic workers—of their rights to a fair wage, to reasonable hours, to a union, and to protection from retaliation for organizing to improve their lot. This exclusion is not an accident; it is a vestige of Jim Crow and a codification of the demeaned status of a category of labor that is predominantly performed by women. Recent efforts to right this wrong have neglected collective bargaining laws, in part because of a misplaced belief that the domestic labor relationship is unconducive to collective bargaining, and currently no federal or state law protects or acknowledges domestic workers' right to a union. However, recent case law presents a roadmap for establishing New York domestic workers' right to organize and extending an effective infrastructure to enforce that right. This Article charts that path and addresses legal and policy considerations, while emphasizing that domestic labor is deserving of the rights, freedoms, and dignity to which all workers are entitled.

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I.
INTRODUCTION

An essential question for any discussion of domestic labor is who we are talking about when we say *domestic workers*, and as this article reveals, the definitions of *domestic worker* are amorphous and politicized. By its broadest definition, domestic work would refer to any work that is necessarily performed in the home. However, as the term is used by sociologists, journalists, and the general public, it typically connotes the paid, indentured, or enslaved labor that maintains and supports the inhabitants of the home: cooking, cleaning, yardwork, childcare, elder care, care for the disabled, and so on. This article relies on an even narrower definition, which draws on but also challenges the legal category of domestic labor. For example, this article does not consider unpaid domestic work.[1] This article also does not address domestic workers employed by an agency or paid through state benefit programs. The former are typically within the jurisdiction of federal collective bargaining laws,[2] while the latter have gained

1. I invite the reader to learn the history of the Wages for Housework campaign championed by Silvia Federici. Silvia Federici, REVOLUTION AT POINT ZERO: HOUSEWORK, REPRODUCTION, AND FEMINIST STRUGGLE (2d ed. 2020). For a short introduction, see Lux Alptraum, *When Women Demanded Pay for Housework*, 15 TOPIC (Sept. 2018). For a book-length history, see LOUISE TOUPIN, WAGES FOR HOUSEWORK: A HISTORY OF AN INTERNATIONAL FEMINIST MOVEMENT, 1972–77 (2018). For a Black feminist critique, see ANGELA DAVIS, *The Approaching Obsolescence of Housework: A Working-Class Perspective*, *in* WOMEN, RACE, AND CLASS (1981).

2. Ankh Services, Inc., 243 N.L.R.B. 478, 480 (1979).

collective bargaining rights in some jurisdictions through public sector labor law.[3] For the purposes of this article, domestic workers are those who are paid directly by the homeowner in whose home they labor. This narrow definition is essential to the thesis of this article because, at time of writing, not a single U.S. worker falling within this definition has a legally protected right to organize or bargain collectively with their employer under state or federal law.

A recent Economic Policy Institute (EPI) study estimated that 2.2 million domestic workers participate in the U.S. labor market, with over a quarter million in New York, although the number of workers who would fall within this article's definition is somewhat lower.[4] The study shows that domestic workers are distributed throughout the country but concentrated particularly in large metropolitan areas.[5] More than 90 percent of surveyed domestic workers were female, over a third foreign-born, and a majority non-white.[6] And domestic workers tend to be older than other workers, with higher percentages in every age group over 50.[7]

The reader likely already suspects that domestic work is a challenging and ill-remunerated profession, but the industry's problems go beyond pay. Domestic workers lag behind other workers in financial and non-financial benefits that provide for a secure future. The EPI survey data shows that domestic workers earn lower hourly wages and annual incomes than other workers and are more than three times as likely to fall below the poverty line.[8] Additionally, factors such as education and age, which tend to indicate higher wages in other professions, barely affect domestic workers' earnings.[9] While roughly half of all other workers receive employer-provided health insurance coverage, less than one in five domestic workers are provided the same, and even this number is skewed upward by the survey's inclusion of agency-based home care aides, who have substantially

3. A number of states have granted public sector collective bargaining rights to domestic workers whose wages are paid partially or fully by the state. These may include health-care and child-care workers. For a general analysis of this "publicization" of domestic work and its limitations, see generally Peggie R. Smith, *The Publicization of Home-Based Care Work in State Labor Law*, 92 MINN. L. REV. 1390, 1403-04 (2008). For an analysis of New York's adoption of a child-care publicization system, see David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 35 FORDHAM URB. L.J. 277 (2008).

4. JULIA WOLFE, JORI KANDRA, LORA ENGDAHL, & HEIDI SHIERHOLZ, ECONOMIC POLICY INSTITUTE DOMESTIC WORKERS CHARTBOOK 4 (2020), https://files.epi.org/pdf/194214.pdf [https://perma.cc/Y8FZ-TNDF]. This may be a substantial undercount, as a 2019 study estimated nearly double EPI's estimate of home care workers, although it did not estimate the number of house cleaners or childcare workers. PARAPROFESSIONAL HEALTHCARE INSTITUTE, U.S. HOME CARE WORKERS: KEY FACTS 2 (2019), https://phinational.org/wp-content/uploads/legacy/phi-home-care-workers-key-facts.pdf [https://perma.cc/APF6-PFHT].

5. WOLFE, KANDRA, ENGDAHL, & SHIERHOLZ, *supra* note 4, at 44–47.

6. *Id.* at 40.

7. *Id.* at 41.

8. *Id.* at 48–50, 52–55.

9. *Id.* 48–49.

higher rates of employer-provided health insurance.[10] Less than 10% of domestic workers report employer-provided retirement benefits.[11]

The ongoing COVID-19 pandemic has exposed the precarity of domestic labor. A National Domestic Workers Alliance (NDWA) survey from October 2020 reveals the woeful state of the industry.[12] Ninety-three percent of domestic workers reported losing jobs during the first month of the pandemic in March 2020.[13] In the summer months, still fewer than 3% reported finding more than 30 hours of work per week.[14] Nearly three quarters of workers did not receive any compensation for canceled work.[15] Domestic workers who continued to work during the pandemic reported substantially lower wages, with the percentage of workers reporting earnings below nine dollars per hour more than doubling between March 2020 and September 2020.[16] A small percentage of domestic workers reported receiving government benefits, with only 14% applying for unemployment insurance and less than one third receiving stimulus checks,[17] which may be the result of several factors including ineligibility due to many domestic workers' immigration status in addition to statutory exemptions for domestic workers. And despite frequent potential exposure to COVID-19 from employers, 50% of domestic workers reported lack of access to medical care.[18]

Domestic workers in the past two decades have organized to win Domestic Worker Bills of Rights in ten states and two cities, starting with New York State in 2010.[19] These bills have expanded domestic workers' legal rights—including the rights to a minimum wage, maximum hours, paid leave, and protection against

10. *Id.* at 58 (25% of agency-based domestic workers received employer-provided health insurance compared to only 17% of other domestic workers).

11. *Id.* at 60.

12. NAT'L DOMESTIC WORKERS ALL., 6 MONTHS IN CRISIS: THE IMPACT OF COVID-19 ON DOMESTIC WORKERS (2020), https://www.domesticworkers.org/wp-content/uploads/2021/06/6_Months_Crisis_Impact_COVID_19_Domestic_Workers_NDWA_Labs_1030.pdf [https://perma.cc/VR42-KTLW].

13. *Id.* at 15.

14. *Id.* at 17.

15. *Id.* at 18.

16. *Id.* at 21.

17. *Id.* at 23.

18. *Id.* at 28.

19. *Domestic Workers Bills of Rights*, NAT'L DOMESTIC WORKERS ALL., https://www.domesticworkers.org/programs-and-campaigns/developing-policy-solutions/bill-of-rights/ [https://perma.cc/H7R2-AZLE] (last visited Feb. 24, 2022) (listing states and cities that have passed bills and linking to bill text); *see, e.g.*, Anna Orso, *Law Protecting Philadelphia Domestic Workers Takes Effect as They're Losing Their Jobs in Droves*, PHILA. INQUIRER (May 1, 2020), https://www.inquirer.com/news/philadelphia/philadelphia-domestic-worker-bill-of-rights-takes-effect-coronavirus-20200501.html [https://perma.cc/LB4M-VQG3].

harassment—and brought attention to the industry.[20] However, no bill in its final form has granted domestic workers collective bargaining rights or organizing protections. This leaves domestic workers reliant on state intervention, unable to vindicate their rights through collective action. Collective bargaining is the historical means by which workers have transformed their working conditions, and its unprotected status in the field of domestic labor exposes organizing efforts to the threat of retaliation.

In 2019, New York farmworkers won the protected right to organize and collectively bargain in *Hernandez v. State*.[21] Like domestic workers, New York farmworkers were originally statutorily excluded from the state's private sector collective bargaining system.[22] However, by relying on the state constitution's guarantee of collective bargaining rights to all employees, farmworkers overturned their exemption.[23] The *Hernandez* decision did not affect the domestic worker exemption,[24] which remains on the books, but it presents a roadmap for future litigation. Domestic workers, relying on *Hernandez*, could demonstrate that their exclusion from the state collective bargaining law constitutes an unjustified denial of a fundamental constitutional right, leading to its invalidation.

This article seeks to demonstrate how and why *Hernandez* should be extended to domestic workers. Part II discusses the distinct legal status of domestic work and domestic workers' exemption from state and federal labor laws. Part III presents efforts to remove the domestic and agricultural labor exemptions from New York law and illustrates how farmworkers' successful litigation can be adapted as a model in service of domestic workers. Part IV analyzes the administrative and privacy-based policy objections to domestic worker collective bargaining rights and their significance for strict scrutiny analysis.

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20. The particular rights and protections afforded by Domestic Worker Bills of Rights in different states and municipalities have varied. *See, e.g.*, Domestic Worker Bill of Rights, S.B. 535, 27th Leg. (Haw. 2013) (requiring overtime pay for work beyond forty-four hours for live-in domestic workers and forty hours for all other domestic workers); Domestic Worker Bill of Rights, A.B. 241, Ch. 374 (Cal. 2013–14) (requiring overtime pay for work beyond nine hours per day or forty-five hours per workweek). A state-by-state comparison is outside the scope of this article.

21. Hernandez v. State, 99 N.Y.S.3d 795, 802–03 (App. Div. 2019).

22. N.Y. LAB. LAW § 701(3)(a) (2019) ("The term 'employees' . . . shall not include . . . any individuals employed as farm laborers.") (amended 2019).

23. *Hernandez*, 99 N.Y.S.3d at 801–03 (ruling that case law and constitutional text established the right to collective bargaining as fundamental and that the justifications for the agricultural exemption were insufficient to survive strict scrutiny).

24. N.Y. LAB. LAW § 701(3)(a) ("The term 'employees' . . . shall not include any individual . . . in the domestic service of and directly employed, controlled and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of serving as a companion to a sick, convalescing or elderly person . . . .").

II.
DOMESTIC LABOR'S LEGAL EXILE

A. Labor Law's Impossible Subjects?

In her writing on immigration, historian Mae Ngai introduced the concept of "impossible subjects" to characterize the racialized construction of unlawfully present non-citizens or "illegal aliens" as presumptively unregulatable and suspect.[25] Ngai identifies how the 20th-century introduction of legal restrictions on immigration "produced the illegal alien as a *new legal and political subject* … a person who cannot be and a problem that cannot be solved."[26] It could be said that domestic workers are the impossible subjects of labor law, in that such laws balk at the homeowner's doorstep. Labor laws are drafted with a conception of labor that is infinitely adaptable to evolving industrial circumstances but that nonetheless cannot—for reasons this section will interrogate—accept domestic work as work. Even sympathetic academics and advocates view domestic labor as too distinct from all other labor to be receptive to traditional labor law.[27] This section asks whether domestic workers are rightfully labor law's impossible subjects, an inherently unadministrable class incompatible with the law as it applies to other workers, or whether domestic labor should be recognized as essentially of the same nature as all other work and therefore entitled to the same protections and rights as all other workers.[28]

The domestic worker was the law's prototypical laborer before being supplanted by the factory worker as a result of the rise of industrial capitalism. Domestic servants were the first legally recognized category of worker in English

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25. MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 5 (2005).

26. *Id.* at 4–5.

27. *See, e.g.*, Elizabeth Kennedy, *When the Shop Floor Is in the Living Room: Toward a Domestic Employment Relationship Theory*, 67 N.Y.U. ANN. SURV. AM. L. 643, 644 (2012) ("The differences between domestic work and all other work might make it inappropriate for a court to require reinstatement of an aggrieved caregiver or housecleaner into a private home."); Ai-jen Poo, *A Twenty-First Century Organizing Model: Lessons from the New York Domestic Workers Bill of Rights Campaign*, 20 NEW LAB. F. 51 (2011) ("[E]ven if [domestic workers] were included, the dynamics of their employment make it difficult (if not impossible) to engage in collective bargaining in the traditional sense."); Ruth Milkman, *Low-Wage Worker Organizing and Advocacy in the USA: Comparing Domestic Workers and Day Laborers*, 35 POL. POWER & SOC. THEORY 59, 73 (2019) ("[Domestic labor is] ill-suited to conventional forms of unionism.")

