UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

NEW YORK STATE VEGETABLE GROWERS ASSOCIATION, INC.; A& J KIRBY FARMS, LLC; PORPIGLIA FARMS, INC.; CRIST BROS ORCHARDS, INC.; CAHOON FARMS, INC.; and LYNN-ETTE & SONS, INC.,

Plaintiffs,

-v-

KATHLEEN HOCHUL, in her official capacity as Governor of New York; LETITIA JAMES, in her official capacity as Attorney General of New York; JOHN WIRENIUS, in his official capacity as Chairperson of the New York Public Employment Relations Board; SARAH G. COLEMAN, in her official capacity as the Deputy Chair of the New York Public Employment Relations Board and an Administrative Law Judge of New York Public Employment Relations Board; MARIAM MANICHAIKUL, in her official capacity as the Director of the New York Public Employment Relations Board's Office of Private Employment Practices & Representation and an Administrative Law Judge of New York Public Employment Relations Board,

Defendants.

Case No.: 1:23-cv-1044-JLS

BRIEF OF *AMICI CURIAE* WESTERN GROWERS ASSOCIATION, NATIONAL COUNCIL OF FARMER COOPERATIVES, INTERNATIONAL FRESH PRODUCE ASSOCIATION, AND U.S. APPLE ASSOCIATION IN SUPPORT OF THE MOTION OF PLAINTIFFS NEW YORK STATE VEGETABLE GROWERS ASSOCIATION, ET AL. FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks whether a state may (1) ban speech by *employers* that "discourages" union organization or other protected concerted activity, but without prohibiting speech by unions, including speech encouraging unionization; (2) prohibit secret ballot elections, substituting instead union dues deduction "authorization cards" as the basis to compel both agricultural employers and farmworkers to associate with a union, even where the farmworkers revoke their authorization *before* the union is certified; and (3) ban strikes and lockouts as a *quid pro quo* for imposing contract terms on one agricultural employer and its farmworkers. Once imposed, that contract remains enforceable even after its term is expired, without any statutory right to decertify the union or to avoid the reimposition of subsequent contracts by force of law.

The protections against the abridgement of free speech and free association are cognate rights, necessary to democratic self-governance by farmworkers. By chilling one side of the debate over unionization, a blatant form of viewpoint discrimination, the Farm Laborers Fair Labor Practices Act (the "FLFLPA," or the "Act"),[1] infringes the right of agricultural employers to speak and the right of farmworkers to receive information necessary to make an informed choice about union representation. In replacing the secret ballot with an undemocratic and unreliable measure of majority support, the state delegates to a self-interested union control over the only indicium of employee choice. By substituting consensual bargaining with a system of compulsory arbitration, the state subjects one employer to a distinct, unequal, individualized set of rules that no other farm owner is required to obey. In enacting the FLFLPA, New York became the first state in over one hundred years to attempt to systematically abridge the constitutional rights of private employers and their employees in this manner.

[1] New York State Employment Relations Act ("SERA"), NY Labor Law § 701 *et. seq*. Individual sections or subdivisions of the Act shall be referred to as "§___."

The Constitution does not permit the State to force workers or employers to associate with labor organizations not chosen by majority rule, or to accept specific contract terms against their will, even as a *quid pro quo* for barring strikes and lockouts. Nor does the New York Bill of Rights, which expressly bestows upon farmworkers the "unqualified" and "fundamental 'right to organize and to bargain collectively through representatives of their own choosing,'" *Hernandez* v. *State*, 173 A.D.3d 105, 113-114 (N.Y. App. Div. 2019) ("*Hernandez*") (quoting N.Y. Const., art. I, § 17) ("any statute impairing this right must withstand strict scrutiny").

In three related cases that are the foundation of modern labor law, the Supreme Court unanimously held that a Kansas compulsory arbitration scheme analogous to the FLFLPA infringes on the liberty and property interests of private employers and employees, and violates the employees' freedom of association. *See Wolff Packing Co.* v. *Indus. Court* (*Wolff I*), 262 U.S. 522 (1923); *Dorchy* v. *Kansas*, 264 U.S. 286 (1924); *Wolff Packing Co.* v. *Indus. Court* (*Wolff II*), 267 U.S. 552 (1925) (collectively, "*Wolff*" or "the *Wolff* trilogy"). *Wolff* established the constitutional dividing line between mandatory collective bargaining and compulsory imposition of terms, which has guided American labor law ever since. *See, e.g., NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 45 (1937) (U.S. labor law "does not compel agreements between employers and employees," and "does not compel any agreement whatever"). The *Wolff* trilogy has never been overruled or questioned by the Supreme Court. Lower courts must "follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc*., 490 U.S. 477, 484 (1989).

Where a union enjoys majority support, the state can claim that the sacrifice of individual rights is necessary to enable the union to promote the interests of the general workforce. "But that power can come into being only when, and continue to exist only so long as, individual aims

are seen to be shared in common with the other members of the group." *A.F. of L.* v. *American Sash Co.*, 335 U.S. 538, 545 (1949) (Frankfurter, J., concurring). This "presuppose[s] that the selection of the bargaining representative 'remains free.'" *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325 (1974) (citation omitted). Having placed "obstacles in the path of [farmworkers'] exercise of freedom of speech," New York then "impose[s] its will by force of law," *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549-550 (1983) (cleaned up), thereby rendering farmworkers "prisoners of the Union." *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 73 (1975) (Douglas, J., dissenting).

STATEMENT OF RELEVANT FACTS

I. The Farm Laborer Fair Labor Practices Act

The New York State Employment Relations Act ("SERA") regulates labor-management relations for certain businesses not subject to the NLRA. Both the NLRA and SERA excluded farmworkers from their definition of "employees." In *Hernandez*, the court held that art. I, §17's definition of "employees" includes farmworkers.[2] The Act does more than extend the protections of art. I, § 17 to farmworkers. It prohibits strikes and lockouts. § 704-b(1) & (2)(a). It bars employer speech. § 704-b(2)(c). It allows a union to compel employers into a forced contracting procedure. § 702-b. It eliminates the secret ballot as the means for ascertaining majority union support. § 705(1-a). Each of these are component parts of a joint compulsion regime whereby a union is imposed by administrative fiat and contract terms are dictated by arbitral decree.

A. "Card Check" Certification Under The NLRA And SERA

Other than where the employer agrees to voluntarily recognize the union based on nonelectoral evidence, the NLRB has certified unions exclusively on the basis of a secret ballot

[2] SERA was enacted in 1937. The following year, the New York Constitution was amended to include: "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." N.Y. Const., art. I, § 17.

elections.[3] 29 U.S.C. §159(c) ("[I]f … a question of representation exists, [the Board] shall direct an election by secret ballot and shall certify the results thereof."). Section 9(c) reflects Congress' longstanding view that an election is "the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support." *NLRB* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 602-603 (1969).[4] Thus, an employer may not be compelled to bargain with a union "simply because he refused to rely upon cards, rather than an election, as the method of determining the union's majority." *Aaron Bros. Co.*, 158 NLRB 1077, 1078 (1966). The exception is where the Board may issue a bargaining order where employer misconduct is so extreme that it would "interfere with the election processes and tend to preclude a fair election." *Gissel*, *supra* at 594.[5]

Under SERA (as under the NLRA, *see* 29 U.S.C. § 9(a)), a union may be chosen "(1) By designation or selection by the majority of the employees in a unit appropriate for such purpose, *or* (2) by the majority of the employees voting at an election which the Board has directed." *Triboro Coach Corp.* v. *Labor Relations Board*, 286 N.Y. 314, 346 (1941) (Lehman, C.J., dissenting) (*citing* § 705)). An employer may be required to recognize and bargain with a union "where no doubt exists" that one union represents the majority. *Id*. at 347.[6] "When,

[3] Although the NLRB recently allowed card authorizations over the objections of an employer, the employer is still permitted to request an election should it believe that the union does not have majority support. *Cemex Construction Materials Pacific, LLC*, 372 NLRB 130 (2023).

