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SUPREME COURT OF THE STATE OF WASHINGTON

JOSE MARTINEZ-CUEVAS and PATRICIA AGUILAR,
individually and on behalf of all others similarly situated,

Petitioners,

v.

DERUYTER BROTHERS DAIRY, INC.,
GENEVAS. DERUYTER, and JACOBUS N. DERUYTER,

Respondents,

and

WASHINGTON STATE DAIRY FEDERATION and
WASHINGTON FARM BUREAU,

Intervenor-Respondents.

AMICI CURIAE BRIEF OF THE FARMWORKER JUSTICE PROJECT & PROFESSOR MARC LINDER

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IDENTITY & INTEREST OF AMICI & INTRODUCTION

The Farmworker Justice Project and Professor Marc Linder write to shed light on the historical underpinnings of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, *et seq.*, urging the Court not to find its racially motivated exclusion of farmworkers from the overtime provisions (in 1938) a reasonable basis for Washington State's exclusion decades later.

Amicus curiae Farmworker Justice Project (FJP) is based in Washington, D. C. It is the only national advocacy organization representing farmworkers in courts and Congress. FJP has a history of advocating for equal treatment of the nation's agricultural workers, who are overwhelmingly non-White.

Amicus curiae Marc Linder is Professor of Law at the University of Iowa College of Law. He is the nation's foremost expert on the legislative history of the Fair Labor Standards Act. Professor Linder has published several books on this legislative history, including books and articles that chronicle extensively the racial motivation for the exclusion of agricultural workers from the FLSA and other New Deal legislation.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the briefs of Petitioners.

ARGUMENT

A. Federal exclusion of farmworkers from overtime coverage is a legacy of New Deal protective legislation that intentionally excluded southern Black farm laborers.

The exclusion of farmworkers from overtime protection under the federal Fair Labor Standards Act (FLSA)[1] provides no "reasonable ground" to deny farmworkers the right to overtime pay enjoyed by most other employees under Washington State law.

Like all New Deal protective legislation, FLSA's exclusion of farmworkers was racially motivated to maintain White supremacy in the South. Racism and White supremacy were the dominant themes in the South during the 1930s, evidenced by Jim Crow laws, racist social relations, and Blacks excluded from the political process and subjected to White terror.

A majority of Southerners worked on farms, mostly on cotton plantations[2] where Black laborers predominated.[3] Due to the racially White Democratic party hegemony in the South, southern Congressmen from one

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[1] 29 U.S.C. § 213(b)(12).

[2] JOSIAH C. FOLSOM & O. E. BAKER, A GRAPHIC SUMMARY OF FARM LABOR AND POPULATION, 3-4 (USDA Pub. No. 265, 1937); O. E. BAKER & ALBERT B. GENUNG, A GRAPHIC SUMMARY OF FARM CROPS, 5, figs. 4 & 5 (USDA Misc. Pub. No. 267, 1938) (S.C., Ga., Ala., Miss., Ark., La., and Tex.); Frank G. Davis & Walter L. Daykin, *The Effects of the Social Security Act upon the Status of the Negro*, 30-31 (Ph.D. diss. Univ. of Iowa, June 1939).

[3] MARC LINDER, MIGRANT WORKERS AND MINIMUM WAGES – REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES, 160-61 (Westview, 1992).

party were elected and re-elected, amassing seniority and powerful positions that could and did veto any Congressional attempts to assist oppressed Blacks.[4]

> [T]he South's misgivings about social change derived in considerable measure from the fact that almost any kind of change might challenge the bi-racial system. Wage and hour laws were resisted because they might mean equal wages for Negroes and whites.[5]

To pass any New Deal legislation, the Roosevelt administration and Congress had to and did fashion exclusions to satisfy controlling Southern interests in Congress that insisted on maintaining White supremacy over Blacks, the predominant workforce on Southern cotton plantations. Southern congressmen "fervently believed in the necessity of maintaining the traditional caste and class structure," causing President Roosevelt to recognize "he would lose the support of these Southerners if his administration made any direct attempt to reform traditional racial and class patterns."[6] "Unwilling to risk schism with Southerners' ruling committees, Roosevelt capitulated to the forces of racism" and agreed "to modify or

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[4] HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE: THE DEPRESSION DECADE, 45 (Oxford Univ., 1978).