28. Although this article posits that the justifications for the *legal* partition of domestic labor are untenable, labor sociologists as early as the 1980s identified the central factor that drives the uniquely insidious *treatment* of domestic workers. JUDITH ROLLINS, BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS 156 (1985) ("What makes domestic service as an occupation more profoundly exploitative than other comparable occupations grows out of the precise element that makes it unique: the personal relationship between employer and employee. What might appear to be the basis of a more human, less alienating work arrangement allows for a level of psychological exploitation unknown in other occupations."), quoted in Ruth Milkman, *The Macrosociology of Paid Domestic Labor*, 25 WORK & OCCUPATIONS 483, 489 (1998).

common law,[29] as their paid service to another distinguished them from contemporary pre-industrial serfs, artisans, merchants, and masters. Domestic employment is embedded in the naming and ordering of the "master-servant" relationship, and it remained a conceptual reference point long after industrial production dwarfed domestic work.[30] However, industrial capitalism rapidly shifted the bulk of first men's and then women's labor from the house and the field to the factory line. By the nineteenth century, the popular conception of labor had shifted so conclusively that in the eyes of contemporary economists, "the domestic servant was understood to perform work that was not work" because domestic labor does not produce a material commercial good.[31] The master-servant frame gradually faded from the law in favor of the at-will employment model,[32] which substituted economic coercion for the threat of corporal punishment that regulated the prior model.[33] Although domestic workers today are included in academic definitions of "employee,"[34] statutory exemptions from labor laws keep these workers in a feudal relationship the law has otherwise rejected.

New York case law makes clear that domestic workers would be recognized as employees under all state labor laws but for their several statutory exemptions. Prior to the 2010 passage of the Domestic Worker Bill of Rights, New York excluded domestic workers from laws governing harassment,[35] minimum wage,[36] and maximum hours,[37] while only full-time domestic workers could receive workers' compensation.[38] However, where not constrained by statutory

29. Carolyn Steedman, *The Servant's Labour: The Business of Life, England, 1760–1820*, 29 SOC. HIST. 1, 3 (2004) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES, *422 (1775)).

30. The First and Second Restatements of Agency, for instance, use the example of "household staff" to illustrate that domestic workers bearing some qualities of independent contractors, such as "highly skilled cooks or gardeners, who resent and even contract against interference, are normally servants [or employees] if regularly employed." RESTATEMENT (FIRST) OF AGENCY, § 220(2), cmt. e (1933); RESTATEMENT (SECOND) OF AGENCY, §220(2), cmt. i (1958).

31. Steedman, *supra* note 29, at 3.

32. In rejecting master-servant terminology, the Third Restatement notes, "The connotation that household service is the prototype for employment is dated, as is its suggestion that an employer has an all-pervasive right of control over most dimensions of the employee's life." RESTATEMENT (THIRD) OF AGENCY intro. (2006). For the countervailing argument that the ordering of "domestic servile relations" is imprinted on the modern employment model to the detriment of all workers, see Julia Tomassetti, *The Contracting/Producing Ambiguity and the Collapse of the Means/Ends Distinction in Employment*, 66 S.C. L. REV. 315, 347–48 (2014).

33. Lea VanderVelde, *The Last* Legally *Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727, 738 (2016). VanderVelde's article seeks to identify the last legally beaten servant and relates the decline of corporal punishment to the legal differentiation of the home from the workplace. *Id.* at 730–32.

34. *See Employee*, BLACK'S LAW DICTIONARY (11th ed. 2019); *cf. Employee*, BLACK'S LAW DICTIONARY 617 (4th ed. 1951) (stating domestic servants are "rarely included" in the definition of employee).

35. N.Y. EXEC. LAW § 296(h) (amended 2010); N.Y. EXEC. LAW § 292(6) (amended 2010).

36. N.Y. LAB. LAW § 651(5) (amended 2010).

37. N.Y. LAB. LAW § 160(3) (amended 2010).

38. N.Y. WORKERS' COMP. LAW § 201(5) (amended 2010).

exemptions, New York courts have recognized domestic workers as employees.[39] For purposes of unemployment insurance, workers' compensation, and tort law, courts have categorized even part-time,[40] seasonal,[41] and short-term[42] domestic workers as employees.

Particularly relevant to this article are the domestic service delineations drawn by agencies administering state and federal collective bargaining laws. The National Labor Relations Act (NLRA) is the federal law governing most private sector collective bargaining in the United States.[43] The New York State Employment Relations Act (SERA),[44] originally titled the State Labor Relations Act (SLRA), is a largely dormant statute governing private sector collective bargaining in New York with jurisdiction only over industries and workplaces outside the jurisdiction of the NLRA, on which it is modeled. The SERA is administered today by the Public Employment Relations Board (PERB), but previously was under the purview of the State Employment Relations Board (SERB) and before that the State Labor Relations Board (SLRB).[45] Both the NLRA and the SERA exempt domestic workers from coverage.[46] The bases and rationales for the exemptions are discussed in the following two sections. In effect, the exemptions exclude domestic workers from the legal framework of collective bargaining. They are not prevented from organizing labor organizations or seeking to bargain with employers, but the statutory exemptions deny domestic workers a protected right to organize, a statutory obligation for employers to bargain in good faith, and access to the legal infrastructure to enforce those entitlements.

NLRA case law demonstrates that neither the type of work nor its location in the private home are determinative of eligibility for the Act's protection. In *Ankh Services*, the National Labor Relations Board (NLRB) was asked to decline jurisdiction over a home care and housekeeping agency with approximately forty

39. *See, e.g.*, *In re* Auster's Claim, 42 N.E.2d 741 (N.Y. 1942) (finding a laundress, a handyman, a cook, and other domestic servants to be employees under the state's unemployment insurance law, placing the employer outside of the exemption for those employing three or fewer domestic workers).

40. *See* Altieri v. Morris, 93 N.E.2d 77 (N.Y. 1950) (finding a gardener employed two days per week to be an employee under workers' compensation law); *see also* Halleran v. U.S. Fidelity & Guaranty Co., 134 N.Y.S.2d 769 (App. Term 1954) (finding a domestic servant with multiple clients to be an employee covered by the defendant employer's liability insurance policy).

41. *See In re* Du Bois, 61 N.Y.S.2d 741 (App. Div. 1946) (finding a seasonally employed laundress to be an employee under unemployment law).

42. *See* Weiss v. Laffman, 251 N.Y.S.2d 833 (Civ Ct. 1964) (finding a worker employed as a servant for a single evening to be an employee for purposes of her employer's insurance liability for a work injury).

43. 29 U.S.C. §§ 151–169.

44. N.Y. LAB. LAW §§ 700–718.

45. N.Y. LAB. LAW § 717 ("All the functions, powers and duties of [the State Labor Relations Board and the State Employment Relations Board] are hereby assigned to and shall hereafter be exercised and performed by and through the [Public Employment Relations Board].").

46. 29 U.S.C. § 152(3); N.Y. LAB. LAW § 701(3)(a).

employees on the basis of the domestic worker exemption.[47] In rejecting the employer's argument and asserting jurisdiction, the NLRB noted "our focus is on the principals to whom the employer-employee relationship *in fact* runs and not merely on the [i]ndisputably 'domestic' nature of some of the services rendered."[48] The Board looked to the legislative history of the NLRA, relying on the specific, although not well-explained, intention to exclude "domestic servants."[49] Nursing assistants, housekeepers, and childcare providers who are employed by an agency have been found within the Act's protection elsewhere,[50] and the NLRB has asserted jurisdiction over apartment houses, nursing homes, day care centers,[51] whose employees perform the same tasks as domestic workers.

If the distinguishing factor then is the principal to whom domestic workers sell their labor, SLRA and NLRA precedents on condominium employees complicate the typical arguments for the domestic worker exemptions. In the only two SLRB cases that address the domestic service exemption, *825 Fifth Ave. I*[52] and *825 Fifth Ave. II*,[53] the Board considered whether the staff of a 76-unit cooperatively owned apartment building were entitled to the law's protection. In construing "domestic servant" narrowly, the SLRB cited to the Court of Appeals' decision in *Wiseman v. Phipps*,[54] noting that "domestic servant" is not a "term[] of art with rigid definite meaning."[55] The Board deferred to "the normal and accepted concept of domestic service, namely, domestic services rendered to a homeowner who directly employs, controls and pays the employee."[56] Finding that the employer-employee relationship in this setting was no different from that of employees working in private clubs and restaurants, the Board held that the condominium owners' collective employment of cleaners was insufficient to trigger the domestic worker exemption.[57] After years of excluding certain

47. 243 N.L.R.B. at 480.

48. *Id.* at 480.

49. *Id.* (quoting S. REP. No. 1184, at 1, 3 (1934) ("[The word 'employee' is] so defined as to exclude from the operation of the Act *domestic servants*.")).

50. *See* Child & Family Serv. of Springfield, 220 N.L.R.B. 37 (1975) (treating agency-employed childcare workers and housekeepers as employees, although the employer did not challenge their status); The Palace at Kendall and Home Nurse Corp., 1998 N.L.R.B. G.C.M. LEXIS 70 (July 15, 1998) (advising that private duty nursing assistants contracted out by an agency would not be excluded from the Act's protection).

51. *See* University Nursing Home, Inc., 168 N.L.R.B. 263 (1967) (establishing jurisdiction over nursing homes with more than $100,000 in gross annual revenue); Salt & Pepper Nursery School & Kindergarten No. 2, 222 N.L.R.B. 1295, 1296 (1976) (establishing jurisdiction over day care centers with a gross annual revenue threshold of $250,000); Parkview Gardens, 166 N.L.R.B. 697 (1967) (establishing jurisdiction over apartment housing projects with gross annual revenue of at least $500,000).

52. 10 S.L.R.B. 465 (1947).

53. 19 S.L.R.B. 151 (1956).

54. 288 N.Y. 311, 314 (N.Y. 1942) (finding a chauffeur to be included within a will provision granting money to "every domestic servant … in my employ at the time of my decease").

55. *Id.* at 312–13, *cited in* 19 S.L.R.B. at 152.

56. 19 S.L.R.B. at 152 (citing *Wiseman*, 288 N.Y. at 312–313).

57. *Id.*

condominium workers from the NLRA's coverage,[58] the NLRB in 1979 adopted a similarly narrow reading of its domestic worker exemption.[59] These SLRB and NLRB decisions acknowledge that even where a corporation exists not as a for-profit venture but only in order to administer the housing complex of its tenant-owners, as an employer, it falls within the jurisdiction of both acts.[60]

What then is unique about domestic work? It is not a matter of the particular labor performed by domestic workers, as the same tasks are performed outside the home by janitors, daycare workers, and hotel workers who receive the protection of the labor laws. Nor is it a matter of the location of the work in private homes, as home care and cleaning agency workers perform these same labors in private homes without being disqualified from collective bargaining statutes.[61] The NLRB in *Ankh Services* differentiated domestic work as where the homeowner hired, paid, and controlled the worker,[62] but when condominium tenants do so collectively, they come under the Act.[63] If the only distinction is that these homeowner-employers are acting individually, it must be noted that personal assistants, employees of unincorporated businesses, and other categories of workers may be directly employed, paid, and controlled by an individual, sometimes even in that individual's home, without being categorized as domestic workers or losing statutory protections.[64]

Domestic workers are not distinguishable from other laborers in any single metric but only in the aggregate of their labor, location, and employer. While these factors may present some challenges for collective bargaining, such as employer privacy rights and small bargaining units, they do not explain or justify unqualified exclusion from labor law. Many countries allow domestic workers to participate in standard collective bargaining regimes.[65] Thus it is a fiction that domestic labor

58. *See, e.g.*, Point East Condominium Owners Ass'n, 193 N.L.R.B. 6 (1971). In this period, New York condominium workers over whom the NLRB declined jurisdiction were able to assert their rights under the SLRA. *See* Leisure Village Ass'n, Inc., 42 S.L.R.B. No. 5 (1979); *cf.* Leisure Village Ass'n, Inc., 236 N.L.R.B. 102 (1978).

59. 30 Sutton Place, 240 N.L.R.B. 752 (1979); *see also* Shore Club Condominium Ass'n, Inc. v. N.L.R.B., 400 F.3d 1336 (11th Cir. 2005) (affirming Board finding that housekeepers employed by the condominium corporation are not subject to the domestic worker exemption), *cert. denied*, 546 U.S. 820 (2005). *Contra* Imperial House Condominium, 279 N.L.R.B. 1225, 1228–29 (1986) (Dotson & Johanson, dissenting) (arguing for reestablishing condominium workers' exclusion either under the domestic worker exemption or through a discretionary denial of jurisdiction).

60. For a discussion of the NLRA's gross income thresholds as they relate to condominiums, see 87-10 51st Ave. Owners Corp., 320 N.L.R.B. 993 (1996).

61. 243 N.L.R.B. 478, 480 (1979).

62. *Id.*

63. 240 N.L.R.B. 752.

64. *See, e.g.*, Chic Pottery Co., 40 N.L.R.B. 83 (1942) (treating an individually owned unincorporated business as an employer).

65. *See, e.g.*, the collective bargaining models discussed in Alexandra Rizio, Alice Chu, Diana E. Marin, & Maria Marulanda, *Domestic Workers Worldwide: Four Collective Bargaining Models* at 22–23 (Apr. 28, 2011), https://idwfed.org/en/updates/usa-afl-cio-partners-with-domestic-workers-alliance-call-for-domestic-worker-representatives-at-ilc/domestic-workers-worldwide-four-collective-bargaining-models_eng.pdf [https://perma.cc/3F3Z-4FWM].

is uniquely unregulatable. And yet, it is this fiction that buttresses a generations-old legal exclusion with origins not in ignorance of domestic workers' capacity for organizing but rather in something more sinister.