[4] *See id*. at 604 ("We would be closing our eyes to obvious, … if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.").

[5] Under the NLRA, "an employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support." *NLRB v. Southland Paint Co.*, 394 F.2d 717, 724 (5th Cir. 1968). Conversely, an employer may not recognize a minority union, even if he acts in good faith. *Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961).

[6] This is consistent with the NLRB's longstanding view that employer violates its duty to bargain by refusing to recognize a union where there is no doubt as to its majority support. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 736 (1950), *cert. denied*, 341 U.S. 914 (1951). In *Pavilion Nursing Home v. Litto*, 48 Misc. 2d 755, 762 (N.Y. Sup. Ct. 1965), the court (citing *Joy Silk Mills*), held

however, an employee or his representative or an employer or his representative alleges that question or controversy exists, the Board is under a duty to investigate and may order such an election." *Id*.

B. "Card Check" Certification Under the FLFLPA

Under the Act, authorization cards are not just the functional equivalent to a proxy vote; they *replace* a secret ballot altogether. The FLFLPA permits the use of authorization cards signed up to one year before they are submitted in support of the petition for certification. The Act does not require any showing that the farmworker was employed as part of the bargaining unit to be certified at the time he signed the card. It does not require any specific disclosures of legal consequences of signing the card, such as whether it will be used to seek an election or as the farmworker's vote. It is silent as to whether the card may be returned upon request should the farmworker decide to no longer support the union or to revoke his authorization to deduct dues. In fact, the authorization cards in the underlying certification proceedings *do not even refer to an election.*[7] Because the Act does not require advance notice that the union intends to petition for

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that under section 705 of SERA, the union "ha[d] not met the burden that they had been designated as bargaining agent by an uncoerced majority of plaintiff's employees."

[7] The UFW's authorization cards submitted to certify the union in the underlying PERB proceedings read (in translation from Spanish):

> I hereby authorize the United Farm Workers (UFW) to be my union representative in order to collectively negotiate a work agreement with my employer and hence, improve my wages, work conditions, and benefits. I hereby authorize and instruct my employer to deduct any union fees or tariffs as established by the UFW from any of my wages during each payment period and remit such amounts to the UFW as established in the agreement between my employer and the UFW, and pursuant to the laws of New York. This authorization shall be valid for one year and shall be renewed automatically for successive one-year periods unless it is revoked by me by providing my written revocation to my employer and the UFW within sixty (60) days following the date of the anniversary of my original authorization.

See Complaint, at ¶ 147; *UFW v. Porpiglia Farms*, CU-6695, 56 PERB ¶ 4406, 2023 WL 3963573 ("*Porpiglia*") (April 12, 2023).

certification, the farmworker may not learn that his card was used to certify the union until after it is installed as his bargaining representative.

Where the electorate comprises of a relatively stable workforce and is not subject to seasonal swings or high turnover, the size of the bargaining unit may be readily ascertained. This does not apply to agricultural labor. Conducting an election during peak season assures that those with most at stake in the outcome will be given the opportunity to vote. But where the card authorization may have been signed months before petition is filed, and where there is no peak season requirement (the FLFLPA contains none), PERB's ascertainment of majority support is inherently at risk of manipulation.[8] Union organizers could easily determine when H-2A workers are near the end of their contract, and whether their departure could decide the outcome. Assuming their signatures are used in support of certification, nothing prevents the union from filing the petition at or near the time H-2A workers depart, making it problematic to call them as witnesses, or for them to revoke their authorization, assuming PERB gave them that right.

The NLRB has never changed its view that "[i]n election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). This includes extensive rules governing electioneering, ballot challenges and so forth, all to ensure that balloting is free and fair. The Act does not regulate the time, place, or manner by which a union may solicit signatures, or how authorization cards are to be safeguarded against alteration or misuse. Other than the ministerial

[8] *Compare* Cal. Lab. Code. § 1156.4; § 1156.37(b)(1) (requiring at least "50 percent of the employer's peak agricultural employment for the current calendar year" for the payroll period immediately preceding the filing of the petition).

act of comparing card signatures to the employer's payroll records, the Act imposes no obligations on PERB to supervise any aspect of the solicitation or signing of cards.

According to PERB, an authorization card is irrevocable for 12 months, even if the farmworker asks to rescind his authorization *before* PERB has certified the union:

> That employees may have changed their minds about signing a card is not a reason to allow employees' to revoke their authorization for the UFW to serve as their collective bargaining representative. These authorizations serve as the functional equivalent of a vote and are not to be lightly set aside.[9]

But even assuming a farmworker would be permitted to revoke his authorization, PERB concluded that because "the cards explicitly provide that authorizations 'shall be valid for one year,'" and because "[a]ll the cards at issue were signed within one year of their purported "'revocation,'" the authorizations could not be revoked. *See also UFW v. A &J Kirby Farms* ("*Kirby*"), CU-6696, 56 PERB ¶ 4402, 2023 WL 3071143 (March 16, 2023) (same). (PERB subsequently certified the UFW as the bargaining representative in *Porpiglia*, as well as in *Kirby*. *See Porpiglia*, at 25; Compl. Ex. 21. That decision is "final and binding," see §702-b(c)(iv).

In contrast, the NLRB has long permitted withdrawal of card authorizations prior to certification or before the union requests bargaining on the basis of a showing of majority support. *See, e.g., Southland Paint Co.*, 156 NLRB 22 (1965) (employee does not lose his right to revoke the card or to demand its return until such time as the employer refused to recognize the union); *TMT Trailer Ferry, Inc.*, 152 NLRB 1495, 1507 (1965) ("It is well settled that union authorization cards may be revoked and, certainly, where, as here, the revocation has been communicated to the Union's agent…, the revocation is, clearly, effective."); *see also NLRB v. Reeder Motor Co.*, 202 F.2d 802, 803 (6th Cir. 1953) ("The union had neither been certified nor

[9] *See* Compl. ¶¶ 147-148, 150 (citing *Porpiglia*, at 18-19; *id.*, Ex. 2, p. 3 ("SERA and the FLFLPA do not provide for withdrawal or revocation of cards."). Per PERB Rule § 263.29, "[t]he certification issued by the hearing officer shall be final and binding and the obligation to bargain shall attach."

recognized as a bargaining agent for respondent's employees and no negotiations for a contract were pending. The designation of a bargaining agent is not irrevocable."). Where "an incumbent union has not been certified, however, and loses its majority, the employer has not only the right, but the duty, to cease bargaining with it." *Glendale Manufacturing Co.* v. *Local No. 520, ILGWU*, 283 F.2d 936, 939 (4th Cir. 1960).[10]

C. "Impasse Resolution" Under the FLFLPA

The Act deviates from the NLRA by imposing compelled contracting—or "compulsory interest arbitration"—via so-called "Impasse Resolution." *See* § 702-b. Although the end result is a "collective bargaining agreement," there is no agreement. The farm owner does not agree to be bound by the terms of employment imposed or agree to submit to interest arbitration at all. The farmworkers are not allowed to ratify the contract, as is typical with consensually-negotiated CBAs. The "agreement" is in reality a state-imposed directive, its terms set by the state labor board.

These procedures apply where PERB determines that there is an "impasse" in contract negotiations, which is deemed to exist if the parties fail to reach a CBA within 40 days after the union is certified. § 702-b(1). Given the range of complex issues in any CBA, consensual bargaining over first contracts can take months. Nevertheless, the normal process of give-and-take is supplanted by thirty days' mediation, followed by the empaneling of an "arbitrator," who is empowered to hold hearings, swear witnesses, admit evidence, and may compel the production of documents and other information. *Id*., § 702-b(3)(b) & (c). The statutory "arbitrator" has broad discretion to set the terms in accordance with his own views of industrial policy, to "make a just and reasonable determination of the matters in dispute," based on non-exclusive "factors"

[10] "The date as of when a Union's majority is to be determined is the date of *the receipt of its request for bargaining rather* than the date when its request was sent." *TMT Trailer Ferry, Inc.,* 152 NLRB at 1508 (citing *Rea Construction Company*, 137 NLRB 1769, 1770 (1962) (same)).

to guide his discretion, such as "comparison of the wages, hours and conditions of employment" of other employees "performing similar services or requiring similar skills under similar working conditions and with other employees generally in agricultural employment in comparable communities," and "the interests and welfare of the farm laborers and the financial ability of the agricultural employer to pay." *Id*., § 702-b(3)(c)(iii)(A) & (B).

