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ALL WORK AND NO PAY: THE MASSACHUSETTS OVERTIME STATUTE AND ITS AGRICULTURAL EXEMPTION

Abstract: At the federal and state level, overtime statutes often contain agricultural exemptions. These exemptions do not require farm owners to pay statutorily mandated overtime compensation to farmworkers who work more than the prescribed workweek. In 1960, the Massachusetts legislature enacted its overtime statute, chapter 151, section 1A of the Massachusetts General Laws, containing an agricultural exemption, as part of a larger remedial response to the Fair Labor Standards Act. In 2019, the Massachusetts Supreme Judicial Court in *Arias-Villano v. Chang & Sons Enterprises, Inc.* limited the agricultural exemption to only those farmworkers working in harvesting, but not those working in post-harvesting. Following the decision, the Massachusetts Department of Labor Standards issued an advisory in March 2020 that eroded farmworker protections by expanding the agricultural exemption beyond the limits established in *Chang & Sons*. Most recently, in 2021, the Fairness for Farmworkers Coalition introduced the Fairness for Farmworkers Act to abolish the agricultural exemption. This Note discusses the legislative intent of Massachusetts’s chapter 151, section 1A and the implications of the recent advisory. Additionally, this Note reviews the current landscape of state-level agricultural exemptions, particularly New York’s newly enacted Farm Laborers Fair Labor Practices Act (FLFLPA). Using the FLFLPA as a reference point, this Note argues that the Massachusetts legislature should adopt the Fairness to Farmworkers Act and abolish the agricultural exemption to better protect farmworkers.

INTRODUCTION

Dilma Perez, who immigrated to the United States from Guatemala nearly twenty years ago, works on a farm in Florida with her husband, harvesting crops.¹ Over the past year, Dilma and her family have been among the increasing number of farmworkers who suffer from food insecurity and lack of suffi-

¹ Allison Salerno, *Here’s Why the People Who Pick Our Food Are Going Hungry During Covid*, IN THESE TIMES (Jan. 25, 2021), <https://inthesetimes.com/article/farmworkers-immigrant-workers-stimulus-aid-work-visas-covid> [https://perma.cc/D3EN-MTXB]. Although Dilma is a farmworker in Florida, her experience is like the experience of most farmworkers in Massachusetts. See Telephone Interview with Margaret Sawyer, Interim Co-Dir., Pioneer Valley Workers Center (Mar. 4, 2021) (noting that the average Massachusetts farmworkers works up to sixty hours in a week during harvesting season).

cient compensation.² Since February 2020, the number of farmworkers needing food donations have tripled.³ Simultaneously, farm owners have decreased hiring and increased their reliance on current employees.⁴ The most recent National Agricultural Workers Survey reports that the average farmworker works forty-five hours per week.⁵ Due to the agricultural exemption in the Fair Labor Standards Act (FLSA), federal law does not mandate employers to compensate farmworkers for work completed beyond the forty-hour workweek.⁶

Farmworkers like Ms. Perez are at the heart of the United States economy.⁷ Despite their central role, however, precise information about those who work in agriculture is not always available.⁸ Agricultural work includes all acts of farming, such as cultivation, harvesting, production, and preparation of produce or commodities.⁹ The United States Department of Agriculture estimated

² See Salerno, *supra* note 1 (noting that on November 4, 2020, at the service center near her house, a non-profit serving agricultural workers provided 1,365 farmworkers with food and household staples).

³ See *id.* (suggesting the increased rate of food insecurity stems from changes in hiring practices).

⁴ See *id.* (noting that in addition to farm owners decreasing hiring, typical off-season work, like landscaping, is less available).

⁵ See JBS INT'L, INC., FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2017–2018, at 25 (2021) <https://www.dol.gov/sites/dolgov/files/ETA/news/pdfs/NAWS%20Research%20Report%202014.pdf> [<https://perma.cc/F85F-CHEU>] (explaining that farmworkers who worked in harvesting worked fifty-four hours per week on average and farmworkers who worked in pre-harvesting worked forty-eight hours per week).

⁶ See Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 169 (2018) (discussing the agricultural exemption within a broader history of legislative exclusion of farmworkers from labor protections). The agricultural exemption serves to prevent agricultural workers from qualifying for overtime compensation under the Fair Labor Standards Act (FLSA). See 29 U.S.C. § 213(b)(13) (containing the agricultural exemption).

⁷ See Guild & Figueroa, *supra* note 6, at 158 (describing farming as vital to the health of the United States because of the jobs provided through this industry and the money generated). The demanding nature of farming contributes to farmworkers' vulnerable status. See *id.* (highlighting the long hours during harvesting, industry-specific hazards, and immigration-related concerns).

⁸ See *id.* at 162 (providing that although there is not exact data on agricultural employment statistics, as of 2018 there were approximately 2.4 million farmworkers across the United States).