[5] DAVID POTTER & DON E. FEHRENBACHER & CARL N. DEGLER, THE SOUTH AND THE CONCURRENT MAJORITY, 70 (La. State Univ., 1972).

[6] RAYMOND WOLTERS, NEGROES AND THE GREAT DEPRESSION: THE PROBLEM OF ECONOMIC RECOVERY, 15 (Greenwood, 1970).

water down the New Deal in its practical operation in the South."[7] Everyone knew of the necessity for this racial expedient from the outset of federal social welfare discussions, so all New Deal protective legislation exempted agricultural workers.

1. Slavery on southern plantations was replaced by feudal White supremacy over Blacks, which continued well through the 1930s.

With the end of slavery, rural Southern Blacks moved from being slaves on plantations to being tenants of plantation owners or sharecroppers, putting in and harvesting cotton in the same way they had done as slaves.[8]

Even while Congress was debating the FLSA in the 1930s, violence or threats of violence were used by White plantation owners to keep their Black laborers on the job.[9] There was "a feeling, on the part of the planters, of a sort of collective ownership of the workers in the community."[10] As a result, the sharecropper had virtually no independence from the planter and had "practically no voice in deciding what crops to grow, or what methods

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[7] Barton Bernstein, THE NEW DEAL: THE CONSERVATIVE ACHIEVEMENTS OF LIBERAL REFORM, 263, 279 (Barton Bernstein ed., 1968); FRANK FREIDEL, F.D.R. AND THE SOUTH, 36 (La. State Univ., 1965).

[8] WILLIAM COHEN, NEGRO INVOLUNTARY SERVITUDE IN THE SOUTH, 1865-1940: A PRELIMINARY ANALYSIS, 31, 60 (S. Hist. Assoc. 1976); s*ee also* CHARLES S. MANGUM, JR., THE LEGAL STATUS OF THE TENANT FARMER IN THE SOUTHEAST, 241-45 & *passim* (Univ. of N.C., 1952).

[9] *Armed Farmers Hold Cotton Pickers on Job: Refuse to Let Negroes Take Higher Pay Offer*, THE NEW YORK TIMES, Sept. 16, 1937, 1, col. 6.

[10] 2 GUNNAR MYRDAL, AN AMERICAN DILEMMA, 248 (Harper & Row, 1962).

to follow in cultivation." The planter had "complete political rule over the cropper."[11] During the New Deal, the rural South was still a "plantation community" that was "feudalistic" with the "Negro…in the position of a tenant peasantry with semi-feudal attachment to the land."[12]

All New Deal legislation that benefited Negroes in the South, especially laws that put Negroes on the same terms as White workers, threatened White supremacy and with it the feudal plantation society.

> [T]he South's role [in the New Deal] cannot be understood without underlining the class structure of Southern cotton agriculture as a landlord dominated sharecropper system from the late nineteenth century through the 1930s….Nor could we possibly ignore the explicit racism that ensured minority white dominance over black majorities in all sectors of economic and social life….[13]

2. White supremacy in the South was blatant and terroristic.

The New Deal period in the South witnessed the unabated enforcement of a comprehensive system of legalized discrimination against Blacks in public facilities. "Jim Crow" laws separated Blacks from Whites

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[11] D. C. ALEXANDER, THE ARKANSAS PLANTATION, 1920-1942, 58, 66 (Yale Univ., 1943).

[12] ARTHUR F. RAPER & IRA DE AUGUSTINE REID, SHARECROPPERS ALL!, 26 (Univ. of N.C., 1941); RUPERT B. VANCE, THE NEGRO AGRICULTURAL WORKER UNDER THE FEDERAL REHABILITATION PROGRAM, 126 (1941).

[13] THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE, 29-30 (Princeton Univ., 1995).

in schools, railroad cars, street cars, hotels, restaurants, parks, playgrounds, theaters, and other public places.[14]

Potential Black voters faced such obstacles as financially unbearable poll taxes, property, education, and "good character" requirements, as well as flagrantly manipulated requirements that Blacks understand provisions of the Constitution to the "satisfaction" of White state registrars.[15] Where such transparent shams failed to keep Blacks from voting, intimidation, violence, and terror filled in the gaps.[16]

3. Southern White supremacist congressmen controlled congressional action during the 1930s.

Roosevelt "was…a Georgian by adoption"[17] and "[a]s for blacks, it never occurred to him to question White supremacy."[18] The one party system in the South combined with seniority rule in Congress resulted in a Congress in which the South controlled the important committees and had veto power over legislation.