The template for this procedure is largely lifted from public employment interest arbitration statutes, notwithstanding the fundamental differences between private and public sector employment. *First*, public sector interest arbitration is a process to resolve disputes over a term of an *existing* agreement, as opposed to a vehicle to dictate the terms of a *new* contract. *Second*, interest arbitration is a matter of consent in private sector labor agreements, along with other bargaining trade-offs. *Third*, non-consensual compulsory arbitration is rarely, if ever, imposed except in public or quasi-public employment situations where strikes are prohibited, i.e., police, fire, public utilities, or hospitals *"*dependent on governmental subsidies, reimbursements, and exemptions," and only where the need to assure continuity of operations warrants such a "drastic remedy." *See Mount St. Mary's Hosp.* v. *Catherwood*, 26 N.Y.2d 493, 510-11 (1970) (*Catherwood*). Except in cases of national emergency, and apart from Kansas' unconstitutional experiment in forced contracting, no other state has compelled employers and their employees into this "drastic remedy." *Id.* Even where public sector interest arbitration is used, the state has made the deliberate choice as to its *own* employment relationships to offer interest arbitration as a fair exchange for depriving its employees "of such economic weapons as strikes and work stoppages which are available to employees in private employment," *City of Biddeford by Bd. of Ed*. v. *Biddeford Teachers Ass'n*, 304 A. 2d 387, 398 (Me. 1973).

ARGUMENT

I. THE FLFLPA INFRINGES ON THE FREEDOM OF SPEECH AND ASSOCIATION OF FARMWORKERS AND FARM OWNERS

A. Farmworkers Have A Constitutional Right To Organize And To Select Their Representatives

The right of laborers to organize and select their representatives is a "fundamental right" under the Due Process Clause. *See Jones & Laughlin*, 301 U.S. at 33 (citing *Amer. Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921) (the employees' right of self-organization was "essential to give laborers opportunity to deal on an equality with their employer"); *accord County Sanitation Dist.* v. *L.A. Cty. Employees*, 38 Cal.3d 564, 588 n. 37 (1985). The right of workers to combine, and to engage in "united action," including through peaceful protests and strikes, was already firmly established well before the New Deal. *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 234 n.13 (1963) (citing *Amer. Foundries, supra* at 209*); Dorchy* v. *Kansas,* (*Dorchy II*), 272 U.S. 306, 311 (1926) (the right to strike, while not absolute, is a protected liberty under Due Process Clause).

While the protection of "collective action" is codified in the NLRA, Congress did not "create" this right; rather, it "safeguarded" existing constitutional protections against state interference in the associational rights of workers. *See Jones & Laughlin*, 301 U.S. at 33-34; *Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261, 263-64 (1940). The Court explained that "[e]mployees have as clear a right to organize and select their representatives for lawful purposes as the [employer] has to organize its business and select its own officers and agents." *Jones & Laughlin*, 301 U.S. at 33. Thus, the NLRA's prohibition against government interference in the exercise of those choices by employees or their employer, "'instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.'" *Id.* at 34 (quoting *Texas N.O.R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 570 (1930)).

Congress did so in two, fundamental aspects: *First*, by preserving freedom of contract by barring government attempts to compel concessions or to force agreements. 29 U.S.C. §158(d); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970) (NLRA prohibits "official compulsion over the actual terms of the contract"). *Second*, by protecting majority rule. *See NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180 (1967) ("The majority-rule concept is today unquestionably at the center of our federal labor policy.") (citation and quotation marks omitted). Once chosen, a union exercises "powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." *Steele* v. *Louisville N.R. Co.*, 323 U.S. 192, 202 (1944).

Because the employer are bound to recognize and to negotiate with the union designated by its employees, the legitimacy of collective bargaining itself depends on whether the employees were able to exercise free choice. Conversely, "[t]here could be no clearer abridgment of § 7 of the [NLRA]," than "grant[ing] exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority." *Int'l Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731, 737 (1961).

B. Prohibiting Employer Speech "Discouraging" Unionization Violates The First Amendment Rights To Speak And To Receive Information

1. The State May Not Infringe The Right to Speak or the Right to Listen

The First Amendment protects the right to receive information and ideas, no matter the source, *see, e.g., Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969), or the nature of the information. *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-07 (1965). This right is the necessary corollary of the right of free speech. *Board of Education* v. *Pico*, 457 U.S. 853, 867 (1982). The right of workers to organize and to exercise free choice presupposes that their rights of free speech, assembly, and association will not be infringed. *See Gissel*, 395 U.S. at 617 (NLRA

"merely implements" the employer's First Amendment right to communicate his views to his employees).[11] In the context of union organizing campaigns, "uninhibited, robust, and wide-open debate" is a bulwark of employee free choice. *See Chamber of Commerce* v. *Brown*, 554 U.S. 60, 67-68 (2008). And while the state has power to regulate unions and labor relations, including the process for choosing a union, it must not "trespass upon the domains set apart for free speech and free assembly" in how it applies such laws. *Thomas* v. *Collins,* 323 U.S. 516, 532 (1945). Thus, the right to present viewpoints concerning labor disputes or conditions in industry "must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Ibid*.

The Act explicitly enjoins one side of the debate over unionization and muzzles the voice of one participant in that debate. The infringement is intended to achieve that result, by deliberately interfering with the ability of farmworkers to educate themselves, not only as to the tradeoffs of unionization, but the consequences of signing a "dues deduction authorization card" on their right to freely choose whether to be represented by any union, or none at all.

2. Section 704-b(2)(c) Violates The First Amendment's Prohibition Against Viewpoint Discrimination

It is a "core postulate of free speech law" that "government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu* v. *Brunetti*, 139 S.Ct. 2294, 2299 (2019) (citing *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (viewpoint discrimination is an "egregious form of content discrimination," and is "presumptively unconstitutional")). Because the government is essentially taking sides in a debate when it engages in viewpoint discrimination, the Supreme Court has held such restrictions are presumptively unconstitutional, because they especially offensive to the First Amendment.

[11] "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622-23 (1984); *accord Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018) ("The right to eschew association for expressive purposes is likewise protected.") State compelled association for expressive purposes is thus subject to strict constitutional scrutiny. *Roberts*, 468 U.S. at 623; *see also Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000).

See Iancu, 139 S. Ct. at 2302 (Alito, J., concurring) ("Viewpoint discrimination is poison to a free society."). It would be difficult to conceive of a more obnoxious example of viewpoint discrimination than Section 704-b(2)(c):

> It shall be an unfair labor practice for an agricultural employer to … discourage union organization or to discourage an employee from participating in a unio organizing drive, engaging in protected concerted activity, or otherwise exercising the rights guaranteed under this article.

The Act engages in content discrimination by restricting speech on a given subject matter. *See Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("The First Amendment presumptively places this sort of discrimination beyond the power of the government."). It discriminates on the basis of viewpoint by singling out and prohibiting one "particular opinion," s*ee, e.g. Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), but not the opposing point of view. Worse, it singles out which individuals may not express the prohibited opinions or speech, while imposing none of the same prohibitions on those who have a vested interest in having only their point of view viewpoint heard. It would be risible to claim that unions are incapable of "discouraging" employees "from participating in a union organizing drive" by one of its rivals, or from "engaging in protected concerted activity," § 704-b(2)(c). Even without such gross censorship of particular speakers or points of view, the inherently vague and malleable nature of terms such as "discourage unionization," leaves employers to guess at how the law will be enforced, resulting in self-censorship to avoid punishment. That is the textbook definition of a prior restraint.