B. The Domestic Worker Exemption in Federal Labor Law

To understand the SLRA's domestic and agricultural exemptions, it is necessary to review the NLRA's earlier enacted parallel exemptions. Embedded in the New Deal legislation that forms the basis for modern federal labor law were racially exclusionary exemptions for certain classes of workers. The National Labor Relations Act (1935), the Social Security Act (SSA) (1935), and the Fair Labor Standards Act (FLSA) (1938) each contained statutory exemptions from coverage for agricultural and domestic workers.[66] It is no accident that the labor performed by slaves seventy years prior was left subject to the whims of plantation owners and wealthy homeowners; each bill, in order to gain the support of Southern Democrats, was amended to exclude the two classes of work then predominantly performed by African Americans.[67] As legal historian Juan Perea has put it:

> During the New Deal Era, the statutory exclusion of agricultural and domestic employees was well-understood as a race-neutral proxy for excluding [B]lacks from statutory benefits and protections made available to most whites. Remarkably, despite these racist origins, an agricultural and domestic worker exclusion remains on the books today, entirely unaltered after seventy-five years.[68]

As Perea and other scholars have documented, the legislative histories of the SSA and FLSA exemptions reveal the discriminatory compromise behind their enactment. The SSA was written to guarantee retirement and unemployment insurance benefits for all American workers, but in order to gain the support of Southern Democrats, domestic and agricultural worker exemptions were written in, with the effect that more than half of all Black workers at the time were

66. 29 U.S.C. § 152(3); Social Security Act, ch. 531, tit. II, § 210(b)(1)–(2); Social Security Act, ch. 531, tit. IX, § 907(c)(1)–(2); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 207(b), 213(a)–(b). Unlike the NLRA and the SSA, the FLSA did not explicitly exclude domestic workers, but the same exclusion was achieved indirectly through the interstate commerce requirement. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95, 131 n.178 (2011).

67. For an article-length discussion of the origins of the agricultural and domestic exemptions, see Perea, *supra* note 66. Perea cites a number of historians linking the NLRA exemption to Jim Crow Democrats' desire to exclude Black workers. *See, e.g.*, Paul Frymer, BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY 27–28 (2008); IRA KATZNELSON, "WHEN AFFIRMATIVE ACTION WAS WHITE": AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 59 (2005).

68. Perea, *supra* note 66, at 96.

excluded from the act.[69] In the case of the FLSA—which established minimum wage and maximum hours regulations—supporters of the agricultural labor exemption were explicit in their racist motivations, as one congressperson warned, "You cannot put the Negro and the white man on the same basis and get away with it."[70]

The legislative history of the NLRA's agricultural and domestic worker exemptions does not contain the same kind of overt admission of racist intent as does that of other New Deal labor legislation, but it nonetheless had the same effect in segregating Black labor from the institutional regime of collective bargaining.[71] In its first draft, the NLRA would have granted collective bargaining rights to all workers, regardless of job class.[72] However, the following language was added without explanation in committee in 1934, and that version of the bill was ultimately enacted[73]: "The term "employee" . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home."[74]

A 1935 Senate Report states the exemptions were added for unstated "administrative reasons."[75] This most likely referred to concerns about drawing in small-scale employers, particularly farmers, which were raised several times throughout the legislative process.[76] However, when one congressman challenged

69. Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 514–15 (1995) (cited in Perea, *supra* note 66, at 110). The motivations behind the SSA exemptions, in particular, are the subject of academic debate. *See, e.g.*, Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217 (1997) (arguing against the "racial politics" approach and emphasizing the importance of a more nuanced read on the motivations behind the SSA exemptions); Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49 (2010) (arguing that the exemptions were not motivated by racial animus).

70. 82 CONG. REC. 1404 (1937) (statement of Rep. Wilcox) (quoted in Perea, *supra* note 67, at 115).

71. Robert Lieberman's calculation that the domestic and agricultural worker exemptions in the SSA excluded a majority of the Black workforce would apply similarly to the NLRA's exemptions. Lieberman, *supra* note 69.

72. Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1952 n.57 (1966).

73. *Id*. at 1952.

74. 29 U.S.C. § 152(3).

75. Morris, *supra* note 72, at 1953.

76. Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too—A Strategic Approach toward Addressing the Marginalization of Agricultural Workers*, 6 U. PA. J. LAB. & EMP. L. 525, 559 n.124, 560 n.130 (2004) (quoting two representatives of employer associations and one congressman who opposed an amendment that would remove the agricultural exemption); Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to Be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 506 (1999) (quoting an economist who opposed the NLRA with or without the farmworker and domestic worker exemptions). Labor law scholar Marc Linder suggests hostility to the radical Industrial Workers of the World for its attempts to organize farm labor outside the South in the preceding decades may also have been a motivating factor behind the farmworker exemption. Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 n.12 (1987).

the farmworker exemption,[77] its advocates justified it as necessary for the passage of the bill and made no reference to the alleged administrability concerns.[78] Although issues of administrability in household labor exist, as discussed in detail in Part IV, there is little indication in the legislative history that they were a meaningful factor in the exemptions' adoption.

If the NLRA's domestic worker exemption hid exclusionary intent behind the rationale of administrability, one court soon ascribed another logic to the exemptions: that the close proximity of domestic workers and their employers meant there was neither a need nor a desire for collective bargaining. In 1940, the Ninth Circuit opined that in agricultural and domestic work "there never would be a great number suffering under the difficulty of negotiating with the actual employer[,] and there would be no need for collective bargaining[,] and conditions leading to strikes would not obtain."[79] This reasoning, were it correct, would justify an expectation that domestic workers would not organize, but it provides no coherent rationale for statutorily preempting it. Not only is this excuse inadequate to justify the exemptions, but it also ignores the concerted activities of domestic workers dating back to the 1860s and continuing through the NLRA's passage.[80]

Although the domestic and agricultural worker exemptions in the SSA and FLSA have largely been removed by legislation or regulation,[81] the NLRA exemptions remain in effect. Some scholars have cautiously suggested that the exemptions may be invalidated as violative of the Equal Protection Clause.[82] Others have argued that the Norris-LaGuardia Act creates an implicit right of

77. Read, *supra* note 76, at 560 (noting New York American Labor Party Congressperson Vito Marcantonio's "impassioned plea for the inclusion of farm labor").

78. Morris, *supra* note 72, at 1954 (quoting Rep. Connery as saying "the committee discussed this matter carefully in executive session and decided not to include agricultural workers. We hope that the agricultural workers will be taken care of . . . . I am in favor of giving agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers.").

79. North Whitter Heights Citrus Ass'n v. N.L.R.B., 109 F.2d 76, 80–81 (9th Cir. 1940) (upholding a Board decision finding packing house workers were not "agricultural laborers" excluded from the Act).

80. On domestic worker organizing in the postbellum period, see Tera W. Hunter, *Domination and Resistance: The Politics of Wage Household Labor in New South Atlanta*, 34 LAB. HIST. 205 (1993). On domestic worker organizing more generally, see TERA W. HUNTER, TO JOY MY FREEDOM: SOUTHERN BLACK WOMEN'S LIVES AND LABORS AFTER THE CIVIL WAR 88–97 (1997); DONNA VAN RAAPHORST, UNION MAIDS NOT WANTED: ORGANIZING DOMESTIC WORKERS 1870–1940 (1988); Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45 (2000) [*hereinafter* Smith, *Organizing the Unorganizable*]; Hina Shah & Marci Seville, *Domestic Worker Organizing: Building a Contemporary Movement for Dignity and Power*, 75 ALB. L. REV. 413 (2012).

81. Perea, *supra* note 66, at 126.

82. Perea, *supra* note 66, at 127–35 (noting that in light of the requirement of discriminatory intent established in *Washington v. Davis*, 426 U.S. 229 (1976), constitutional invalidation would be a longshot).

action to enforce the collective bargaining rights of workers excluded from the NLRA.[83] Either of these strategies could conceivably work, but both rely on unlikely judicial interventions, and neither strategy is currently being publicly championed by domestic or farmworker organizations or unions. Barring a major shift in legislative priorities or a longshot legal victory, the domestic and agricultural worker NLRA exemptions are likely to remain in effect for the foreseeable future.

C. Domestic Worker Exemptions in New York Labor Law

When it was passed in 1937, the New York State Labor Relations Act contained its own domestic and agricultural worker exemptions.[84] The legislative history of the SLRA is sparse, and it cannot be assumed that the same racist machinations behind the NLRA's exemptions motivated the New York legislature. However, this section demonstrates that New York domestic workers were aggressively organizing in the 1930s and posits that New York lawmakers may have viewed domestic labor with suspicion or antipathy because of its racial composition and association with the Communist Party (CP).

The subject of this section is domestic worker exclusion from the SLRA, but the first statutory exclusions of domestic workers appeared two decades earlier. New York was the first state to pass a mandatory workers' compensation bill in 1910,[85] although this bill was struck down as violative of employers' substantive due process.[86] New York passed another workers' compensation law in 1913 applicable to specific industries and amended it in 1918 to apply to most industrial labor.[87] Both the 1913 law and the 1918 amendment included domestic and agricultural worker exemptions, and both versions survived appeals to the Supreme Court in which Justice Mahlon Pitney commented cryptically on the exemptions.[88] In *New York Cent. R. Co. v. White*, Pitney—"notable mainly for his persistent hostility to labor"[89]—stated that because of an absence of briefing on the basis for an equal protections challenge raised by the plaintiff insurer, he would assume it was premised on the domestic and agricultural worker exemptions.[90] He

83. Kayce Compton, *Defeating the Agricultural Exemption: The Norris LaGuardia Act as a Means for Collective Action for Agricultural Labor*, 74 N.D. L. REV. 509, 509–10 (1998).

84. N.Y. LAB. LAW § 701.

85. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 320 tbl.2 (1998).

86. N.Y. WORKMEN'S COMPENSATION LAW, Laws 1910, c. 674; Ives v. South Buffalo Ry. Co., 201 N.Y. 271, 319 (N.Y. 1911).

87. N.Y. WORKMEN'S COMPENSATION LAW, Laws 1913, c. 816; N.Y. WORKMEN'S COMPENSATION LAW, Laws 1918, c. 634.

88. N.Y. Cent. R. Co. v. White, 243 U.S. 188 (1917) (denying due process and equal protections challenges to the 1913 law); Ward & Gow v. Krinsky, 259 U.S. 503 (1922) (denying due process and equal protections challenges to the 1918 amendment).

89. Michal R. Belknap, *Mr. Justice Pitney and Progressivism*, 16 SETON HALL L. REV. 381, 381 (1986).

90. *White*, 243 U.S. at 208.

ruled the exemptions were not unconstitutionally arbitrary because "it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar."[91] In his subsequent decision in *Ward & Gow v. Krinsky*, Pitney characterized the exemptions as "a classification sustained upon simple grounds, doubtless far from expressing in full the reasons that had actuated the Legislature."[92] Although Pitney's pithy remarks are too vague to satisfy the legal historian, they indicate an awareness that the stated bases for the domestic and agricultural worker exemptions—administrative concerns or the lesser hazardousness of the industries[93]—elided unarticulated and perhaps less savory considerations.

The New York State Labor Relations Act was enacted in 1937, two years after the NLRA.[94] The "little Wagner act," as the SLRA was branded,[95] was written to cover all employees in New York not within the NLRB's jurisdiction.[96] The SLRA's potential as a vehicle for the institutionalization of collective bargaining has been largely unrealized because the statute slumbers in the preemptive penumbra of the NLRA. For a brief period after the SLRA's passage, the State Labor Relations Board heard hundreds of cases each year.[97] However, in the

91. *Id.* Pitney relied again on this argument two years later in *Middleton v. Tex. Power & Light Co.*, 249 U.S. 152, 159 (1919) (upholding exemption for cotton gin laborers in Texas's workers' compensation law).

92. *Krinsky*, 259 U.S. at 522.

93. This latter reason has proven particularly inapt as workers' compensation laws have expanded to include all employment not explicitly excluded, including comparatively safe industries. Although far from the hand-crushing, foot-lopping hell of early twentieth-century industrial manufacturing, domestic labor presents high rates of workplace injuries. A 2020 report on New Jersey domestic workers found that 17% had suffered a workplace injury, and a 2012 national report found that 64% of domestic workers had been injured on the job. RUTGERS CTR. FOR WOMEN AND WORK, *Domestic Workers in New Jersey*, 12 (2020), https://smlr.rutgers.edu/sites/default/files/Documents/Centers/CWW/Publications/cww_domestic_workers_report.pdf [https://perma.cc/G7TJ-UNWA]; NAT'L DOMESTIC WORKERS ALL., *HomeEconomics: The Invisible and Unregulated World of Domestic Work*, 32 (2012), https://www.domesticworkers.org/wp-content/uploads/2021/06/HomeEconomicsReport.pdf [https://perma.cc/N3M2-L72B]. For a critique of the farmworker exemptions in workers' compensation laws, see Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE J. AGRIC. L. 263 (2008).