> Throughout the thirties, the representatives of Dixie…controlled over half the committee chairmanships and a majority of leadership positions in every New Deal Congress. The combination of a

[14] MYRDAL, AN AMERICAN DILEMMA at 628.

[15] *Id*. at 484, n.27.

[16] *Id*. at 474-90; THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, 40 (1947).

[17] *Id*.

[18] FRANK FREIDEL & JAMES C. COBB & MICHAEL V. NAMORATO, THE NEW DEAL AND THE SOUTH, 17, 23, 24 (Univ. of Miss., 1984).

> seniority rule determining access to congressional influence, a one-party political tradition below the Mason-Dixon line, and a Democratic weakness outside the South prior to 1930 resulted in legislative hegemony for advocates of white supremacy.[19]

Lynching of Blacks was one of the ways White supremacy was maintained in the South and a sharp increase during the 1930s led to Congressional efforts to control this terror. The South used the filibuster to stop anti-lynching legislation, which President Roosevelt would not oppose, because he feared his opposition to the filibuster would lead to retaliation against New Deal legislation.[20]

Relating to the proposed New Deal wage and hour law specifically (the Fair Labor Standards Act), President Roosevelt took pains to allay Southern fears, insisting at a press conference, "[o]f course, there never has been any thought of including field labor in the Wages and Hours Bill."[21] The President went further, quoting from full-page ads by the Southern lumber industry, telling housewives, "'[i]f the Wages and Hours Bill goes through, you will have to pay your negro girl eleven dollars a week.'" In response, the President said:

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[19] SITKOFF, A NEW DEAL FOR BLACKS at 45.

[20] ARTHUR M. SCHLESINGER, JR., POLITICS OF UPHEAVAL, 436-38 (Heinemann, 1960); FREIDEL, F.D.R. AND THE SOUTH at 88; NANCY WEISS, FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR, 96-119, 241-49 (Princeton Univ., 1983).

[21] FRANKLIN D. ROOSEVELT & JONATHAN DANIELS, COMPLETE PRESIDENTIAL PRESS CONFERENCES OF FRANKLIN D. ROOSEVELT, 296 (Da Capo, 1972).

> [Y]ou know if you come from the South, you can employ lots of excellent domestic help in the South, for board and lodging and three or four dollars a week. No law ever suggested intended a minimum wages and hours bill to apply to domestic help.[22]

4. Congress itself promoted Jim Crow, treating Blacks and Whites differently.

That the New Deal Congress enacted the racially motivated discriminatory exclusion of Black farmworkers from the FLSA was no aberration: Congress in the 1930s was itself a profoundly segregated and racially exclusionary institution. The 75th Congress, which enacted the FLSA, and the 74th, 76th, and 77th Congresses, included only a single Black Representative, and he served only from 1929-1935.[23]

Just one month after the FLSA bill containing the exclusion was filed in 1937, the 75th Congress demonstrated its support of Jim Crow by approving the funding of segregated schools in the District of Columbia. Specifically, Congress appropriated money "[f]or maintenance and instruction of colored deaf-mutes of teachable age belonging to the District of Columbia, in Maryland, or some other State" as well as for an "industrial home school for colored children." Act of June 29, 1937, ch. 403, 51 Stat. 359, 370, 382. Congress also mandated the racial segregation of the entire

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[22] *Id*. at 297.

[23] Oscar DePriest, a Republican from Chicago. *See* Elliot M. Rudwick, *Oscar De Priest and the Jim Crow Restaurant in the House of Representatives*, 35 J. Negro Educ. 77, 77 (1966).

District of Columbia school system into the 1950s. ***Carr v. Corning***, 182 F.2d 14, 18-19 (D.C. Cir. 1950); D.C. CODE § 31-1109-31-1113 (1940).