3. No Compelling Governmental Interest Justifies Stifling Employer Speech, And None Is Offered By The State

To pass constitutional muster, prior restraints must, at a minimum, further a compelling governmental interest, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 562-66 (1976), and must include "narrow, objective, and definite standards" delimiting what the government can restrain,

and when. *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969). Even so, no amount of tailoring could justify a law which discriminates based on the identity of the speaker as well as the content of his speech.

The State makes no attempt at any justification, perhaps because the only conceivable purpose of gagging employers is an illegitimate one: To inhibit the employer from sharing its views as to how card check actually works. In this respect, the prohibition of speech "discouraging unionization" is ineluctably intertwined with the Legislature's decision to replace secret ballot elections with an opaque recognition process based on an inherently unreliable measure of assent. Instead, it argues that the statute is not susceptible to a facial overbreadth challenge. The cases it cites have no bearing where a statute is viewpoint discriminatory. While §704-b(2)(c) is both vague and substantially overbroad, and "can easily be exploited for illegitimate ends," *see Iancu*, 139 S. Ct. at 2303 (Alito, J., concurring), the overbreadth analysis is irrelevant, since "[a] finding of viewpoint bias end[s] the matter." *Id*. at 2302.

The State suggests the statute may be interpreted in light of "PERB guidance," in order to argue that the court should defer any ruling, at least until that "guidance" is tested in an as-applied challenge. *First*, assuming any weight may be given to that guidance, it is irrelevant for ripeness purposes whether PERB "generally believes" the law does not punish the expression of opinions, or does not apply to factual statements (PERB never acknowledges that factual statements – e.g., "the UFW's standard CBA requires employers to deduct three percent from a worker's paycheck for the benefit of the union," or "that CBA also requires the employer to fire you if you refuse to authorize this deduction" – may "discourage" a farmworker from choosing union representation.) Even so, the State hedges with the qualification that the line to be drawn will be based on *ad hoc*, *post hoc* interpretations in case-specific enforcement hearings,

something which most sensible employers would prefer to avoid, even if that means self-censorship. *Second*, a facial challenge based on deprivation of First Amendment rights is uniquely suited for judicial review, given that the immediate injury caused by their denial would be exacerbated by withholding court consideration. *Nat'l Park Hospitality Ass'n* v. *Dep't of Interio*r, 538 U.S. 803, 808 (2003); *see also Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983).[12]

Defendants' insistence of judicial deference to "agency discretion" underscores why this dispute is ripe for adjudication. Whatever may be the source of this authority, it does not go so far as to give PERB "unbridled discretion" to discriminate based on the content or viewpoint of speech. *See*, *e.g.*, *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). The absence of any statutory limits on that authority is no less a prior restraint, the effects of which may be effectively alleviated only through a facial challenge, regardless of whether that discretion and power is never actually abused. *See id.*, at 755-759 ("Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power.").

Finally, the State argues, in the teeth of statute's plain language, that § 704-b(2)(c) should be construed "as applying solely to employer speech that forms part of a coercive course of

[12] Having commenced a federal action to vindicate their own First Amendment rights, and to enjoin the compelled association with a union certified in violation of their employees' First Amendment rights, Plaintiffs may not be forced to suffer further delays that "might itself effect the impermissible chilling of the very constitutional right [they] seek[] to protect." *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). Yet, that would be precisely the effect of deferring until PERB or a state court "interpret[s] § 704-b(2)(c) and its limits." DKT No. 35 at 34-35, n. 30:

> Abstention is, of course, the exception and not the rule, and we have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment. We have held that "abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression."

Houston v. *Hill*, 482 U.S. 451, 467 (1987) (quoting *Dombrowski* v. *Pfister*, 380 U.S. 479, 489-90 (1965)).

conduct," based on PERB precedent interpreting § 704(5), a preexisting provision of SERA that "expressly prohibits employers from discouraging union membership 'by discrimination in regard to hire or tenure or in any term or condition of employment.'" DKT No. 35 at 33 (quoting § 704(5)). *First*, the court may no more rewrite § 704-b(2)(c) by interpolating the element of "coercive conduct" than it may read the statute so as to make § 704(5) superfluous or redundant. The two statutes accomplish two, very different things: Unlike § 704(5), the speech which "discourages" unionization is the only "conduct" required to violate § 704-b(2)(c). *Second*, the only conceivable reason for including § 704-b(2)(c) is to compel employers to remain neutral in the face of a unionization campaign, something which the State never mentions.

"Neutrality" agreements are specifically intended to supplant the First Amendment protections of the NLRA, in order to deprive employees of their "right to receive information opposing unionization." *Chamber of Commerce*, 554 U.S. at 68. Indeed, the very concept of a "neutrality agreement" is premised in the idea that an employer waives First Amendment rights to oppose unionization efforts. This may be acceptable so long as the employer agrees to do so. The same cannot be said where the source of the coercive pressure is a legislative enactment or agency order. *Cf. Golden State Transit Corp.* v. *Los Angeles*, 475 U.S. 608 (1986) (government may not coerce employer concessions by conditioning renewal of its franchise on the company's agreement to settle a labor dispute).[13]

[13] An infringement of farmworker's right to choose necessarily infringes upon the farm owner's freedom of association, since their right not to be compelled to associate with a union that lacks majority support is intertwined. *See Wolff I,* 262 U.S. at 541 (because "joint compulsion" was central to the purpose and function of the act, the state had no basis to argue "that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment."). *See also Truax* v. *Raich*, 239 U.S. 33, 38 (1915) (rejecting argument that employee could not assert employer's liberty interest in not being compelled to fire employee) ("The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others."). Here, it is "at least doubtful" whether individual farmworkers, including nonimmigrant H-2A visa holders, could or would adequately present the objections of Plaintiffs. *Cf. Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 159 (1951) (Frankfurter, J., concurring).

II. FLFLPA'S "CARD AUTHORIZATION" REGIME VIOLATES THE FIRST AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The Act infringes First Amendment and the Due Process Clause of the Fourteenth Amendment rights in two, related ways. *First*, the Act places virtually no checks on the solicitation and use of authorization cards, as well as on the union's irrevocable control over the "vote" itself, even where the farmworker withdraws or rescinds his authorization *before* the union may be certified. *Second*, the card check certification under FLFLPA lacks rudimentary due process checks against abuse or misuse, including that any waiver of the farmworker's right to choose must be "freely given and shown by clear and compelling evidence." *Janus* v. *AFSCME*, 138 S.Ct. 2448, 2486 (2018) (state may not compel its employees to pay agency fees unless the employee affirmatively consents to pay).

A. Card Authorizations Are Constitutionally Protected Petitioning Activity And Core Political Speech

The right "to petition the Government for a redress of grievances" is "one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE&K Constr. Co.* v. *NLRB,* 536 U.S. 516, 524, 532 (2002). The Supreme Court has called petitioning the essence of a citizen's participation "in the democratic process." *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 395-396 (2011) (noting that petitions had often served as the equivalent of the franchise for people denied actual suffrage). Petitioning activity under the Act is expressly for the purpose of exercising a choice as to who will represent farmworkers. There can be no doubt that card authorizations are recognized by the State precisely that purpose.

The right to petition "extends to all departments of the Government," *BE&K*, 536 U.S. at 525 (quotation omitted), and "other forums established by the government for resolution of legal disputes." *Borough of Duryea*, 564 U.S. at 387. Petitioning *activity,* and not just the act of

petitioning, is also protected as part of the freedom of expression guaranteed under the Free Speech Clause, insofar as state regulation may burden the ability "to engage in core political speech.'" *See, e.g.*, *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999) ("Petition circulation ... is core political speech because it involves interactive communication concerning political change.") (citation and quotation omitted). "First Amendment protection for such interaction," the Court reaffirmed in *Buckley*, is "'at its zenith.'" *Id*. (*quoting Meyer* v. *Grant*, 486 U.S. 414, 425 (1988) (*Meyer*)).