94. N.Y. LAB. LAW §§ 700–718.

95. *Lehman Will Act Soon on Labor Bill*, N.Y. TIMES, May 15, 1937, at 6.

96. N.Y. LAB. LAW § 715 ("The provisions of this article shall not apply to: (1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act . . . .")

97. From 1939 to 1988, the SLRB published annual volumes of its decisions, which gradually shrank from thick hardbound tomes to softbound beach reads. PUB. EMP'T RELATIONS BD., *Researching Issues Under New York's Private Sector Law*, https://perb.ny.gov/researching-issues-under-new-yorks-private-sector-law/ [https://perma.cc/QN4X-N4YP] (last visited Feb. 24, 2022). Since 1989, the agencies administering the law have only published slip opinions. *Id.* In 2002, the SERB issued just seven decisions and certified a single bargaining unit. PUB. EMP'T RELATIONS BD., *Private Sector Decision & Certification Summaries, Volume 50*, https://perb.ny.gov/private-sector-decision-certification-summaries-vol50/ [https://perma.cc/4MEW-YTNU] (last visited Feb. 24, 2022).

1950s the NLRB's interstate commerce test was adopted, which established jurisdiction over businesses above certain gross revenue thresholds.[98] The SLRA has gradually lost its relevance as the NLRB's revenue thresholds have not adjusted for inflation,[99] allowing its jurisdiction to expand to cover virtually all enterprises.

The SLRA, modeled on the NLRA, was passed with its own domestic and agricultural worker exemptions, albeit in characteristically more specific language. The SLRA in its original text excluded from its definition of "employee":

> any individual . . . in the domestic service of and directly employed, controlled and paid by any person in his home, any individual whose primary responsibility is the care of a minor child or children and/or someone who lives in the home of a person for the purpose of serving as a companion to a sick, convalescing or elderly person . . . or any individuals employed as farm laborers . . . .[100]

In practice, the exemptions have functioned almost identically.[101]

In New York in the 1930s, domestic work was a Black woman's profession. It was the primary source of employment for African American women in the state, although also a substantial source of employment for African American men

98. The Board established various gross revenue thresholds for different business types and industries in a series of cases throughout the 1950s. *See, e.g.*, Carolina Supplies & Cement Co., 122 N.L.R.B. 88 (1959) (retail enterprises with gross revenue of at least $500,000 annually); Charleston Transit Co., 122 N.L.R.B. 1296 (1959) (transit systems with gross volume of business of at least $250,000 annually), *Jurisdictional Standards*, NLRB https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/jurisdictional-standards [https://perma.cc/5XKL-2QZS] (last visited Feb. 24, 2022).

99. *See Jurisdictional Standards*, *supra* note 98 (citing dollar thresholds set by cases in the 1950s). *See, e.g.*, Carolina Supplies & Cement Co., 122 N.L.R.B. at 88; Charleston Transit Co., 122 N.L.R.B. at 1296.

100. N.Y. LAB. LAW § 701(3)(a). The clause excluding farmworkers was removed in 2019.

101. The only distinction in the case law is in the treatment of condominium workers. *See supra* Section II.A.

and white immigrant women.[102] Domestic work had already long been associated with Black women, but an exodus of Irish women from domestic service following the passage of the Immigration Act of 1921 further racialized the industry.[103] As the Depression wore on, Black domestic workers experienced especially high rates of unemployment,[104] leading to what was characterized as the Bronx Slave Market[105]—droves of Black workingwomen amassed at Bronx street corners where "[n]ot only is human labor bartered and sold for slave wage, but human love also is a marketable commodity."[106] The association of domestic work with sex work was more than a coincidence of proximity;[107] the gendered, racialized,

102. Of the 275,457 domestic servants in New York State recorded in the 1930 census, 46% were "foreign-born white" and 24% were "Negro." Black and foreign-born white workers made up even larger percentages of other categories of low-paid domestic labor such as laundresses, laborers, and porters. U.S. CENSUS BUREAU, FIFTEENTH CENSUS OF THE UNITED STATES: POPULATION, VOL. IV: OCCUPATIONS BY STATES: NEW YORK 1122–1123, tbl.11 (1930). In New York City, where Black and immigrant workers were concentrated, 85% of domestic servants were Black, foreign-born white, or "other." *Id.* at 1132–1134, tbl.12. However, these statistics undersell the concentration of Black workers in domestic work, as the Black working population of New York was still small only two decades into the Great Migration. In 1930, 28% of Black workers were employed as servants, and more than 52% were categorized as working in the domestic and personal service industry. *Id.* at 1122–23. A decade later, Black workers accounted for 32% of employed domestic workers and 44% of unemployed domestic workers. The portion of African American women workers either employed or looking for work as domestic workers had risen to 66%. U.S. CENSUS BUREAU, SIXTEENTH CENSUS OF THE UNITED STATES: POPULATION, VOL. III: THE LABOR FORCE: NEW YORK 380–384, tbl.13 (1940). *See also* LASHAWN HARRIS, SEX WORKERS, PSYCHICS, AND NUMBERS RUNNERS (2016) (discussing the many ways Black women engaged in the informal economy, which would not be reflected in these census data).

103. Danielle Phillips, *Cleaning Race: Irish Immigrant and Southern Black Domestic Workers in the Northeastern United States, 1865–1930*, *in* U.S. WOMEN'S HISTORY: UNTANGLING THE THREADS OF SISTERHOOD 26 (Leslie Brown, Jacqueline Castledine & Anne Valk eds., 2017).

104. African American domestic workers suffered a subantially higher unemployment rate compared to their white counterparts in the 1940 census (13.4% and 8.5% respectively). SIXTEENTH CENSUS OF THE UNITED STATES, *supra* note 102, at 380–84, tbl.13. A 1936 article noted especially high rates of unemployment among Black domestic workers, although this was more pronounced in southern cities. Mary Anderson, *The Plight of Negro Domestic Labor*, 5 J. OF NEGRO EDUC. 66, 67 (1936).

105. Ella Baker & Marvel Cooke, *The Bronx Slave Market*, 42 CRISIS 330 (1935). For a history of the slave markets, see Ariana E. Alexander, Soles on the Sidewalk: The Bronx Slave Markets from the 1920s to the 1950s (Sept. 2017) (Ph.D. dissertation, New York University).

106. Baker & Cooke, *supra* note 105.

107. For a discussion of the connections between sex work and domestic work in this period, see Shana A. Russell, Domestic Workers, Sex Workers, and the Movement: Reimagining Black Working-Class Resistance in the Work of William Attaway, Richard Wright, and Alice Childress, 1935–1960 (Oct. 2015) (Ph.D. thesis, Rutgers).

and intimate nature of both professions contributed to their perception as undignified and undeserving of labor law's protection.[108]

The slave markets precipitated the founding of two domestic workers' unions. The first was the Women's Day Workers League (WDWL), formed by Harlem Communist Party activist and political candidate Fanny Austin in 1928.[109] Little is written about the WDWL, but the union claimed a membership of "nearly a hundred workers,"[110] and it remained in existence, at least on paper, as late as 1934.[111] That year, the Domestic Workers' Union of New York (DWUNY) was formed by African American and Finnish domestic workers in Harlem,[112] although there is no record of whether it was a continuation of the WDWL or an entirely separate entity.[113] DWUNY operated as a hiring hall, and union workers were guaranteed a minimum wage and a contract that included maximum hours and paid time off.[114] The union affiliated with the American Federation of Labor in 1936 and grew to a membership of several hundred primarily African American women throughout the 1930s.[115] Although DWUNY represented only a fraction of New York's domestic workers, the union fostered powerful alliances and

108. Indicative of domestic labor's reputation at the time, an African American employer of domestic workers said the following in an interview with Esther Cooper Jackson: "Negroes should join unions, but domestic workers wouldn't know what to do even if they had a union. They're too ignorant, and like good times too much to take them seriously." Esther Cooper Jackson, *The Negro Woman Domestic Worker in Relation to Trade Unionism (1940)*, VIEWPOINT MAG. (Oct. 31, 2015), https://viewpointmag.com/2015/10/31/the-negro-woman-domestic-worker-in-relation-to-trade-unionism-1940 [https://perma.cc/CCY3-SA4B].

109. Philip S. Foner & Ronald L. Lewis, *Black Women Workers*, 6 THE BLACK WORKER 170 (1981). *See also* LaShawn Harris, *Running with the Reds: African American Women and the Communist Party During the Great Depression*, 94 J. AF. AM. HIST. 21, n.36 (2009) (describing Fanny Austin's call for Black women workers to join the Communist party). Fanny Austin was the first Black woman nominated for municipal office in New York. *Leading Communist Candidate at Big Negro Meet Friday*, DAILY WORKER, Oct. 15, 1929.

110. Foner & Lewis, *supra* note 109, at 170.

111. *Parade, Mass Meeting to Climax Boycott Against Blumstein's*, N.Y. AGE, July 28, 1934 ("Other speakers included Mrs. Fannie Carter of the Women's Day Workers League."); *Nat Turner Society to Meet*, AFRO-AM. BALT. Dec. 17, 1932, at 3 ("Among those listed to speak [is] . . . Mrs. Fanny Austin, president of the Women's Day Workers League.").

112. Cooper, *supra* note 108; VANESSA H. MAY, UNPROTECTED LABOR: HOUSEHOLD WORKERS, POLITICS, AND MIDDLE-CLASS REFORM IN NEW YORK, 1870–1940 155–65 (2011). DWUNY features heavily in an unpublished novel by Richard Wright, *Black Hope*, as "a symbol of an interracial organization that would fight oppression collectively." Julieann Veronica Ulin, *Talking to Bessie: Richard Wright's Domestic Servants*, 85 AM. LIT. 151, 167 (2013).

113. One sign that the DWUNY may have been the successor to the WDWL is a reference to the former as having been "in existence since 1927" in the *Daily Worker*. *Domestic Workers Union Backs FDR*, DAILY WORKER, Oct. 7, 1944, at 4.

114. MAY, *supra* note 112, at 157. The two weeks' vacation contracted for by the DWUNY dwarfs the three days' rest won through the New York Domestic Worker Bill of Rights seventy years later. N.Y. Legis. Assemb. A-1470, Reg. Sess. 2009–2010 (N.Y. 2010).

115. Cooper estimates the union had "about 1,000 members" in 1940, but May notes that other sources indicate fewer members. Cooper, *supra* note 108; MAY, *supra* note 112, at 157.

became a significant political lobby, meeting with the New York City mayor,[116] testifying before Congress,[117] and—most significantly—petitioning the state legislature to pass bills that would grant domestic workers a minimum wage, maximum hours, and access to workers' compensation.[118]

The DWUNY, like the WDWL before it, had a close relationship with the Communist Party. Dora Jones, a Black domestic worker living in Queens and the union's executive secretary, appears to have been the public face of the DWUNY. Jones ran for office several times on the CP line or with the party's endorsement.[119] DWUNY was not formally affiliated with the CP, but it was sponsored by the National Negro Congress,[120] itself closely aligned with the CP.[121] Additionally, the bulk of what is known about the DWUNY comes from the *Daily Worker*, the CP's newspaper, as well as the writings of Esther Cooper Jackson and Marvel Cooke,[122] both CP members.[123]

The domestic worker labor bills were the zenith of the DWUNY's organizing, and their mixed success is illustrative of the hostility and suspicion that organized Black domestic labor evoked from New York's powerbrokers in the period in which the domestic worker exemption was written into the SLRA. The bills were drafted by the Women's Trade Union League, which alongside the DWUNY advocated for their passage in meetings, speeches, and editorials.[124] A Women's City Club meeting organized by these two groups to promote the bills highlights the fault lines in this coalition.[125] The meeting's attendants, many of them employers of domestic workers, voiced their support for the bills.[126] However,

116. Dora Jones met with Mayor Fiorello LaGuardia to pressure him to act to stop the trafficking of southern Black women to New York under indenture contracts. MAY, *supra* note 112, at 147–48.

117. Rosa Rayside, at one time the acting president of DWUNY, testified before Congress in favor of an unemployment insurance bill that would be inclusive of domestic and agricultural workers. *Servants' Union Urges Old Age Pensions Too*, AFRO-AM. BALT., Feb. 23, 1935, at 3.

118. MAY, *supra* note 112, at 160–61; *Behind Drive for New Laws*, N.Y. AMSTERDAM NEWS Mar. 18, 1939, at 14.

119. *Nominate Powers C.P. Candidate for Queens Borough President*, DAILY WORKER, Sept. 18, 1933, at 3; *United Front Is Formed to Elect Mrs. Chaney*, N.Y. AMSTERDAM NEWS, Aug. 24, 1935, at 15.

120. Phillips, *supra* note 103, at 27.

121. On the CP's attempts to organize Black women workers, see generally ERIK MCDUFFIE, SOJOURNING FOR FREEDOM: BLACK WOMEN, AMERICAN COMMUNISM, AND THE MAKING OF BLACK LEFT FEMINISM 93–94 (2011).

122. *See* Cooper, *supra* note 108; Marvel Cooke, "*Modern Slaves": Domestic Jobs Are Miserable in Hours, Pay. Union Is Seeking to Relieve Their Bad Situation*, N.Y. AMSTERDAM NEWS, Oct. 16, 1937.