The harshest discriminatory treatment of Blacks was reserved for its own facilities. Congressionally run and funded public restaurants in the Capitol excluded Blacks during the New Deal.[24] And as late as 1947, Black journalists were still banned from the press gallery.[25]

During the House debate over excluding Blacks from its restaurant, Congressman George Terrell from Texas, a farm employer himself, wrote to Congressman De Priest from Chicago that he was:

> not in favor of social equality between the races. If there [were] enough Negroes around the Capitol to justify a restaurant for them to patronize, [he] would have no objection to establishing a restaurant for their use. [He could] neither eat nor sleep with the Negroes and no law [could] make him do so.[26]

In the end, the House of Representatives affirmed the Southern White supremacist tradition in its own institution.[27] Nor was Congress alone in maintaining Jim Crow: many federal government offices in Washington,

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[24] *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY, 129-30 (Vintage Books, 1975).

[25] Donald A. Richie, *Equal Access to the News: Integrating the Washington Press Corps* (Apr. 2, 1992) (unpublished manuscript, prepared for speech at the Annual Meeting of the Organization of American Historians).

[26] Letter for Rep. George B. Terrell to Rep. Oscar De Priest (n.d.), *reprinted in* 78 CONG. REC. H5049 (daily ed. March 21, 1934).

[27] Rudwick, *Oscar De Priest* at 77.

D.C. during the 1930s separated Black workers and excluded them from their restaurants.[28]

These racially discriminatory actions by the New Deal Congress were not based on economics, but on the insistence of Southern Congressmen that Whites were superior to Blacks and acceptance of this view by our highest representative institution.

5. New Deal legislative and administrative action treated Blacks and Whites differently.

Southern Democrats opposed New Deal programs that

> [t]hreatened the planter elite… and local social and economic relationships – most fundamentally, the laws and customs governing the low wage, racially segmented labor force….[29]

By the time the FLSA was enacted in 1938, discrimination against the Southern Negro was firmly established in all New Deal programs. Significantly, this discrimination was not voiced as keeping *farmworkers* in their place, but as keeping Blacks at a subsistence level and at a level below that of Whites.

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[28] In Washington, D.C. during the 1930s, '[m]ore of the government offices separate[d] Negro workers and exclude[d] them from the restaurant concessions in the buildings than accept[ed] them." CHARLES S. JOHNSON, PATTERNS OF NEGRO SEGREGATION, 7 (Harper, 1943).

[29] Margaret Weir, *The Federal Government and Unemployment: The Frustration of Policy Innovation From the New Deal to the Great Society*, THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES, 149, 158-59 (Margaret Weir ed., 1988).

To help reduce wage cutting and stimulate the economy by supporting workers' ability to consume products, the National Industrial Recovery Act (NIRA) was passed in 1933.[30] But the codes of fair competition adopted under the Act excluded the sectors in which most Southern Blacks worked: agriculture and domestic service.[31] Where codes establishing wages under the NIRA did include Blacks, differentials were allowed to keep Black wages lower than that of Whites. As conceded by President Franklin Roosevelt:

> [i]t is not the purpose of the Administration, by sudden or explosive change, to impair Southern industry by refusing to recognize traditional differentials.[32]

Recognition of these "traditional differentials" was easily understood by Southerners and New Deal administrators to mean the maintenance of unequal pay based on race;

> "…a division should be made between White labor and Black labor, so that proper attention may be given to certain racial conditions and habits."[33]

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[30] LINDER, MIGRANT WORKERS AND MINIMUM WAGES at 133.

[31] Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1945-51 (1966); WOLTERS, NEGROES AND THE GREAT DEPRESSION at 150.

[32] LEVERETT LYON, THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL, 328 n.9 (Brookings Inst., 1935); NIRA.

[33] Philip Murphy, Chief, Commodities Purchase Sect., Memorandum to AAA Adm'r (Feb. 20, 1935), National Archives (NA), Record Group (RG) 145: Dep't of Agric.: Subject Correspondence 1933-35, Folder: Citrus Fruit.