Although a card authorization has legal consequences under state law, "[p]etition signing remains expressive even when it has legal effect in the electoral process." *Doe* v. *Reed*, 561 U.S. 186, 195 (2010). In *Reed*, the Court found that a petition "signature still expresses the political view that the question should be considered 'by the whole electorate,'" *id.* at 195 (*quoting Meyer v. Grant,* 486 U.S. 414, 425 (1988)), and that "the expression of a political view implicates a First Amendment right." *Id*. at 195 (*quoting Republican Party of Minn.* v. *White*, 536 U.S. 765, 788 (2002) ("The State, having "cho[sen] to tap the energy and the legitimizing power of the democratic process, . . . must accord the participants in that process the First Amendment rights that attach to their roles."); *see also Nev. Comm'n on Ethics* v. *Carrigan*, 564 U.S. 117, 128 (2011) (explaining *Reed*'s holding that the signing of a petition is "core political speech") (internal quotation marks omitted).

There is also no question that a certification involves matters of public concern. For starters, the purpose of labor relations law in general, and SERA in particular, is to protect the *public* interest in promoting labor peace and avoiding industrial strife by encouraging collective bargaining and protecting the exercise of "full freedom of association" by workers. *See* § 700; *accord* 29 U.S.C. § 151. As with the NLRB, PERB is "a public agency acting in the public

interest, not any private person or group, not any employee or group of employees, is chosen as the instrument." *Cf. Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261, 265 (1940); *see also Nat. Licorice Co.* v. *Labor Bd.*, 309 U.S. 350, 362 (1940) ("The proceeding authorized to be taken by the Board … is not for the adjudication of private rights.").

Second, the certification grants monopoly control over the bargaining rights of workers and also restrains the employer from entering into individual agreements with its own employees, *Janus*, 138 S.Ct. at 2460, or to engage in "direct dealing," an unfair labor practice which tends to undermine majority support of the union. The monopoly power is not dissimilar to the grant of a certificate of public convenience and necessity issued by a public utilities commission. *See* N.Y. Pub. Serv. Law § 68; *see also J.I. Case Co.* v. *Labor Board*, 321 U.S. 332, 335 (1944) (likening the labor agreement "to the tariffs established by a carrier, to standard provisions prescribed by supervising authorities for insurance policies, or to *utility schedules of rates and rules for service*"). *Third*, the choice by employers whether to be represented by a union is not purely a matter of private ordering. Without the state's imprimatur, neither the employer nor their employees would be obligated to recognize the union. But without majority support, the union may not be certified, at least in theory.

B. The Certification Process Itself May Not Impair The Exercise Of Speech And Petitioning Rights By Farmworkers

The First Amendment and the Fourteenth Amendment protect "'two different, although overlapping kinds of rights'" relating to the right to vote: "'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983) (*Anderson*) (*quoting Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968)). *Accord López Torres* v. *N.Y. State Bd. of Elections*, 462 F.3d 161, 183-84 (2d Cir. 2006). While the

Constitution does not prescribe a particular procedure to vindicate that fundamental right, it should be obvious that any deviation from the historic tradition of secrecy in the polling booth presents risks to First Amendment rights.

The Supreme Court has invalidated regulatory regimes that burden the right to vote expressly on First Amendment and Fourteenth Amendment grounds. *See, e.g., Anderson*, *supra* at 786 n.7 (striking down a state regime establishing early filing deadlines for independent presidential candidates); *Norman* v. *Reed*, 502 U.S. 279, 288 n.8 (1992) (striking down a state law establishing signature requirements for new parties wishing to run candidates in local elections). In cases where the rights of voters are "subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) (citing *Norman* and *Anderson*) (quotations omitted).

Whatever may be the state's regulatory interests in assuring that "'some sort of order, rather than chaos, is to accompany the democratic processes,'" *Anderson*, *supra* at 788 (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)), it may not infringe on the expressive rights of the farmworker, including through his right to petition for an election and to choose his own representative, whether by secret ballot or card authorizations. Thus, the authorization cards must reflect the choice of the farmworker *at the time* the cards are offered to determine whether the union has the support of a majority of workers. *Cf. Baltimore Sun Co.* v. *NLRB*, 257 F.3d 419, 426 (4th Cir. 2001) (The NLRB "guards with equal jealousy employees' selection of the union of their choice and their decision not to be represented at all.").

1. Denying Farmworkers The Right To Revoke Abridges Speech And Petitioning Rights And Risks Disenfranchisement

Where the State denies farmworkers' actual suffrage through a secret ballot election, and gives the farmworker no option to oppose the certification other than by remaining silent and

withholding his assent,[14] the freedom to exercise of the right *not* to associate becomes of paramount importance. At minimum, that right may not be abridged by refusing the farmworker's request to withdraw his authorization, at least not without clear and unmistakable evidence that the farmworker voluntarily agreed to waive that right.

According to PERB, card authorizations "serve as the functional equivalent of a vote and are not to be lightly set aside." *Porpiglia*, at 19. The State has things backwards.[15] As Judge (later Attorney General) Griffin Bell explained, it is "[t]he right of employees to a choice and a choice through the secret ballot [that] should not be lightly disregarded," and any "rule of convenience ... must give way to truth based on the record considered as a whole." *NLRB* v. *Lake Butler Apparel Company*, 392 F.2d 76, 82 (5th Cir. 1968). In the face of timely, written objections by the farmworkers themselves, PERB adopted a per se rule foreclosing any inquiry into whether the UFW had majority support at the time it filed its certification petition. This destroyed the premise upon which the legitimacy of the certification is based – majority rule.

This is not merely a matter of controlling the mechanics of the electoral process, as was the case in *Storer* (ballot access), *Anderson* (filing deadlines), or *Burdick* (write-in voting), where the Supreme Court balanced the relative interests of the State and the injured voters to "evaluate[] the extent to which the State's interests necessitated the contested restrictions." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995). Here, the denial of the right to revoke is "a regulation of pure speech." *Id.* at 345. "Consequently, we are not faced with an

[14] For example, by striking against the unwanted imposition of the union by the state. *See Gerawan Farming, Inc.* v. *ALRB*, 23 Cal.App.5th 1129, 1156-1157 (2018) (describing massive one-day strike to protest ALRB's denial of farmworkers' petition for a decertification election).

[15] While the card authorizes the union to negotiate an agreement on behalf of the worker, that cannot happen until the union is certified. The dues deduction authorization is, in turn, conditioned on the union reaching an agreement with the employer. The authorization does not give the farmworker any membership rights or impose any binding fiduciary or contractual duties upon the union. The union is under no obligation whatsoever to do anything with the authorization cards.

ordinary election restriction; this case 'involves a limitation on political expression subject to exacting scrutiny.'" *Id*. at 345-46 (quoting *Meyer*, 486 U.S. at 420). In fact, the result is worse than disenfranchisement, because the ballot "cast" was, in numerous instances, the *opposite* of the choice farmworkers would have made, had they been permitted to rescind their authorization.

In rejecting the farmworkers' objections to the use of their authorization cards, PERB concluded that their "statements seem, at most, to indicate that the employee (assuming they signed a card) has changed their mind regarding union representation." *Porpiglia*, at 18. That should have been enough to honor their wishes. Nevertheless, PERB concluded that it would "decline to probe into employees' subjective state of mind when signing the cards," as "an employee's change of mind due to alleged misrepresentations is an insufficient basis to invalidate a timely, signed dues deduction authorization card which is clear on its face." *Id*. *First*, there was no "state of mind," subjective or otherwise, to probe: The farmworkers stated unequivocally that they did not wish to be represented by the UFW. *Second*, the fact that the workers had once given authorization to the UFW (weeks or possibly months ago) does not mean that they were not free to withdraw it just as easily, at least before the union was certified based on that authorization. *Third*, the fact that the authorization was valid for one year does not foreclose the right of the farmworker to rescind it at any time prior to its expiration, whether for good reason or no reason at all.