123. LaShawn Harris, *Marvel Cooke: Investigative Journalist, Communist, Black Radical Subject*, 6 J. FOR THE STUDY OF RADICALISM 91, 93 (2012); Erik S. McDuffie, *"No Small Amount of Change Could Do": Esther Cooper Jackson and the Making of a Black Left Feminist*, *in* WANT TO START A REVOLUTION? RADICAL WOMEN IN THE BLACK STRUGGLE 25, 26 (Dayo F. Gore, Jeanne Theoharis, & Komozi Woodard eds., 2009).

124. MAY, *supra* note 112, at 106.

125. *See id.* at 106–07.

126. *Housewives Want No Servants' Union*, N.Y. TIMES, Jan. 27, 1938, at 23.

when Dora Jones was introduced as a speaker and her affiliation with DWUNY made known, employers derailed the meeting, decrying domestic worker unionization and warning of overregulation and intrusive union workplace inspections.[127] Progressive employers were willing to pay modestly higher wages and accept a cap on work hours, but they reacted to domestic workers organizing under the leadership of a Black leftist with terror and fury. The bills did not pass that year or the next. In 1946, domestic workers finally won partial inclusion under the state workers' compensation law,[128] but the campaign did not achieve coverage under minimum wage or maximum hours laws. After failing to reach a critical mass of domestic workers and unable to win labor law protections, the DWUNY gradually faded away.[129]

As this history indicates, New York's legislators were likely well aware of domestic worker organizing when they passed the 1935 State Labor Relations Act. Thus it was not a belief that domestic workers could not form unions that underlay the exemption. Perhaps it was even the knowledge that domestic workers could organize and were doing so with the help of the CP that scared legislators into excluding them from legislation that would give them the means to legitimate and entrench a collective bargaining relationship.[130] However, the search for a contextually specific reason for the statutory exemptions misses the obvious: the exemptions were the sad result of the mundane contempt the powerful and privileged hold for servants. Domestic work is socially constructed as women's work, Black work, immigrants' work—illegitimate and degraded.[131] This social construction permits the legal withdrawal of domestic workers' entitlement to the

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127. *Id.*

128. DWUNY President Nina Evans in 1946 said of the bill,

> About two-thirds of our 125 members have been injured in the course of their jobs. . . . Only about a third of our members who work a forty-eight hour week will be covered by the new law, and we certainly aren't satisfied with the fact that there's no penalty to enforce it. But it's a big step forward and I guess we'll just have to keep on fighting for better social legislation.

Extension of Compensation Law to Domestic Workers Acclaimed, N.Y. HERALD TRIB., Apr. 7, 1946, at A5.

129. *See* MAY, *supra* note 112, at 173. The last reference to the union appears in a 1954 issue of the *Daily Worker*, which documented then–union president Nina Evans's testimony to Congressman Adam Clayton Powell urging him to remove the domestic worker exemption from minimum wage laws. *Legislative Confab Urges Law to Stop Runaways*, DAILY WORKER, Dec. 15, 1954, at 4.

130. Similar motivations could even have been behind the earlier exclusions from the workers' compensation bills. In the 1910s, the Industrial Workers of the World (IWW) organized domestic workers in major cities, including New York. UNIV. WASH. IWW HISTORY PROJECT, *IWW Local Unions (Database)*, https://depts.washington.edu/iww/locals.shtml [https://perma.cc/22KG-6JZ4] (last visited Feb. 24, 2022). The IWW's domestic worker organizing was well known enough in New York the year the workers' compensation bill was expanded to most blue collar industries that a 1918 New-York Tribune editorial warned, "The dissatisfied domestic who carries a red [IWW membership] card—an unholy lot of them do—is taught that she can get even with the 'Lady of the House' by introducing bed bugs to the bed linen." Boyden R. Sparkes, *The I.W.W.: An X-Ray Picture*, N.Y. TRIB., Apr. 14, 1918, at B6.

131. *See supra* Section II.A.

rights and protections extended to other laborers. New York legislators, like their federal counterparts, did not need to state a coherent reason for disenfranchising domestic labor; they never saw domestic workers as workers at all.

Whether the social construction of domestic labor has shifted in the more than eighty years since the SLRA's passage is a question the reader must answer for themself. However, a movement has arisen with the purpose of equalizing the rights of domestic workers, and the legal support for domestic worker disenfranchisement has never appeared so thin. Part III explores the recent legislative victories of domestic worker organizations and their allies, as well as their limitations. It then presents a legal path to achieving the most elusive goal of the domestic worker rights movement: organizing and collective bargaining rights.

III.
WINNING DOMESTIC LABOR RIGHTS

A. The New York Domestic Worker Bill of Rights

New York was the first state in the country to address the unjust differential treatment of domestic workers through comprehensive legislation, passing a Domestic Worker Bill of Rights (DWBR) in 2010.[132] The bill is remarkable for its sweeping eliminations of statutory domestic service exemptions, save for one: the SERA exemption. Although the DWBR's passage was a significant victory, continuing exclusion from the SERA denies domestic workers their most powerful means of enforcing all other rights prescribed by the bill: a protected right to organize and the ability to form statutorily empowered labor organizations.

The campaign for a state-level DWBR started in 2003 when the advocacy group Domestic Workers United (DWU) joined with unions, community organizations, clergy, employers, and other domestic worker organizations to form the New York Domestic Workers Justice Coalition.[133] Organized labor was critical to the bill's passage, articulating the need for labor law protection as arising from domestic workers' inability to organize collectively.[134] In August 2010, during a brief period of Democratic control of the state senate, the DWBR was signed into law, taking effect later that year.[135]

The DWBR as it was passed was an impressive win for domestic workers, but it did not include all that the coalition had campaigned for. The bill extended

132. N.Y. Legis. Assemb. A-1470, Reg. Sess. 2009–2010 (2010); N.Y. Sen. S-2311, Reg. Sess. 2009–2010 (2010); *see Organizing to Transform Ourselves and Our Laws: The New York Domestic Workers Bill of Rights Campaign*, 44 CLEARINGHOUSE REV. 577, 577 (2011).

133. *Organizing to Transform Ourselves*, *supra* note 132, at 577–78 (2011).

134. SEIU Local 32BJ's then-Secretary-Treasurer, Hector Figueroa, testified before the State Senate, "Other workers are able to collectively bargain for basic rights. That is impossible for this workforce because of the nature of the industry. Legislation is necessary." *Organizing to Transform Ourselves*, *supra* note 132, at 579.

135. N.Y. Legis. Assemb. A-1470, Reg. Sess. 2009–2010 (2010); N.Y. Sen. S-2311, Reg. Sess. 2009–2010 (2010).

minimum wage protections to many New York domestic workers,[136] strengthened overtime protections,[137] and entitled workers to a weekly day of rest, three days of paid time off and two days of sick leave annually, and protection against harassment under the New York State Human Rights Law.[138] However, aspects of the bill that would have given domestic workers special protections to compensate for the lack of established collective bargaining were removed, leading to debates within the coalition about whether the bill was over-compromised.[139] In its original form and in the draft passed by the State Assembly, DWBR Section 4 would have eliminated the domestic worker exemption in the SERA.[140] However, the final bill removed Section 4 in favor of ordering the Department of Labor to examine the feasibility of granting collective bargaining rights to domestic workers.[141]

The DWBR was hailed as a victory for domestic workers, but critics have focused on its limited scope and coverage, its failure to address issues related to immigration status, and the value of focusing organizing efforts on legislation to the detriment of other efforts.[142] Terri Nilliasca, a volunteer attorney with the Filipina migrant worker center Damayan, noted that the minimum standards the DWBR established are well below what workers typically win through informal bargaining.[143] By leaving the SERA's domestic worker exemption in place, the DWBR fails to protect domestic workers from retaliation for the kind of organizing and bargaining that wins wages and conditions above the bill's minimum standards.

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136. Some domestic workers were already covered by New York minimum wage protections, but live-in companions and babysitters were not. The DWBR expanded minimum wage protections so that only casual part-time babysitters are excluded. Shah & Seville, *supra* note 80, at 430 n.116.

137. Prior to the passage of the DWBR, live-in companions had no overtime protections, while other domestic workers were entitled to overtime but at one and one-half times the minimum wage, rather than at one and one-half times the regular rate of pay. The DWBR now grants overtime protections to all domestic workers at one and one-half times the regular rate of pay, with the exceptions of casual babysitters and live-in companions, who still receive the lower rate. *Id.*

138. Assemb. B. 1470, 2009–2010 Leg., 232nd Reg. Sess. (2010).

139. HARMONY GOLDBERG, OUR DAY HAS FINALLY COME: DOMESTIC WORKER ORGANIZING IN NEW YORK CITY, 234–35 (Graduate Center, CUNY 2014)

140. CLAIRE HOBDEN, INT'L LABOUR ORG., WINNING FAIR LABOUR STANDARDS FOR DOMESTIC WORKERS: LESSONS LEARNED FROM THE CAMPAIGN FOR A DOMESTIC WORKER BILL OF RIGHTS IN NEW YORK STATE 26 (2010), https://ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_149488.pdf [https://perma.cc/WNH9-ERK9]; Elizabeth Kennedy & Michael B. Runnels, *Bringing New Governance Home: The Need for Regulation in the Domestic Workplace*, 81 UMKC L. REV. 899, 918 n.113 (2013).

141. Kennedy & Runnels, *supra* note 140, at 918–19.

142. Terri Nilliasca, *Some Women's Work: Domestic Work, Class, Race, Heteropatriarchy, and the Limits of Legal Reform*, 16 MICH. J. RACE & L. 377, 397–405 (2011).

143. Terri Nilliasca, *Perspectives: Whose Movement? Domestic Worker Bill of Rights Four Years Later*, LAW AT THE MARGINS (Apr. 30, 2014), https://lawatthemargins.com/perspectives-whose-movement-domestic-workers-bill-of-rights-four-years-later/ [https://perma.cc/6BYJ-XP97].

The New York Department of Labor (DOL) released its report on "The Feasibility of Domestic Worker Collective Bargaining" (hereafter "Feasibility Report") the same month the DWBR went into effect.[144] The report identifies issues unique to domestic worker collective bargaining—in particular privacy and administrability[145]—but concludes that domestic worker collective bargaining under the SERA is feasible and "a critical first step in the organizing process."[146] The DOL found the domestic worker exemption could be removed from the SERA, particularly if industry-specific provisions to support multi-employer bargaining were added.[147] DWU and Damayan also released reports endorsing domestic worker collective bargaining rights,[148] but the legislative path quickly became untenable. Two months after DOL issued the Feasibility Report, Republicans retook their State Senate majority, and the legislature abandoned the question of domestic worker collective bargaining.

Thus while the DWBR was a historic victory, it remains incomplete. Domestic Worker Bills of Rights have subsequently been passed in California, Connecticut, Hawaii, Illinois, Massachusetts, Nevada, and Oregon, as well as Seattle and Philadelphia,[149] but following New York's example, none have extended collective bargaining rights to domestic workers. However, at least in New York, legislative opportunities for winning collective bargaining rights for domestic workers have improved substantially since the first years after the DWBR's passage. The new Democratic Senate majority that took office in 2019 has already removed the agricultural worker exemption from the SERA, while extending farmworkers other labor rights.[150] Farmworkers were able to force the issue by first taking it to the courts, and domestic workers can do the same.

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144. N.Y. DEP'T OF LABOR, FEASIBILITY OF DOMESTIC WORKER COLLECTIVE BARGAINING 5 (2010) [hereinafter *Feasibility Report*], https://www.ilo.org/dyn/migpractice/docs/147/Feasibility.pdf [https://perma.cc/7SYY-7ZQF].

145. The issues raised by the Feasibility Report are addressed in Sections IV.A and B.

146. *Feasibility Report*, *supra* note 144, at 29.

147. *See id.*

148. DOMESTIC WORKERS UNITED, NAT'L DOMESTIC WORKERS ALL., & URB. JUST. CTR., DOMESTIC WORKERS AND COLLECTIVE BARGAINING: A PROPOSAL FOR IMMEDIATE INCLUSION OF DOMESTIC WORKERS IN THE NEW YORK STATE LABOR RELATIONS ACT 12, 14 (2010), https://issuelab.org/resource/domestic-workers-and-collective-bargaining-a-proposal-for-immediate-inclusion-of-domestic-workers-in-the-new-york-state-labor-relations-act.html [https://perma.cc/SAS8-D2PM]; DAMAYAN MIGRANT WORKERS ASS'N & URB. JUST. CTR., DOING THE WORK THAT MAKES ALL OTHER WORK POSSIBLE: A RESEARCH NARRATIVE OF FILIPINO DOMESTIC WORKERS IN THE TRI-STATE AREA 12 (2010), takerootjustice.org/wp-content/uploads/2019/06/damayan_march11.pdf [https://perma.cc/BE74-55MS]; Matthew Cunningham-Cook, *Domestic Workers Look to Extend Gains*, LAB. NOTES (Mar. 13, 2012), https://labornotes.org/2012/03/domestic-workers-look-extend-gains [https://perma.cc/83VP-CYUT] ("Activists now want to expand their gains by winning collective bargaining rights for domestic workers, bringing them under the [SERA].").