The Agricultural Adjustment Act (AAA) set up county agricultural committees across the nation, but '[n]ot a single Negro served on any AAA county committee throughout the South."[34] When some Washington officials proposed that Southern farmers allow their Black sharecroppers to stay on the land during the term of AAA contracts, Southern Congressmen insisted that unless these officials were fired "no major farm legislation Roosevelt might want would be passed." The proposal was withdrawn and the officials purged from the program.[35]

Southerners worried about Social Security's implications for race relations. For example, the *Jackson Daily News* wrote

> The average Mississippian can't imagine himself chipping in to pay pensions for able-bodied Negroes to sit around in idleness on front galleries, supporting all their kinfolks on pensions, while cotton and corn crops are crying for workers to get them out of the grass.[36]

Although an NAACP representative testified before Congress that if farmworkers and domestics were excluded from Social Security most

[34] SITKOFF, A NEW DEAL FOR BLACKS at 53, 48.

[35] WILLIAM BRIGGS & HENRY CAUTHEN, THE COTTON MAN: NOTES ON THE LIFE AND TIMES OF WOFFORD B. (BILL) CAMP, 133-34 (Univ. of S.C., 1983).

[36] WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940, 131 (Harper & Row, 1963).

Black workers would be disqualified, both categories of workers were excluded entirely from Social Security protection.[37]

> Because of southern opposition, agricultural workers and domestic servants – most[ly] black men and women - were left out of the core programs of the Social Security Act…. They sought control over any social program that might threaten white domination, so precariously balanced on cotton production.[38]

The Civilian Conservation Corps (CCC) employed the unemployed throughout the country, but Southerners objected to including Blacks. President Roosevelt asked that he be kept out of the issue, because it was "political dynamite," and while Blacks ultimately were not entirely excluded, they were underrepresented and placed in segregated camps.[39]

The Farm Security Administration provided loans and grants to farmers, but when its first administrator appointed Blacks to state advisory

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[37] Economic Security Act: Hearings Before the Senate Comm. on Finance, 74th Cong., 1st Sess. 644, 640-41 (1935) (statement of Charles Houston). Cf. Unemployment, Old Age and Social Insurance: Hearings Before the House Comm. on Labor, 74th Cong., 1st Sess. 147 (1935) (statement of Manning Johnson, Nat'l Exec. Council, League of Struggle for Negro Rights) ("Practically 85 percent of the Negroes in the South are agricultural workers").

[38] JILL S. QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY, 2 (Oxford Univ., 1994).

[39] JOHN SALMOND, THE CIVILIAN CONSERVATION CORPS, 1933-1942: A NEW DEAL CASE STUDY, 88-101 (Duke Univ., 1967); GEORGE MARTIN, MADAM SECRETARY: FRANCES PERKINS, 297 (Houghton Mifflin, 1976); Allen F. Kifer, The Negro Under the New Deal, 1-76 (Ph.D. diss. Univ. of Wisconsin, 1961); John Salmond, *The Civilian Conservation Corps and the Negro*, THE NEGRO IN DEPRESSION AND WAR, 78 (B. Sternsher ed. 1969); Henry P. Guzda, *Frances Perkins' Interest in a New Deal for Blacks*, MONTHLY LAB. REV., April 1980, 31, 34-35; WEISS, FAREWELL TO THE PARTY OF LINCOLN at 53-55.

committees, South Carolina Senator Byrnes objected and the appointments were rescinded.[40]

The Works Progress Administration (WPA) employed more than ten thousand supervisors in the South, only eleven of whom were Black.[41] Because of the pay differential between Blacks and Whites in the South, a Black person could be denied a WPA placement for refusing a low wage job that a White person would not be required to take.[42]

6. With White supremacist Southern congressmen in control, the minimum wage and overtime protections of the FLSA had to and did exclude Blacks working on Southern plantations.

Deference to the South's White supremacist economic and social institutions had been firmly established in the New Deal, both by FDR and Congress, by the time the FLSA was considered in 1938. From its initial drafting, the FLSA excluded all agricultural workers from both minimum wage and overtime protection. In fact, the drafters did not even consider including coverage for farmworkers, given how they had been excluded

[40] SIDNEY BALDWIN, POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION, 279, 307 (Univ. of N.C., 1968).

[41] DONALD S. HOWARD, THE WPA AND FEDERAL RELIEF POLICY, 291-96 (Da Capo, 1943).