For such a waiver to be effective, an employee must agree *at the time* the authorization is given to relinquish unconditionally his right to revoke his support. *See, e.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege."). "[I]n the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.'" *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972)

(citation omitted). Courts "do not presume acquiescence in the loss of fundamental rights." *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937); *see also Janus*, 138 S.Ct. at 2486 (citing *Johnson*) (waiver of First Amendment rights "cannot be presumed"). This presumption is especially strong when First Amendment rights are at stake. The Court will not find a waiver of such rights "in circumstances which fall short of being clear and compelling." *Curtis Publ'g Co.* v. *Butts*, 388 U.S. 130, 145 (1967) (plurality op.). Following *Janus*, the state may no longer take money from employees to subsidize union speech "unless the employee affirmatively consents to pay." *Janus*, *supra* at 2486. Rather, "to be effective, the waiver must be freely given and shown by 'clear and compelling' evidence." *Id.* (citation and quotation omitted). The same requirements apply with even greater force where the denial of the farmworkers' liberty and property is the result of the abridgement of the First Amendment.

2. Under The NLRA And State Law, Employers Are Permitted To Revoke Or Withdraw Authorization Of Majority Support Before The Union Is Certified.

While the NLRB has required evidence of "clear and unambiguous conduct" to effect a revocation of a card authorization by the employer, *NLRB* v. *Colonial Knitting Corp.*, 464 F.2d 949, 952 (3d Cir. 1972), there is no requirement that "the withdrawal of the authority be evidenced with the degree of formality required to establish the original designation. … This would exalt form over substance and make the interest of the agent of paramount importance rather than that of his principals." *Reeder Motor Co.*, 202 F.2d at 804.[16]

[16] PERB believes that federal precedent does not allow revocation "outside the terms set forth in the cards themselves," *Porpiglia*, at 19 (citing 29 U.S.C. §186(c)(4)) (governing timing of revocability of employee's authorization to permit employer to deduct union dues from his paycheck), and *Ohlendorf v United Food & Commercial Workers International Union*, 883 F.3d 636, 644 (6th Cir.) (union did not act in bad faith in holding employees to terms of revocation contained in dues deduction authorization card), *cert. denied*, 139 S.Ct. 198 (2018). These decisions have nothing to do with whether an employee may revoke his support of the union *before* it is certified, particularly where the certification determination itself depends on the viability of the worker's assent.

Under the Taylor Act, unless a dues deduction authorization, even when not revoked, "is not sufficient for purposes of certification without an election because it is equivocal as to employee intent," as the cards "may not have been revoked for a variety of reasons not evidencing majority support." *Town of Ossining*, 32 PERB ¶ 3013, 1999 WL 35115393 (Feb. 25, 1999) (attestation of non-revocation by union not sufficiently reliable for purposes of certifying union without an election). Based on published opinions of PERB Counsel, "a public employee has a right to revoke his dues deduction authorization at any time and that *this right cannot be annulled by any contract entered into between a public employer and an employee organization." See, e.g.,* 8 PERB ¶ 5003, 1975 WL 388481 (Apr. 17, 1975) (emphasis original) (citation omitted). Other state public employment relations boards have interpreted card check legislation to give employees the right to revoke prior to certification. *See, e.g.*, *Township of North Bergen,* 35 NJPER ¶ 143, 2009 WL 8155797 (Nov. 24, 2009); Ill. Code of Regs., tit. 80, sec. 1210.80(e)(6) (permitting authorization cards to be withdrawn prior to filing of majority interest petition).

More broadly, in the context of ballot initiatives or referenda, the cases are legion that, in the absence of statutory provisions to the contrary, an elector has a right to withdraw his name from such petition at any time before official action has been taken thereon, *Lynn v. Supple*, 166 Ohio St. 154, 155 (1957). As another court explained, "[a] majority of jurisdictions allow the retraction of signatures from a petition up until final action is taken on the petition, even though the result renders the petition ineffective for lack of the required number of signatures." *Dale v. Town of Elsmere*, 2001 WL 541459, at *4 & *5 (Del. Super. Apr. 27, 2001) ("the right to withdraw one's signature is paramount to the future right to vote") (collecting cases).

3. The State May Not Delegate Government Control Over The Solicitation of Farmworker Consent To A Self-Interested Union

If the elimination of the secret ballot threatens the liberty and property interests of farmworkers and farm owners, then delegating to a union the power of self-investiture delegitimizes the core purpose of SERA, which is to protect worker self-determination. The exercise of such inherently governmental functions by a private party must be subject to the same constitutional standards as those applied to the state. Here, there is more than a "sufficiently close nexus" between delegated power and the traditional functions of the state, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351, 352-53 (1974), since the solicitation of farmworker consent is required before government will authorize monopoly bargaining control over the farmworkers and, by extension vis-à-vis their employers.

It would be unthinkable to cede to a political party unreviewable control over the mechanics of the electoral process without requiring adherence to constitutional limitations. *See Terry* v. *Adams*, 345 U.S. 461, 469-70 (1953) (designating a private group's running of a statewide primary election as state action for purposes of constitutional limitations on race discrimination). The same applies here: PERB may not delegate responsibility over the disclosures required to vindicate the public interest in insuring that the choice of bargaining agent is based on the informed consent of farmworkers.[17]

[17] For example, the NLRB has broad discretion in determining the composition of bargaining units as well as deciding whether to add a new group of employees to an existing bargaining unit, without first having an election of the accreted employees. *See, e.g., Consolidated Papers, Inc.* v. *NLRB*, 670 F.2d 754, 756-57 (7th Cir. 1982). However, before such an election may be held "regardless what type of employees are involved, the Board must first determine what units would be appropriate. *The Board cannot delegate this preliminary duty to the employees*." *Pacific Southwest Airlines* v. *NLRB*, 587 F.2d 1032, 1039 n.10 (9th Cir. 1978) (emphasis added). *See also NLRB* v. *Jones & Laughlin Steel Co.*, 146 F.2d 718, 721 (6th Cir. 1945) ("In selecting appropriate units for collective bargaining, the duty of the Board to consider the public interest as a material factor is not different from that imposed upon it in the administration of any other feature of the Act. *It must consider the public interest and may not delegate its authority in this respect.*"), *vacated on other grounds*, 331 U.S. 416, 424 (1947) (emphasis added).

As noted, the Act not only fails to specify disclosures sufficient to apprise workers of the consequences of signing an authorization card, or to mandate notice and a statutory period after the filing of the certification petition to allow the farmworker to withdraw his consent. To the contrary, the certifications at issue here were based on authorization cards which make no mention as to *how* the cards will be used. It is one thing for the cards to "hereby authorize the UFW to be my union representative in order to collectively negotiate a work agreement with my employer." But this does not convey the extent to which the designation substantially restricts the rights of the farmworker, *Janus*, 138 S.Ct. at 2460, and in no way constitutes a "clear statement of purpose," *Porpiglia*, at 18, for the use of the cards.

The Supreme Court has repeatedly struck down schemes which cede police power over the rights of individuals to private parties. *See, e.g.*, *Eubank* v. *City of Richmond*, 226 U.S. 137, 143-44 (1912) (invalidating city ordinance requiring municipal authorities to establish set-back lines for buildings upon the request of the owners of two-thirds of the abutting property); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982) (invalidating law delegating to private, nongovernmental entities power to veto certain liquor license applications, "a power ordinarily vested in agencies of government"). Such delegation may be permissible, so long as the role of private parties in formulating regulations is merely "as an aid to a government agency that retains the discretion to approve, disapprove, or modify them," *Ass'n of Am. R.R.s* v. *Dep't of Transp.,* 721 F.3d 666, 671 (D.C. Cir. 2013), *vacated and remanded on other grounds,* 575 U.S. 43 (2015), and provided that the private entity function subordinately to the supervising agency. *See Nat'l Horsemen's Benevolent & Protective Ass'n* v. *Black*, 53 F.4th 869, 881-82 (5th Cir. 2022). But here, the delegation enables the union to exert authority, not only over farmworkers,

but vis-à-vis their employers, who are structurally antagonistic (at least for collective bargaining purposes). This is "'anathema . . . to the very nature of governmental function'":

> Delegating legislative authority to official bodies is inoffensive because we presume those bodies are *disinterested,* that their loyalties lie with the public good, not their private gain. But here, the majority producers "may be and often are adverse to the interests of others in the same business." That naked self-interest compromised their neutrality and worked "an intolerable and unconstitutional interference with personal liberty and private property." Accordingly, the Court invalidated the Act as "so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment."