149. NAT'L DOMESTIC WORKERS ALL., *supra* note 19; Orso, *supra* note 19.

150. Farm Laborers Fair Labor Practices Act, N.Y. Assemb. A-8419, Leg. Sess. 2019–2020 (2019); *see infra* Section III.B.

B. The Defeat of the Agricultural Worker Exemption

In May 2016, the New York Civil Liberties Union (NYCLU), the Worker Justice Center, and the Workers' Center of Central New York brought an action on behalf of Crispin Hernandez and other New York farmworkers against the State of New York challenging the SERA's farmworker exemption,[151] which they alleged violated the state constitution's guarantee that all "[e]mployees shall have the right to organize and to bargain collectively."[152] Less than one month after the *Hernandez* litigation succeeded in a state appellate court,[153] the New York State Senate passed a long-sought farmworker rights bill that included codification of farmworker collective bargaining rights under the SERA,[154] suggesting that the Third Department Appellate Division's decision provided the necessary pressure to move the legislature to act.

The farmworker litigation focused not so much on collective bargaining rights but on the broader right to "mutual aid and protection" under the SERA § 703.[155] The plaintiffs' complaint alleged that in 2015, Crispin Hernandez and Saul Pinto attempted to organize a workers' committee to advocate for improving conditions on the farm where they worked.[156] When Hernandez and Pinto continued their organizing efforts despite intimidation by a farm manager, their employer fired them.[157] Although a workers' committee is not a union, the SERA, like the NLRA, prohibits employers from retaliating against workers for "engag[ing] in concerted activities, for the purpose of . . . mutual aid or protection."[158] However, because Hernandez and Pinto were farmworkers, the SERA's agricultural worker exemption prevented them from seeking redress through PERB.

Hernandez argued that the SERA's farmworker exemption violated the New York state constitution.[159] He relied on a 1939 amendment to the New York state constitution that guarantees to all "[e]mployees . . . the right to organize and to bargain collectively through representatives of their choosing,"[160] while also raising claims under the state constitution's equal protections, due process, and freedom of association clauses.[161] The amendment was adopted one year after the

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151. Complaint, Hernandez v. State, 99 N.Y.S.3d 795 (App. Div. 2019) (No. 526866).

152. N.Y. CONST. art. I, § 17.

153. *Hernandez*, 99 N.Y.S.3d at 803.

154. Farmworker Fair Labor Practices Act, N.Y. Assemb. A-8419, Leg. Sess. 2019–2020 (2019).

155. Complaint, *supra* note 151, at 3, 6–7.

156. *Id.* at 2.

157. *Id.*

158. N.Y. LAB. LAW §§ 703–704.

159. Complaint, *supra* note 151, at 2; Brief of Plaintiffs-Appellants at 2, 14, 29–32, Hernandez v. State, 99 N.Y.S.3d 795 (App. Div. 2019) (No. 526866).

160. *Hernandez*, 99 N.Y.S.3d at 800 (citing N.Y. CONST. art. I, § 17).

161. *Id.* at 789 (first citing N.Y. CONST. art. I, § 11 (the right to equal protection); then citing N.Y. CONST. art. I, § 6 (the right to due process); and then citing N.Y. CONST. art. I, § 9 (the right to freedom of association)).

passage of the SLRA by largely the same legislature, but its use of the word "[e]mployees" was unqualified by any exemption, and Hernandez argued that this broader definition must reach farmworkers.[162]

The *Hernandez* litigation was not initially successful. Even though the state attorney general, tasked with defending the exemption, declined to do so at the outset of the litigation, the New York Farm Bureau, a lobbying group opposed to the expansion of farm laborers' rights and protections, soon intervened as a defendant. [163] The Farm Bureau argued that because the right to bargain collectively was added to the state constitution only a year after the passage of the SLRA, its definition of "employee" should be read as containing the same exemptions as § 701(3)(a).[164] The Farm Bureau won a dismissal in the trial court, which accepted that the constitutional definition of "employee" implicitly incorporated the SERA's exemptions.[165] Hernandez appealed.[166]

In May 2019, in *Hernandez v. State*, the Appellate Division of the New York Supreme Court reversed the trial court's dismissal and declared that the farmworker exemption in the SERA violated article I, § 17 of New York's constitution.[167] Laws that burden rights given special constitutional protection are subject to a heightened standard of review that requires the demonstration of a compelling state interest and the absence of "less onerous alternatives."[168] The *Hernandez* court found the right to bargain collectively to be fundamental based on its legislative history and its inclusion in the state bill of rights, and therefore subject to strict scrutiny.[169] In support of their position, the Farm Bureau raised the perishability of farm produce and the interests of small farmers.[170] However, the court rejected those rationales, holding that the farmworker exemption could not "conceivably withstand strict scrutiny" and striking it down as unconstitutional.[171]

While the NYCLU expected the Farm Bureau to appeal *Hernandez*,[172] the issue became moot when the governor signed into law AB 8419, which extended

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162. Complaint, *supra* note 151, at 7; *see Hernandez*, 99 N.Y.S.3d at 798–800.

163. *Landmark Farmworker Suit Moves Forward after Farm Bureau Intervention*, N.Y. C.L. UNION (Oct. 24, 2016), https://www.nyclu.org/en/press-releases/landmark-farmworker-suit-moves-forward-after-farm-bureau-intervention [https://perma.cc/NBD2-6ENZ].

164. *Hernandez*, 99 N.Y.S. 3d at 800.

165. *Id.* at 798–800.

166. *Id.* at 798.

167. *Id.* at 802–03.

168. Alevy v. Downstate Med. Ctr., 348 N.E.2d 537, 542–44 (N.Y. 1976); *see also* Golden v. Clark, 564 N.E.2d 611, 613–14 (N.Y. 1990).

169. *Hernandez*, 99 N.Y.S.3d at 801–03. The Court cited multiple instances of delegates to the 1938 Constitutional Convention referring to the right as "fundamental," noted the significance of the right's placement in the constitution's bill of rights, and highlighted New York's history of support for collective bargaining. *Id.* at. 802–803.

170. *See id.* at 808 (Pritzker, J., dissenting).

171. *Id.* at 803.

172. Daniel Weissner, *New York Appeals Court Says Bar on Farmworker Unionizing Is Unconstitutional*, REUTERS LEGAL, May 23, 2019.

nearly full collective bargaining rights, workers' compensation, and unemployment benefits to farm laborers, to go into effect on January 1, 2020.[173] Collective bargaining rights and organizing protections are granted to farmworkers by removing the farmworker exemption from the SERA and adding § 701(3)(c), which explicitly includes farmworkers within the definition of "employee."[174]

Farmworkers won their right to a union through a constitutional challenge. The argument was simple but compelling: all employees in New York have a fundamental right to organize and bargain collectively, and no statutory exemption can take that away without a compelling justification. As a statement on the dignity of labor and the necessity of protected organizing rights, it is not only a profound victory for farmworkers but also a path to equalizing the rights of domestic workers.

C. The Constitutional Path to Defeating the Domestic Worker Exemption

The *Hernandez* decision makes no mention of domestic workers, but the Court's ruling extends naturally to them. The wall that stands between the current reality of domestic worker disenfranchisement and the possibility of domestic worker collective bargaining is paper thin. Domestic workers need only for a state court to declare that *Hernandez* extends to them to gain the protection of the SERA.

The *Hernandez* court found that

> the choice to use the broad and expansive word "employees" in N.Y. Constitution, article I, § 17, without qualification or restriction, was a deliberate one that was meant to afford the constitutional right to organize and collectively bargain to any person who fits within the plain and ordinary meaning of that word.[175]

The court did not provide a definition of "employee," citing simply to "its natural and ordinary meaning."[176] However, the NYCLU's appellate brief[177] relied on the Restatement (Third) of Agency's definition of an employee as "an agent whose principal controls or has the right to control the manner and means of the agent's

173. Farmworker Fair Labor Practices Act, N.Y. Assemb. A-8419, Leg. Sess. 2019–2020 (2019). The newly added provision denies farmworkers "concerted activities" protections for engaging in strikes, stoppages, or slowdowns. N.Y. LAB. LAW § 703.

174. N.Y. LAB. LAW § 701(3)(c) ("The term 'employee' shall also include farm laborers. 'Farm laborers' shall mean any individual engaged or permitted by an employer to work on a farm. Members of an agricultural employer's immediate family who are related to the third degree of consanguinity or affinity shall not be considered to be employed on a farm if they work on a farm out of familial obligations and are not paid wages, or other compensation based on their hours or days of work.").

175. *Hernandez*, 99 N.Y.S.3d at 800.

176. *Id.* at 801.

177. Brief of Plaintiffs-Appellants, *supra* note 159, at 16.

performance of work."[178] Such a reading, or indeed any modern definition of "employee,"[179] would encompass domestic workers as intuitively as it did farmworkers in *Hernandez*.[180]

If it is true that the fundamental article I, § 17 right encompasses domestic workers, the § 701(3)(a) exemption can only be constitutional if the policy rationale underlying it survives strict scrutiny and no "less onerous alternatives" for serving that purpose are available.[181] The *Hernandez* court rejected the Farm Bureau's policy arguments for the farmworker exemption as inadequate to withstand strict scrutiny.[182] Although the domestic worker exemption is subject to different policy arguments than those raised by the Farm Bureau in *Hernandez*, this article posits that they likely still would not withstand the strict scrutiny standard. New York DOL's 2010 Feasibility Report examined policy questions specific to domestic worker collective bargaining, raising the challenges of administrability and privacy.[183] Part IV of this article addresses each individually.

However, the privacy and administrability concerns raised by the Feasibility Report only pertain to domestic workers' unionization. Collective bargaining rights center on access to a legal infrastructure that prescribes the rights and privileges of unions and employers, while organizing rights protect employee concerted activities regardless of whether they are in pursuit of or on behalf of a union.[184] Although *Hernandez* won farmworkers access to the SERA's collective bargaining regime, the case did not arise out of farmworkers' attempts to unionize.[185] Domestic workers' right to protection against retaliation is not implicated by either the Feasibility Report's administrability or privacy objections—except the reinstatement remedy, discussed below—and it would protect other forms of organizing even if domestic workers do not opt to form traditional unions. Access to a protected organizing right presents a valid basis for ending the domestic worker exemption before even reaching the challenges of collective bargaining in the sector.

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178. RESTATEMENT (THIRD) OF AGENCY § 7.07(3) (AM. L. INST. 2006).

179. *See supra* Section II.A (discussing domestic worker inclusion in the definition of "employee").

180. As *Hernandez* was never appealed, this reading of "employee" in N.Y. CONST. art. I, § 17 is binding on all New York state trial courts. The doctrine of *stare decisis* holds all New York trial courts to the precedential rulings of any New York appellate department in the absence of a departmental split or a contrary Court of Appeals ruling. Mountain View Coach Lines v. Storms, 476 N.Y.S.2d 918, 920 (App. Div. 1984).

181. *See* Alevy v. Downstate Med. Ctr., 348 N.E.2d 537, 543 (N.Y. 1976).

182. *Hernandez*, 99 N.Y.S.3d at 803.

183. *Feasibility Report*, *supra* note 144, at 17–23.

184. N.Y. LAB. LAW § 700 ("[I]t is hereby declared to be the public policy of the state … 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 interference, restraint or coercion of their employers.") (emphasis added).

185. Complaint, *supra* note 151, at 2.

Part IV concludes that even if the exemption's unconstitutionality were to hinge on domestic worker collective bargaining as opposed to organizing rights, the policy concerns raised by the Feasibility Report would not be sufficient to survive strict scrutiny. Domestic worker unionization can function and be administered through existing models of collective bargaining, and it can do so in a manner compatible with the privacy rights of domestic employers. However, abolishing the SERA's domestic worker exemption is a necessary first step in the process of instituting a workable model for domestic worker collective bargaining.

IV.
THE EMINENT FEASIBILITY OF DOMESTIC LABOR RIGHTS

A. The Challenge of Single-Employee Units and Administrability

The DOL's Feasibility Report placed administrability concerns in two categories: single-employee bargaining units and employer voluntary action.[186] Each is addressed below, with consideration given to whether they present a compelling state interest and whether less onerous alternatives exist for preserving that interest besides the wholesale denial of domestic worker collective bargaining rights. The Feasibility Report expressed a strong preference for multi-employer bargaining as a means of reducing administrative costs for all parties and in order to promote industrial uniformity.[187] The DOL relied heavily on a report prepared by Domestic Workers United shortly after the passage of the DWBR (hereafter DWU report), which also suggested that multi-employer bargaining units would increase the feasibility of domestic worker collective bargaining.[188] In considering the administrability and privacy concerns below, this section begins by presenting multi-employer bargaining as a model largely achievable under extant law and addresses whether legislative changes to the law are necessary to make multi-employer bargaining function.

Multi-employer bargaining—in which workers from multiple workplaces and their several employers agree to be bound collectively by a single contract—is the most appropriate model of collective bargaining that could take effect immediately upon the invalidation of the domestic worker exemption. Multi-employer bargaining is a variation on the typical model of collective bargaining under U.S. law, rather than a distinct system, and therefore would not require industry-specific statutory language to operate. Under such a system, multiple employers would be bound by a single uniform contract setting out terms of employment.

Agencies administering the SERA are well-prepared to oversee multi-employer bargaining units. Under the SERA, PERB has the authority to determine "the unit appropriate for the purposes of collective bargaining," including "the

186. *Feasibility Report*, *supra* note 144, at 17–23.