[42] *Id* at 291.

from other New Deal legislation.[43] While minimum wage protection for farmworkers was partially provided in 1966 FLSA amendments,[44] the overtime exclusion has never been revisited and exists today as it did in 1938.[45]

The impact of minimum wage and overtime coverage would have been predominantly on Black wage hands and sharecroppers on cotton plantations of the South. First, Southern farm wages were less than half those on Northern farms, which were mostly paying the 25 cent per hour, original FLSA minimum wage.[46] Paying such a wage would have completely upset the economic and political relationships on plantations of the "Black Belt," where social and economic customs relied on paying Blacks wages that were both low and less than those paid to Whites.

Second, in various forms the FLSA from the outset (and to this day with the small farmer exemption from the minimum wage, 29 U.S.C. § 213 (a)(6)) applied only to larger enterprises engaged in interstate commerce, and

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[43] LINDER, MIGRANT WORKERS AND MINIMUM WAGES at 132-33; Judge Gerard Reilly, Solicitor, DOL, 1937-1941, chief drafter of FLSA, telephone interview (May 5, 1985); s*ee also* THE MAKING OF THE NEW DEAL 172-75 (K. Louchheim ed., 1981).

[44] *See* 29 U.S.C. § 213(a)(6).

[45] *See* 29 U.S.C. § 213(b)(12).

[46] LINDER, MIGRANT WORKERS AND MINIMUM WAGES at 172-73.

> [o]nly the plantations of the South and a comparatively few farms elsewhere [w]ere too large for family operation.[47]

Thus, FLSA coverage for farmworkers would have largely impacted large cotton plantations of the South and could have resulted in doubling the wages of Blacks working on those plantations, equalizing the farm wages of Blacks with those of Southern Whites.

B. Defendants' historical affirmation, denying any racial motivation for excluding farmworkers from the FLSA, misses the target, is illogical, and has virtually no historical support.

Defendants submitted a statement from an historian[48] that largely misses the point of Plaintiffs' contention. Plaintiffs show above (1) dominant White supremacy that continued in the South from the time of slavery through the New Deal; (2) the importance in maintaining White supremacy by denying Southern Black plantation laborers higher pay, equal to that of Whites; and (3) the veto power of Southern Congressmen over New Deal legislation.

Defendants' historian contends that racial animus could not have been a reason for excluding farmworkers from the FLSA in 1938, because

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[47] HOWARD A. TURNER, A GRAPHIC SUMMARY OF FARM TENURE, 1 (U.S. Dep't. of Agric., 1936); calculated according to Julius Wendzel, *Distribution of Hired Farm Laborers in the United States*, 45 MONTHLY LAB. REV. 561, 565 tab. 1 & tab. 2, 568 (1937) (78% of large farm employers (with 10 or more hired workers) were in the South and California, Arizona and New Mexico, where the largest concentration of non-White farmworkers existed outside the South); Bureau of Census, Census of Agriculture, 3 General Report, tab. 11, 166-67 (1935).

[48] CP 851-78.

at that time, in the nation as a whole, mostly White farmworkers were harmed by the exclusion, not Blacks.[49] Accepting that most farmworkers *nationally* in 1938 were White, this fact does not impact the controlling imperative of Southern White supremacy that could not countenance Blacks and Whites being paid the same wages on its cotton plantations.

Moreover, given that (1) when the FLSA was enacted small employers were generally not considered to be producing goods in interstate commerce and most large agricultural operations were Southern cotton plantations on which Blacks labored; and (2) Southern farms were the ones paying sub-minimum wages (below .25 cents per hour) in 1938, the FLSA's impact would have been focused on Blacks in the South.

The opposing historian also claims that racial animus could not have been a motivation for excluding farm laborers, because most Black agricultural workers in the South were working on plantations as either sharecroppers or tenant farmers, not as wage laborers. The reasoning seems to be that Southern Congressmen would not have objected to paying Blacks the same wages as Whites working on farms, because so many other Blacks

[49] CP 853-56. For example, ¶12: "Thus, it would have made little sense to exclude all farm labor from the FLSA simply to avoid paying minimum wage to the small percentage of that group that was wage earning black farmers."

were laboring as tenants or sharecroppers and, as non-"employees," would have received no protection from FLSA coverage.[50]

First, given the level of racial animus toward Blacks in the South and the blatantly White supremacist legal and social rules keeping Blacks in their subservient place – as well as dedication to the view that Blacks were inferior in every way to Whites - it is fanciful to think that the elevation of any group of plantation Blacks to the level of Whites could have been tolerated.