Ass'n of Am. R.R. v. *Dep't of Transp.*, 821 F.3d 19, 29-31 (D.C. Cir. 2016) (quoting *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 311 (1936)).

III. THE FLFLPA'S COMPULSORY ARBITRATION SCHEME VIOLATES THE FOURTEENTH AMENDMENT

Nearly a century ago, the Supreme Court concluded that states may not impose contracts on private employers and employees through "compulsory arbitration." *See Wolff*. Nor may they "single out" an employer and its workforce "in an arbitrary and irrational fashion." *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 83 (1988); *Vill. of Willowbrook* v. *Olech*, 528 U.S. 562 (2000). As Plaintiffs explain, the Act's "Impasse Resolution" procedure is inconsistent with fundamental due process and equal protection principles and irreconcilable with the Supreme Court's holdings.

The State does not dispute that its compulsory arbitration scheme implicates significant liberty and property interests. Nor does the State attempt to distinguish its scheme from the one *Wolff* invalidated. Instead, Defendants (and *amici*) claim *Wolff* has been "repudiated," without pointing to any decision of the Supreme Court that casts the slightest doubt on *Wolff*. While this throwaway conclusion is incorrect, it is also revealing. In discussing his monumental two-volume study published last month, *The Taft Court: Making Law for a Divided Nation, 1921-1930* (Cambridge University Press 2023), Professor Robert Post describes *Wolff* as a "pivotal"

and "massively important case that is totally lost to the modern imagination."[18] "What is striking about *Wolff*," Professor Post writes, "is its unanimity," based on the Court's recognition of "a sphere of individual liberty that was beyond the administrative management of the state."[19] As here, Kansas had intruded too unreasonably on "the freedom of contract *and* of labor secured by the Fourteenth Amendment." *Wolff I*, 262 U.S. at 540 (emphasis added).

A. The FLFLPA'S Compulsory Arbitration Scheme Deprives Farm Owners And Farmworkers Of Liberty And Property Without Due Process

Since the Magna Carta, the central meaning of due process is that no one may be divested of their rights except by generally applicable law. As Blackstone explained, the law is "not a transient sudden order ... to or concerning a particular person; but something permanent, uniform, and universal." 1 William Blackstone, Commentaries *44; *see also* Akhil Reed Amar, "Intratextualism" 112 Harv. L. Rev. 747, 772 (1999) ("The framers of the Fourteenth Amendment believed that due process of law meant a suitably general evenhanded law.").

This is not a question of substantive due process; Plaintiffs do not ask the court to recognize new liberties outside the scope of positive law or enumerated constitutional rights. Rather, this is a due process case in the most classic sense of due process: Plaintiffs object that its positive law rights, and those of its employees, are being taken away not by law but by arbitrary fiat. New York may set minimum wage and maximum-hour laws; it may establish rules for recognition of labor unions; and it has broad discretion to regulate workplaces through law. But it cannot by decree compel one employer and its workers to enter into the state's notion of a proper "contract" or craft legal rules applicable to them and no one else. Neither Plaintiffs nor their farmworkers agreed to compulsory arbitration as a "bargained-for" exchange. *14 Penn*

[18] https://constitutioncenter.org/news-debate/americas-town-hall-programs/the-taft-court-making-law-for-a-divided-nation.

[19] Robert Post, *The Taft Court: Making Law for a Divided Nation, 1921-1930*, at pp. 798-799 (Cambridge University Press 2023) ("Post").

Plaza LLC v. *Pyett*, 556 U.S. 247, 257 (2009); *see also Volt Info. Scis., Inc.* v. *Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (arbitration "is a matter of consent, not coercion"). The Act forces them into this process based on the exercise of the state's "coercive power" over its employment relationship. *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982); *see also Regan,* 461 U.S. at 550 ("Constitutional concerns are greatest when the State attempts to impose its will by force of law.") (citation and quotation omitted).

By design, the scheme does not apply "contract" terms generally to New York's agricultural industry, or even among local competitors. They are to be imposed on one workplace by a state-imposed arbitrator who exercised virtually plenary authority under a "vague law[]" that not only "invite[s] arbitrary power," but guarantees it. *Sessions* v. *Dimaya*, 138 S.Ct. 1204, 1223 (2018) (Gorsuch, J., concurring). While states may deprive citizens of liberty and property through due process of law, they may not "deprive citizens of liberty or property through arbitrary coercion." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) (cleaned up).

B. The Supreme Court Has Already Concluded That Compulsory Arbitration Schemes Similar To The FLFLPA Violate Due Process

The California Supreme Court acknowledged the "rareness" of forced contracting schemes in the private sector, *Gerawan Farming, Inc.* v. *ALRB*, 3 Cal.5th 1118, 1140 (2017), *cert. denied,* 139 S. Ct. 60 (2018), as did *Catherwood*, *supra* at 500. That is an understatement. Other than California, New York is the only state to enact a scheme imposing forced contracting on private parties engaged in ordinary commerce, and the first state to ban strikes and lockouts as a *quid pro quo* for compelled arbitration. Such schemes are rare because they are unconstitutional under *Wolff*. *See United Steelworkers of Am.* v. *United States*, 361 U.S. 39, 74-

75 (1959) (Douglas, J., dissenting) (citing *Wolff* as the reason why collective bargaining, not compulsory arbitration, is the norm).

Instead, the State claims that *Wolff* is a "completely repudiated" relic of the *Lochner* era.[20] This *ipsi dixit* is plainly erroneous. It would also come as a surprise to Justice Holmes, who famously dissented in *Lochner*, but joined the opinions of the Court in the *Wolff* trilogy. Justice Brandeis, also no friend of *Lochner*, wrote the opinion of the Court in one of the three *Wolff* cases (*Dorchy I*), and joined the opinion of the Court in the other two. Chief Justice Taft, who authored *Wolff I*, issued a forceful repudiation of *Lochner* two months before *Wolff I* was decided. *See Adkins v. Children's Hospital*, 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting).[21]

Unlike *Lochner*, which invalidated a maximum hour law of general application, *Wolff* dealt with the state's particularized efforts to restrict the rights of *one* employer and its workers through selective and procedurally unfair administrative fiat. The *Lochner* era cases regulated hours, pay, and working conditions – not speech, association, or the right to organize or to strike, fundamental individual rights which Kansas' "system of compulsory arbitration" abridged. As *Wolff* explained, these abridgments were necessary in order to compel both the employer and his employees to operate on terms dictated by the state: "Without this joint compulsion, the whole theory and purpose of the act would fail." *Wolff II*, 267 U.S. at 568. The same applies here: The abridgement of worker and employer rights are "very intimately connected with the system of compulsory arbitration," *Dorchy I*, 264 U.S. at 290, and "cannot be deemed separable." *Id*. If the prohibition of strikes cannot withstand constitutional scrutiny, then the "Impasse Resolution" procedure must also be invalidated, notwithstanding the Act's severability provision.

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[20] *See* DKT No. 35 at 30, n. 25 (citing *Gerawan Farming, Inc.*, 3 Cal.5th at 1139).

[21] *See generally* David A. Schwarz, *Compelled Consent: Wolff Packing and the Constitutionality of Compulsory Arbitration*, 12 NYU J. of Law & Liberty 14 (2018).