187. *Id.* at 29 (recommending a special procedure be added to the SERA for the purpose of certifying multi-employer bargaining units).

188. DOMESTIC WORKERS AND COLLECTIVE BARGAINING, *supra* note 148.

employer unit, multiple employer unit . . . or any other unit."[189] PERB already administers multi-employer bargaining units in the building services industry organized under the SERA.[190] Building service workers first organized into single-employee bargaining units before merging under a single contract.[191] Such a model is reproducible in the domestic labor context.

The DOL predicted that single-employee bargaining units could produce onerous administrative costs on PERB, employers, and the union.[192] Unlike the NLRA, the SERA has long been interpreted to allow for bargaining units comprising a single worker.[193] Since domestic workers often work alone, this rule makes collective bargaining possible where it otherwise would not be. However, the Feasibility Report speculated that if a great number of domestic workers sought single-employee bargaining units, "this could lead to a significant administrative burden for PERB. The time devoted to a massive number of one-person units under the SERA could adversely impact PERB's ability to continue to satisfy its [public sector] statutory obligations."[194] The DOL also noted that the cost of negotiating individual contracts would be substantial for both the union and the employer.[195]

Multi-employer bargaining units would resolve these concerns by significantly reducing the state's administrative burden as well as costs for unions and employers. If each workplace were organized separately, with its own negotiations leading to its own unique contract, PERB could have a massive administrative burden. But with multiple workplaces joined together under a single contract, PERB would only need to oversee a single bargaining relationship.

The Board has historically limited multi-employer units to employer associations with binding authority over their members.[196] Such associations

189. N.Y. LAB. LAW § 705(2).

190. *Feasibility Report*, *supra* note 144, at 17–18 (narrating how single-employee units merged into multi-employer units).

191. *Id.*

192. *Id.* at 22–23.

193. *See, e.g.*, Union Turnpike, Inc., 2 S.L.R.B. 866, 873 (1939) (ruling that a single-employee bargaining unit could be certified pursuant to the SLRA).

194. *Feasibility Report*, *supra* note 144, at 22.

195. *Id.* at 23.

196. For example, the Board has previously ruled that

> [t]he normal and typical unit is limited to the employees of a single employer. The Board, however, will find a multi-employer unit appropriate where, *inter alia*, an employer association has authority to negotiate and bind its members to a collective bargaining contract. But the Association's authority to bind its members must be clear and unequivocal, for if individual Association members have the option to accept or reject the negotiated contract, an association-wide unit is ineffective, its purposes unfulfilled, and the negotiations futile.

Nu Reliable Maintenance Corp., 23 S.L.R.B. 887, 890 n.3 (1960) (rejecting a multi-employer bargaining unit because an employer association lacked binding authority over its members) (citing American Marble Co., Inc., 18 S.L.R.B. 471, 472, 474–75 (1958)).

require voluntary entrance,[197] and employers may be wary to enter contracts they did not have a say in negotiating. However, employer voluntary agreement to join a multi-employer contract may be less stubborn of an issue than it at first appears. To deal with this issue, an NDWA report recommended negotiating a first contract on a neighborhood level with organizations representing employers who participated in the Domestic Workers Justice Coalition, specifically Park Slope Parents and Jews for Economic Justice.[198] This first contract could be written to set reasonable minimum standards that less public interest–minded employers would find acceptable, and it could provide for voluntary employer admission during the term of the contract.[199] In drafting such a contract, a domestic worker organization could draw on existing collective bargaining agreements in industries with similar responsibilities—such as cleaning and care agencies—and similar bargaining relationships—such as building services. Non-union domestic workers seeking to join the contract would petition for recognition, which in a single-employee bargaining unit could potentially take the form of a simple expression of intent. Their employer would then have the choice either to join the contract and agree to its terms or to negotiate separately with the union. The legal fees associated with negotiating separately would likely be substantial for employers, far exceeding any contractual advantage clawed back through negotiating individually. In the long term, self-sorting could lead similarly economically positioned employers to negotiate together, leading to multiple contracts that are not onerous on moderate-income employers or too generous to wealthy employers. Either way, it would be in employers' self-interest to negotiate collectively, just as it would be in the interest of the individual workers.

Sectoral bargaining presents an alternative solution to the problems raised by applying traditional collective bargaining to the domestic sector. The viability of such an alternative is therefore relevant to the less onerous alternative element of strict scrutiny analysis. A report prepared for the National Domestic Workers Alliance in response to the DOL's report recommended legislation creating a state-wide sectoral bargaining regime for domestic labor modeled on similar sectoral arrangements in Uruguay, France, and Switzerland, but recognized the challenges to getting a such a law passed through the state legislature.[200] Under a sectoral bargaining system, the state would play an active role alongside unions

197. *Nu Reliable Maintenance Corp.*, 23 S.L.R.B. at 890 n.3.

198. Rizio, Chu, Marin, & Marulanda, *supra* note 65, at 25. After the passage of the DWBR, DWU and the Employers for Justice Network reported to DOL that they had identified organized groups of worker and employers "willing to commence pilot projects if SERA were amended." *Feasibility Report*, *supra* note 144, at 20.

199. *See* Realty Advisory Bd. on Lab. Rel., Inc. & Serv. Emp. Int'l Union, Loc. 32BJ, *2018 Apartment Building Agreement*, Article IX (Apr. 21, 2018) [hereinafter 32BJ Contract], https://www.seiu32bj.org/wp-content/uploads/2012/08/2018-RAB-Residential-Agreement.pdf [https://perma.cc/HC26-AVEW] (featuring comparable contract terms).

200. Rizio, Chu, Marin, & Marulanda, *supra* note 65, at 23–24. This report was prepared by a group of Fordham juris doctorate students as a response to the Feasibility Report, suggesting practical means of achieving domestic worker collective bargaining.

and employer associations in contract negotiations.[201] The result of this bargaining would be a sectoral standards agreement, rather than a collective bargaining agreement, with the binding force and scope of a state regulation. State-level tripartite sectoral bargaining systems governing potentially thousands of distinct employment relationships are a novel concept in the United States and to my knowledge no such system has ever existed to face legal scrutiny. But so long as the state's role in bargaining is clearly delimited, legislation establishing such systems should be a lawful delegation of legislative authority.[202] Sectoral bargaining therefore represents a means of avoiding the pitfalls that traditional collective bargaining presents in domestic labor without fully excluding domestic workers from the constitutional right to a union; in other words it is a less onerous alternative to the abridgement of a constitutional right.

Although it may be lawful, this article does not endorse sectoral bargaining in the domestic sphere. There is an ongoing debate in the labor law community about the feasibility and desirability of sectoral bargaining, but the details of the debate are beyond the scope of this article.[203] In the much-debated rideshare sector, dominant employers Uber and Lyft have embraced sectoral bargaining legislation as a means of quieting critics while concretizing the lower status of their employees, who are currently excluded from federal labor laws by virtue of their misclassification as independent contractors.[204] Even if sectoral bargaining in the domestic labor sphere produced wages and conditions above the legal minimums for other workers, it could end up acting as both a floor and a ceiling, removing the possibility of negotiating better terms. Additionally, by treating domestic workers differently than all other workers, such a regime would reify the myth of domestic labor's unadministrability. And crucially, sectoral bargaining removes the need for and possibility of organizing initiated organically by workers. Such organizing, in which workers become aware of the possibility of effectuating change through collective action, is essential to the development of

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201. *See generally* Seattle, Wash., Ordinance 125,627 (July 23, 2018) (establishing a Domestic Worker Standards Board of mayor- and city council-appointed representatives). While this might prove a test case, the Board has no binding authority and merely makes recommendations to the city council.

202. A brief survey of New York nondelegation cases indicates that a tripartite sectoral bargaining board with binding authority would need to limit its regulations to within legislatively determined bounds, thus limiting its ability to adapt to changes in the workplace. *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1351 (N.Y. 1987) (finding that the Public Health Council, made up of appointed industry and consumer representatives, did not exceed the legislature's delegable authority but that the Council had exceeded its specific statutory mandate).

203. *See, e.g.*, Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016); Matthew Ginsburg, *Nothing New Under the Sun: "The New Labor Law" Must Grapple with the Traditional Firm-Based Organizing and Building Self-Sustainable Worker Organizations*, 126 YALE L.J. F. 488 (2017); William J. Tronsor, *Unions for Workers in the Gig Economy: Time for a New Labor Movement*, 69 LAB. LAW. J. 181 (2018).

204. *See* Veena Dubal, *Sectoral Bargaining Reforms: Proceed with Caution*, 31 NEW LAB. F. 11 (2022), available at https://newlaborforum.cuny.edu/2022/01/20/sectoral-bargaining-reforms-proceed-with-caution/ [https://perma.cc/KHM3-5LCZ].

class consciousness and effective, militant leadership. Sectoral bargaining might soften the harsh conditions of domestic labor, but it would remove domestic workers' agency to fight collectively for a better world.[205]

Returning to the strict scrutiny of administrability concerns that necessitates this discussion, there is little reason to suspect a court would uphold the domestic worker exemption in light of *Hernandez*. Under New York's state constitution, as with the U.S. Constitution, restrictions on fundamental rights are only permissible where they serve a compelling government interest and when less onerous alternatives are not available.[206] Although there is some limited validity to administrability concerns, they are largely mitigable under existing law. As this section has shown, multi-employer bargaining units, already common under the SERA, provide a means of organizing many workplaces under a single contract. Additionally, even if a court were to accept that a speculative burden on state agencies justifies the wholesale disenfranchisement of hundreds of thousands of workers, there is a readily available alternative in sectoral bargaining. The administrative objection to extending collective bargaining rights to domestic workers likely would not survive strict scrutiny both because of the limited weight of the objection and the potential availability of less onerous alternatives.

B. The Challenge of Privacy and Domestic Worker Collective Bargaining

Many common elements of industrial collective bargaining present issues of privacy when carried over into the domestic work sector. In particular, the reinstatement remedy, the union's entitlement to employer financial information in bargaining, and residential picketing are implicated in domestic worker collective bargaining. This section begins with a discussion of the right to privacy as it relates to domestic work before addressing each privacy concern individually, with attention to whether these concerns withstand strict scrutiny. As an initial note, I have found no evidence in the legislative record that privacy concerns were raised or had any impact on the drafting of the domestic labor exemption in the SLRA. Although this fact alone might be sufficient to preclude a court's consideration of these objections, this section proceeds under the assumption that privacy concerns are litigable.

The issue of homeowners' privacy rights is a predictable refrain in policy discussions of domestic workers' rights,[207] even as the woefully diminished privacy rights of domestic workers, particularly live-in workers, are almost

205. There is separately a question of whether a tripartite sectoral structure would survive a challenge under the nondelegation doctrine. A brief survey of New York nondelegation cases indicates that a tripartite sectoral bargaining board with binding authority would need to limit its regulations to within legislatively determined bounds, thus limiting its ability to adapt to changes in the workplace. *See* Boreali v. Axelrod, 517 N.E.2d 1350, 1351 (N.Y. 1987) (finding that the Public Health Council, made up of appointed industry and consumer representatives, did not exceed the legislature's delegable authority but that the Council had exceeded its specific statutory mandate).

206. Alevy v. Downstate Med. Ctr., 348 N.E.2d 537, 543–44 (N.Y. 1976).

207. *See, e.g.*, *Feasibility Report*, *supra* note 144, at 22–23.

universally ignored.[208] It is often expected that domestic workers sacrifice almost all their privacy in exchange for a wage,[209] while their employers do not give up a modicum of privacy by establishing an employment relationship within their homes. Scholar Peggie Smith has written at length about domestic employer privacy,[210] concluding that the argument that regulation of domestic workers too gravely threatens employers' privacy "requires one to accept that household employers were not only entitled to paid domestics, but that the workers themselves were propertied objects." [211] The New York Constitution's proclamation that "[l]abor of human beings is not a commodity" appears within the same article that ensures collective bargaining rights to all employees, indicating that collective bargaining is essential to maintaining labor's freedom.[212] While extending collective bargaining rights to domestic workers would, as demonstrated below, necessarily diminish the privacy rights of their employers, this diminution should be weighed against the egregious consequences that have flowed fr7om domestic workers' historical denial of full labor rights.[213]

The reinstatement remedy presents a privacy challenge where the discharged worker is mandated to be reinstated into the employer's home. When an employer's decision to terminate an employee is motivated by anti-union animus or a desire to frustrate an employee's concerted activities, the possible statutory remedies are backpay and reinstatement.[214] Although reinstatement is not without

208. For an exception, *see* Reyna Ramolete Hayashi, *Empowering Domestic Workers through Law and Organizing Initiatives*, 9 SEATTLE J. FOR SOC. JUST. 487, 495 (2010) (citing HUM. RTS. WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES (2001), hrw.org/reports/2001/usadom/usadom0501.pdf [https://perma.cc/7VVV-45JP]) (noting that "employers invaded the privacy of domestic workers by reading their mail and diaries, listening in on telephone conversations, and searching workers' purses and rooms").

209. A 2006 DWU report found that 20% of live-in workers slept either in a common area or in the same room as the children. Domestic Workers United & DataCenter, HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY, at 28 (2006), http://www .datacenter.org/reports/homeiswheretheworkis.pdf [https://perma.cc/P7PU-LMJY].