Moreover, most Southern Black sharecroppers and tenant farmers were hardly the kind of independent businessmen likely to be considered unprotected by the FLSA's broad definitions of "employment." The FLSA used the broadest definitions of coverage of employees that had ever been included in a law,[51] including the definition of "employ," which included not only the common law definition but also "to suffer or permit to work." 29 U.S.C. § 203(g). Ninety percent (90%) of the "tenants" were "just

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[50] CP 854-56, 867.

[51] "'[E]mployee'" includes "'to suffer or permit to work'" and is "the broadest definition. . . ever included in any one act." ***United States v. Rosenwasser***, 323 U.S. 360, 362, 363 n.3, 65 S. Ct. 295, 89 L. Ed. 301 (1945), *quoting* Sen. Hugo Black, the Act's sponsor, 81 CONG. REC. 7657 (1937); s*ee also* ***Reyes v. Remington Hybrid Seed Co.***, 495 F. 3d 403, 408 (7th Cir. 2007), *quoting* ***Nationwide Mut. Ins. Co. v. Darden***, 503 U.S. 318, 326, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992) (the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under. . . traditional agency law principles").

ordinary laborers" under supervision.[52] Only ten per cent of "tenants" and sharecroppers paid cash to rent land and possibly could have been considered non-employees.[53] "Croppers, the most dependent of all tenants, [were] little more than wage hands."[54] Most Black sharecroppers had

> practically no voice in deciding what crops to grow, or what methods to follow in cultivation…. In reality the sharecropper was little more than a wage hand being paid in kind….Essentially, it was a form of debt peonage.[55]

That FLSA protections under its broad definition of "employ" would indeed have covered most sharecroppers had farm employees been covered in 1938 was confirmed when farmworkers were included for minimum wage protection in 1966.

> Coverage is intended in the case of certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent. These individuals, called sharecroppers and tenants, are employees by another name.[56]

Thus, whether called "tenant farmers," "sharecroppers," or "wage laborers," in reality nearly all the laborers working on Southern cotton

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[52] MYRDAL, AN AMERICAN DILEMMA at 245 & n.b.

[53] LINDER, MIGRANT WORKERS AND MINIMUM WAGES at 164, 220-27. "Only one-tenth of black tenants (including sharecroppers) in the South were cash tenants-the highest rank and only one that could plausibly be regarded as non-employees." *Id.* at 164.

[54] ARTHUR F. RAPER, PREFACE TO PEASANTRY, 148-49 (Univ. N.C., 1936).

[55] ALEXANDER, THE ARKANSAS PLANTATION at 66.

[56] H.R. 1366, 89th Cong., 1st Sess. 32 (1966); also confirmed in U.S. Dep't. of Labor Interpretive Bulletins. 37 FED. REG. 12.084, 12.102 (1972); 29 C.F.R. § 780.330(a) (1990).

plantations would have been considered "employees" had farmworkers been covered by the FLSA.

Much of Defendants' historical evidence is devoted to showing the existence of an "agricultural myth" in the United States, allowing agriculture to be treated more favorably than other industries.[57] But no evidence shows that this myth was on the minds of members of the New Deal Congress, let alone the drafters who excluded farm laborers.

CONCLUSION

The overwhelming historical evidence shows that farm laborers were excluded from all New Deal social welfare legislation, including the overtime protections of Fair Labor Standards Act, because both President Roosevelt and Congress could not allow any New Deal legislation to revolutionize social and economic relationships between Blacks and Whites in the South, which all parties understood were based on White supremacy.

RESPECTFULLY SUBMITTED this 9th day of September 2019.

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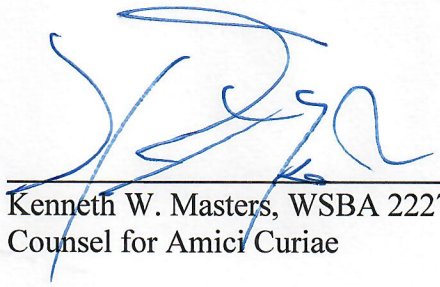

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