The core holding in of the *Wolff* decisions was that the state's system of joint compulsion – which functioned only so long as strikes were outlawed, and contract terms were imposed on a single workplace – violates both the "freedom of labor" and the "freedom of contract." Without one, the other would necessarily "fall with it." *See Wolff I*, 262 U.S. at 541-542; *Dorchy I*, 264 U.S. at 291; *Wolff II*, 267 U.S. at 569. In *Wolff II*, the Court considered whether the state could regulate hours (as opposed to wages) through compulsory interest arbitration. Again, the Court concluded that it did not matter whether the arbitration proceedings addressed wages, hours, or any other condition of employment, because it was the compulsory nature of the proceedings that rendered the regulation unconstitutional. *Id*. As the Court observed, the statute "shows very plainly that its purpose is not to regulate wages or hours of labor either generally or in particular classes of businesses," *id*. at 565, but rather "is intended to compel ... the owner and employees to continue the business on terms which are not of their making," *id*. at 569. In short, the non-general and compulsory nature of the proceedings and the manner by which terms were imposed rendered the statute unconstitutional. *Id*.

The State cites *Catherwood* for the proposition that private sector compulsory arbitration is constitutional. *Catherwood's* discussion of *Wolff* comprises two sentences, and cites *dicta* in *Lincoln Fed. Labor Union* v. *Northwestern Co.,* 335 U.S. 525, 535-536 (1949) (which in turn cites *dicta* in *Wolff I, see id.,* at 536, n.6), for the conclusion that the "underpinnings" of *Wolff* has been "severely, if not fatally, weakened." 26 N.Y.2d at 500. Although *Lincoln* notes (correctly) that the Supreme Court no longer attempts to distinguish between businesses according to whether they were "clothed with a public interest," 335 U.S. at 536 (citing *Nebbia*), *Wolff* did not rely on this distinction.[22] *Lincoln* involved state laws forbidding employers from

[22] As Professor Post explains, *Wolff* "in dicta sought deliberately to contract the definition of property affected with a public interest." Post, at 793; *see also id*. at 796 (Chief Justice Taft,

discriminating against prospective employees based on their membership (or not) in a union. 335 U.S. at 527-28. In upholding those laws, the Court distanced itself from "certain language" from *Wolff I*—i.e., that case's "distinction between businesses according to whether they were or were not 'clothed with a public interest.'" *Id*. at 535. But the Court had no reason to address *Wolff*'s compulsory arbitration holding, because that was not the issue in *Lincoln*. And the *Lincoln* Court expressly noted it was not addressing "[c]onsiderations involved in the constitutional validity" of the Kansas act that "are not relevant here." 335 U.S. at 536 n.6.

To be sure, *Wolff* does not categorically preclude a state from fixing wages, hours, or conditions of employment through compulsory arbitration and forced contracting, just as other constitutional rights are not absolute. "[G]reat temporary public exigencies" due to wartime or national emergencies may require "the exercise of the power of compulsory arbitration" as to one business or class of businesses, 262 U.S. at 542, and so too might regulation to avoid a "possible danger of monopoly," or where "the obligation to the public of continuous service is direct, clear, and mandatory," as would be the case involving public utilities or other services on which the public depends, *id*. at 539-41.[23] However, outside of these narrow circumstances, something

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"speaking for a unanimous Court, used the Fourteenth Amendment to cut short any such doctrinal expansion of the category of property affected with a public interest."):

> In his original draft, Taft had apparently based his decision on the theory that preparing human food was not "affected with the public interest." In his final, published version, however, Taft merely cast strong doubt on this question and decided that, even if the Wolff Packing Company were clothed with the public interest, its owners and workers could not be ordered to continue in business "on terms fixed by an agency of the State."

Post, at 796 (footnote omitted) (quoting *Wolff I*, 262 U.S. at 539).

[23] Most cases of compulsory interest arbitration are in the public sector, where the government perforce consents to it, *see, e.g., Municipality of Anchorage* v. *Anchorage Police Dep't Emps. Ass'n*, 839 P.2d 1080, 1082-83 (Alaska 1992) (police officers); *Caso* v. *Coffey*, 359 N.E.2d 683, 687 (N.Y. 1976) (firefighters); or where "[a] stoppage in utility service so clearly involves the needs of a community as to evoke instinctively the power of government," *Bus Emps.* v. *Wis. Emp't Relations Bd*., 340 U.S. 383, 405 (1951); *see also, Fairview Hosp. Ass'n* v. *Pub. Bldg. Serv. & Hosp. & Inst. Emps. Union*, 64 N.W.2d 16, 28 (Minn. 1954) (characterizing hospitals as

more than "mere legislative declaration" is required to justify such "drastic regulation" or "drastic exercise of control" over one business and its employees. *Id*. No such justification exists here. "[L]ike most apocalyptic warnings" involving *Lochner*, "this one proves a false alarm." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018). *Cf. TXO Prod. Corp.* v. *All. Res. Corp.*, 509 U.S. 443, 455 (1993) ("While respondents 'unabashedly' denigrate those cases as '*Lochner*-era precedents,' they overlook the fact that the Justices who had dissented in the Lochner case itself joined those opinions."). Ironically, it is the Act that, in this context, imposes coercive arbitration on workers and employers, at the behest of a union that stands to gain financially at the expense of both workers and owners. *See Epic*, 138 S.Ct. at 1634-35 (Ginsburg, J., dissenting). The bottom line is *Wolff* controls this case. *Hohn* v. *United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").[24]

C. The Impasse Resolution Procedure And The Ban On Strikes And Lockouts Are Both Unconstitutional; If Either Is Struck Down, Then Both Must Be Invalidated And Severed From The Act

The State does not even attempt to defend the constitutionality of the Act's prohibition of strikes and lockouts. Even if a compelling justification exists for such a blanket prior restraint, it is not narrowly tailored to meet the sort of national emergency or public health or safety crisis that might justify denying employers or farmworkers resort to such economic weapons as part of the collective bargaining process. *Cf. NLRB* v. *Insurance Agents,* 361 U.S. 477, 488-489 (1960) (self-help economic activities, whether of employer or employee, were not to be regulable by

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part of "a field of enterprise in which the public has a direct and vital interest, distinct from almost any other type of business.").

[24] Even modern advocates of compulsory interest arbitration acknowledge this. *See* William B. Gould IV, "Some Reflections on Contemporary Issues in California Farm Labor" 50 U.C. Davis L. Rev. 1243, 1251 n.31 (2017); Jean R. Sternlight, "Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration" 72 Tul. L. Rev. 1, 83 (1997) ("[T]he Court has never expressly overruled *Wolff*.").

states any more than by the NLRB). As with SERA's compulsory arbitration scheme for non-profit hospitals, §716, the FLFLPA's Impasse Resolution procedure, § 702-b, was enacted as a *quid pro quo* for outlawing strikes and lockouts. *Compare* §§704-b(1), (2)(a) and §713. *See* Opp. Br. at 29; NY AFL-CIO Br. at 19-21; *see also Catherwood*, *supra* at 511-512.

Because the Impasse Resolution procedure is intertwined with the strike/lockout injunction, that the elimination of one negates the statutory basis for the other. As Justice Brandeis explained in *Dorchy I*, "[m]ost of the provisions of the [Kansas Act in *Wolff*] are very intimately connected with the system of compulsory arbitration." *Id*. at 290. As with the FLFLPA, the Kansas Act also has a broad severability clause. As Justice Brandeis explained, "[t]he clause "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." *Dorchy I*, 264 U.S. at 290.

In *Carter Coal,* the Court addressed whether the Bituminous Coal Conservation Act of 1935, under which wage/hour and price fixing "codes" were promulgated by industrial boards comprised of private employers, violated due process and unlawfully delegated legislative authority to private, self-interested actors. The Court held that "the price-fixing provisions of the code are so related to and dependent upon the labor provisions . . . as to make it clearly probable that the latter being held bad, the former would not have been passed. *The fall of the latter, therefore, carries down with it the former*." *Id.* at 315-16 (emphasis added). New York law is in accord: "Generally speaking, a severability clause does not apply where the invalid provision was 'the core' of the regulation and 'interwoven inextricably through the entire regulatory scheme.'" *Cuomo v. New York State Commission on Ethics and Lobbying in Government*, 196 N.Y.S.3d 668, 683 (2023) (*quoting New York State Superfund Coalition* v. *New York State Dept. of Envtl. Conservation*, 75 N.Y.2d 88, 94 (1989)).

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be granted.

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