210. Smith, *Organizing the Unorganizable*, *supra* note 80, at 105–07; Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 906–915 (1999) [hereinafter Smith, *Regulating Paid Household Work*].

211. Smith, *Regulating Paid Household Work*, *supra* note 210, at 859.

212. N.Y. CONST. art. I, § 17.

213. Two recent articles have discussed this necessary balancing of employers' privacy rights and domestic workers' bargaining rights in depth. Shayak Sarkar, *Intimate Employment*, 39 HARV. J.L. & GENDER 429 (2016) (examining employers' rights in light of the extension of anti-discrimination laws into the domestic work sector); Donna E. Young, *The Constitutional Parameters of New York's Domestic Workers Bill of Rights: Balancing the Rights of Workers and Employers*, 74 ALB. L. REV. 1769, 1770 (2011) (addressing employers' rights in light of New York's passage of the DWBR).

214. N.Y. LAB. LAW § 706(3)(b)–(d).

controversy in the industrial context,[215] it has the potential to be particularly problematic in the domestic sphere, where an employer's personal privacy and security are involved. The remedies of backpay and reinstatement are discretionary, and in circumstances where the employer expresses valid concerns, PERB would presumably not order reinstatement for the safety and comfort of all parties involved.[216] However, even if PERB were inclined to take that extraordinary step, SERB precedent regarding lay faculty of religious schools demonstrates the Board's remedial powers are still subject to constitutional restraints.[217] In *St. John's*, SERB concluded that it could not order reinstatement of unlawfully discharged lay faculty of a religious school based on the school's claims that the discharges were religiously motivated, and reinstatement would threaten the employer's First Amendment rights.[218] An employer presumably has a right to security in the home, whether established through the Fourth Amendment or the penumbral privacy rights identified in *Griswold v. Connecticut,*[219] and a reviewing court would likely view reinstatement of a domestic worker over an employer's objection as constitutionally dubious. Following *St. John's*, it is implausible that reinstatement would be applied in the domestic context where it could arguably violate an employer's constitutional rights.

If anxiety persists around the issue of reinstatement, the state could pass industry-specific legislation[220] barring the remedy of reinstatement in the domestic context.[221] One benefit would be that domestic workers who, for their

215. A 1974 study of reinstatement outcomes, Elvis C. Stephens & Warren Chaney, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L.J. 31 (1974), spawned pleas to remove reinstatement as a remedy from labor and anti-discrimination laws. *See, e.g.*, Martha West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1 (1988). However, others have advocated for expanding reinstatement into other fields of law. Benjamin W. Wolkinson & Victor W. Nichol, *The Illusion of Make-Whole Relief: The Exclusion of the Reinstatement Remedy in Hostility-Based Discrimination Cases*, 8 LAB. LAW. 157 (1992); Dawn S. Perry, *Deterring Egregious Violations of Public Policy: A Proposed Amendment to the Model Employment Termination Act*, 67 WASH. L. REV. 915 (1992).

216. The Feasibility Report stated, "It is difficult to imagine PERB or a court ordering an employer to reinstate an employee into an employer's home." *Feasibility Report*, *supra* note 144, at 16.

217. *See St. John's*, 49 S.E.R.B. 51 (citing *New York v. Culvert*, 753 F.2d 1161 (2d Cir. 1995)).

218. *Id.*

219. 381 U.S. 479, 483 (1965).

220. Elizabeth Kennedy has advocated for employment regulations unique to domestic work, possibly including collective bargaining rights, which she terms "The Domestic Employment Model," drawing heavily on Cynthia Estlund's REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (2010). Kennedy's model takes special consideration of employer privacy rights but balances these against workers' need for regulation. Kennedy, *supra* note 27, at 672. This article does not endorse such a model, as it contributes to the fiction that domestic labor is categorically distinct from all other labor.

221. For comparison, the Mexican federal labor law, which allows for domestic worker collective bargaining, bars the reinstatement remedy for domestic workers along with several other classes of workers. Magdeline R. Esquivel & Leonicio Lara, *The Maquiladora Experience: Employment Law Issues in Mexico*, 5 NAFTA: L. & BUS. REV. AM. 589, 602 (1999).

own privacy or security, are unwilling to accept reinstatement could still be eligible for backpay.[222] However, doing so would diminish domestic workers' protections by limiting employers' risk in violating the law. Without the possibility of reinstatement, an employer's decision to illegally terminate an organized or organizing domestic worker, subject only to backpay with a worker's duty to mitigate, would be a straightforward calculation of efficient breach of its legal obligation. To balance this reduction in remedies, the legislature could borrow from discrimination law and provide PERB with authority to award front pay[223] or even punitive damages in lieu of reinstatement. There is also SLRA case law awarding housing and moving costs to illegally terminated live-in workers,[224] which would offset some of the risk to workers of employer retaliation.

The DOL's Feasibility Report also raised privacy concerns relating to mandatory financial disclosures in the bargaining process.[225] The SLRB has followed NLRB precedent in finding an unfair labor practice where an employer fails to disclose financial information after premising its bargaining position on its financial condition.[226] SERA precedents are limited, and necessarily none deal with domestic employers, but if such an employer were to premise their bargaining position on their financial condition, the domestic workers' union could theoretically be entitled to documentation of the employer's financial condition. Multi-employer bargaining would resolve this issue by allowing for the anonymization of financial information. Although multi-employer bargaining could produce contracts that some employers cannot afford, existing building

222. SERB has adhered to an overturned NLRB precedent requiring that an unlawfully terminated employee make an unconditional offer to return to work in order to be eligible for backpay. *See, e.g.*, L.J.F. Corp., 23 S.L.R.B. 105, 116 (1960); Christ the King Regional High School, 48 S.L.R.B. 403, 420 (1989); *cf.* Abilities & Goodwill, Inc., 241 N.L.R.B. 27, 28–29 (1979) (overturning the requirement that an unlawfully terminated worker make an unequivocal request for reinstatement in order to be eligible for backpay as a remedy). This precedent could pose issues for domestic workers unlawfully terminated and unwilling to return to an abusive workplace, but such a precedent could be modified in light of the circumstances of the industry.

223. For a discussion of front pay in lieu of reinstatement in the collective bargaining context, see Rita Trivedi, *What to Do When Reinstatement Falls Short of the Ideal: Considering Front Pay as an Alternative Legal Remedy Under the National Labor Relations Act*, 22 EMP. RTS. & EMP. POL'Y J. 59 (2018).

224. *See, e.g.*, *2373 Ocean Parkway, Inc.*, 24 S.L.R.B. 393 (1961) (calculating backpay to include lost housing and utility as well as moving and storage costs). In the small number of cases awarding housing costs, the SLRB did not include the cost of substitute housing in its calculation. *See, e.g.*, *Farrell*, 23 S.L.R.B. 843, 850 (1960) (awarding backpay including cost of moving and value of apartment to an evicted worker who subsequently lived rent free in another apartment). The inclusion of housing in salary calculation is, however, a double-edged sword. Building superintendents who struck while continuing to occupy employer-provided housing were found to be committing unfair labor practices by accepting compensation for work not performed. *Matter of Weissman*, 16 S.L.R.B. 60 (1953).

225. *Feasibility Report*, *supra* note 144, at 22, 29.

226. *Christ the King Regional High School*, 48 S.L.R.B. at 415–16, 421.

services multi-employer contracts have incorporated processes for resolving this issue, which could serve as a model for a uniform domestic labor contract.[227]

The final privacy concern raised by the Feasibility Report is residential picketing.[228] New York courts have varied in the severity of their disapproval of residential picketing,[229] but they have not addressed the question for workers whose primary worksite is their employer's home. Only two cases across the United States appear to have addressed residential picketing in circumstances where the employer's home was the situs of the collective bargaining relationship, and they came to opposite conclusions. In *State v. Cooper*, the Minnesota Supreme Court found that a chauffeur peacefully picketing his former employer's home in response to his termination was engaged in disorderly conduct.[230] In contrast, in *Annenberg v. Southern Cali. Dist. Council of Laborers*, the California Court of Appeal reversed a trial court's injunction of a picket of 15 gardeners, finding that the domestic workers involved in that case had a right to picket the residences of their employer, although this did not alone provide for a right to unionize or a legal

227. Where an individual employer in a multi-employer contract claims financial hardship, the contract may provide for a special committee—subject to duties not to disclose information—to review and assess the merits of the claim. *See* 32BJ Contract, *supra* note 199, at 33 (providing for Special Committee review of financial hardship claims).

228. *Feasibility Report*, *supra* note 144, at 23. For a survey of cases involving residential picketing, including non-labor disputes, *see* George L. Blum, *Validity, Construction, and Operation of Statutes or Regulation Forbidding, Regulating, or Limiting Peaceful Residential Picketing*, 113 A.L.R.5TH 1 (2003). For arguments in favor of allowing domestic workers to engage in residential picketing, see Natasha Lycia Ora Bannan, *Domestic Workers and the Right to Be Heard: Residential Picketing Makes Visible the Invisible*, 4 CRIT: CRITICAL STUD. J. 112 (2011). *See also* Smith, *supra* note 80, at 100–05 (suggesting that residential picketing could be useful in raising awareness of domestic workers' poor working conditions and raising questions about how a domestic worker's right to picket should be balanced against the employer's right to privacy).

229. *Compare* People v. Levner, 30 N.Y.S.2d 487, 493 (Magis. Ct. 1941) (finding residential picketing of the mayor's home by a teacher's union constituted disorderly conduct), *and* Hebrew Home & Hosp. for Chronic Sick, Inc. v. Davis, 235 N.Y.S.2d 318, 324 (N.Y. Sup. 1962) (denouncing picketing in a residential area as "a form of direct and unmitigated coercion and terrorism that should be roundly denounced and sternly condemned"), *with* Sager v. Rivera, 1993 WL 356757, at *2 (N.Y. Sup. 1993) (deferring to the NLRB on the legality of residential picketing).

230. 285 N.W. 903, 905–06 (Minn. 1939). *Cooper* was cited positively in *Petrucci v. Hogan*, 27 N.Y.S.2d 718, 727 (N.Y. Sup. 1941) (enjoining the picketing of strikebreakers' homes).

infrastructure to support that right.[231] This concern may be overstated, as residential pickets lack the utility of an industrial picket without customers and other employees refusing to cross. Domestic workers may nonetheless attempt to use pickets as an economic weapon, but it would be in keeping with the precedents cited above if New York courts were to enjoin such picketing.

It seems unlikely that homeowner privacy presents a sufficiently compelling state interest since extant law obviates many of the concerns. Therefore, privacy-based arguments, if they are to be considered at all, likely would not survive strict scrutiny.

V.
CONCLUSION

In 1932, the *New York Times* crowed, "Depression Ends Servant Problem," sharing with its readers reporting from *Fortune* magazine that documented the "'pathetically underpriced'" Black labor that could be found throughout northern cities.[232] The influx of job seekers and contraction of demand in the Depression era labor market produced the conditions for the formation of the Bronx Slave Markets, but it also led to one of the most creative and sustained efforts to collectively organize domestic workers in New York.[233] Today, the COVID-19 pandemic has devastated the domestic labor industry, cratering wages and magnifying the power asymmetries between employers and individual workers.[234] It may be the case that now is not the time for domestic worker advocates to invest in litigation to vindicate a right that does not represent current forms of domestic labor organizing, which in recent years has been conducted through non-profits and worker centers rather than trade unions.[235] However, if these current forms of organizing prove inadequate to the moment, and domestic workers later do

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231. 113 Cal. Rptr. 519, 647–49 (Cal. Ct. App. 1974). While this technically made California the first state to grant domestic workers the right to bargain collectively at least in some instances, the lack of a legal infrastructure equivalent to the SERA has made that right unenforceable. Furthermore, the court in *Annenberg* made clear that they were

> deliberately refrain[ing] from [issuing] a ruling that *all* domestic employees have the right to picket the private residences of *all* domestic employers. Under some circumstances, such picketing would be such a serious invasion of the right of privacy that the court in the exercise of its discretion could well prohibit all picketing of that particular home. Under other circumstances, such picketing would not involve such a serious invasion of the right of privacy. Then after weighing the factors involved, the court in the exercise of its discretion should allow picketing, severely limited in time, space and manner, in order that the intrusion into the privacy of the home be kept at an irreducible minimum.

Id. at 648.

232. *Depression Ends Servant Problem*, N.Y. TIMES, Nov. 25, 1932 (quoting *A Note on the Servant Problem*, FORTUNE (Dec. 1932)).

233. *See supra* Section II.C

234. *See supra* Part I.

235. *See generally* Milkman, *supra* note 27; JANICE FINE, WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM (2006).

assemble into solidaristic labor organizations, there will be a need for a legal infrastructure to protect and administer those efforts.

The *Hernandez* decision validated a new line of attack to overcome the SERA's discriminatory exemptions after the Domestic Worker Bill of Rights fell short of this goal. Following *Hernandez*, a constitutional challenge to the domestic worker exemption would likely succeed in establishing collective bargaining rights for the hundreds of thousands of New York workers employed in private homes. Defeating the domestic worker exemption in New York would be the first step to resolving the unjust denial of domestic workers' right to a union nationally.