⁹ See 29 U.S.C. § 203(f) (defining agricultural work as inclusive of all forms of agriculture, such as harvesting crops, as well as the rearing animals, lumbering, and all other tasks completed incident to farming). Congress has determined that agriculture is essential to the health of the United States and to sustaining employment rates. See 7 U.S.C. § 1621 (dedicating resources to continued research and investment in farming). Congress intended section 1621 to demonstrate cooperation with the states in addressing agricultural issues. See *P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975) (emphasizing the importance of communication between the United States Department of Agriculture and states when collecting and analyzing farming data). Scholars broadly define agriculture as the cultivation of produce and commodities through biological methods. See Wallace E. Huffman, *Trends, Adjustments, and Demographics, and Income of Agricultural Workers*, 27 REV. AGRIC. ECON. 351, 352 (2005) (describing the changes to agricultural processes due to technological advancement). Within the context of the agricultural exemption of the federal overtime statute, the Department of Labor defines agriculture more narrowly—inclusive of only those who are employed “solely in agriculture.” See *What Is Considered Farm Work?*, CISA, <https://www.buylocalfood.org/what-is-considered->

that in 2019, 22.2 million full- and part-time jobs were connected to both the food and agricultural sectors, composing 10.9 percent of total employment in the United States.¹⁰ The average farmworker works during the harvesting season for approximately thirty-three weeks, rather than year-round.¹¹ During the working seasons, agricultural labor is demanding.¹² Even when farmworkers perfectly till the soil, sow seeds, and apply pest-control products, natural forces such as drought, snow, and heat can spoil the harvest.¹³ Furthermore, even with perfect natural conditions, farmworkers must still harvest, clean, assemble, package, and ship the goods before they decay.¹⁴

Typically, federal law under the FLSA requires certain protections for workers, including minimum wage and overtime compensation.¹⁵ Agricultural

farm-work/ [<https://perma.cc/XTR3-HWJV>] (Jan. 2021) (emphasis omitted) (providing the examples of field laborers, equipment managers, and delivery personnel as included in the exemption).

¹⁰ Econ. Rsch. Serv., *Ag and Food Sectors and the Economy*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> [<https://perma.cc/3SEF-NBD6>] (June 2, 2021). Starting in the 1950s, the demographics of the agricultural industry shifted. See Econ. Rsch. Serv., *Farm Labor*, U.S. DEP'T OF AGRIC., <https://www.ers.usda.gov/topics/farm-economy/farm-labor/> [<https://perma.cc/ET85-9KWR>] (Aug. 18, 2021) (attributing the demographic changes to the influence of technological advancements, reduction in self-employed and family labor, and changes in agricultural work done by employees). Due in part to increasing industrialization, the number of farmworkers has decreased from over nine million in the 1950s to approximately three million in the 2000s. See *id.* (noting that the decline in farmworkers was across both hired employees and familial employees).

¹¹ See FARMWORKER JUST., SELECTED STATISTICS ON FARMWORKERS (2015–16 DATA) 2 (2019), <http://www.farmworkerjustice.org/wp-content/uploads/2019/05/NAWS-Data-FactSheet-05-13-2019-final.pdf> [<https://perma.cc/KJ3G-5SG7>] (noting that farmworkers may work at multiple farms throughout the year, even though they are not working year-round). According to Margaret Sawyer, the average farmworker in Massachusetts works up to sixty hours in the summer season and employers lay off farmworkers in the winter. See Telephone Interview with Margaret Sawyer, *supra* note 1 (stating that farmworkers undertake different jobs in the winter to compensate for the lost income).

¹² See Letter from Michael Flanagan, Dir., Mass. Dep't of Lab. Standards, to Interested Parties 2 (Mar. 13, 2020), <https://www.mass.gov/doc/request-for-comments-critiques-and-suggestions-regarding-agricultural-overtime-opinion-letter-3/download> [<https://perma.cc/GU49-LJK6>] (presenting farming as a risk for farm owners and workers, suggesting that there is a threat of loss at each step of the harvesting process).

¹³ See *id.* (describing the agricultural industry as highly susceptible to the forces of nature).

¹⁴ See *id.* (framing this work as part of the essential duties of farmworkers).

¹⁵ See Joshua A. Duden, *Unreasonable Exemptions: Analyzing the Agricultural Worker Exemptions to Workers' Compensation Laws in Light of Rodriguez v. Brand West Dairy*, 24 DRAKE J. AGRIC. L. 75, 76 (2019) (describing the purpose of these worker protections and their practical function, such as to paying injured employees). Minimum wage protects employees' ability to receive a sufficient wage to support themselves. Cf. H.R. REP. NO. 95-521, at 2 (1977) (increasing the minimum wage to help employees adjust to increased costs of living). Overtime compensation supports employees who work more than the standard workweek and discourages employers from exploiting their employees for arduous working hours. See Autumn L. Canny, *Lost in a Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 364 (2005) (observing that overtime compensation deters employers from forcing employees to work over forty hours in a week because they incur greater labor expenses).

work is distinctive, however, because Congress excludes it from overtime compensation under the FLSA.¹⁶ Congress created the agricultural exemption out of a desire to exclude African American farmworkers from protections otherwise afforded under the FLSA.¹⁷ In modern time, justifications for the exemption have focused on the fact that farming is highly time-sensitive, and that the industry is unpredictable and contingent on nature.¹⁸

Each state has also adopted its own analog to the FLSA, many of which also contain an agricultural exemption that prevents farmworkers from receiving overtime compensation.¹⁹ Massachusetts, the state of concern in this Note, also has an agricultural exemption in its overtime statute.²⁰ The Massachusetts agricultural exemption excludes those employees who work “in agriculture and farming on a farm” from qualifying for overtime compensation if they work over forty hours in a week.²¹ Executive and judicial interpretation of this statute, however, has recently undergone some changes.²² Most notably, in 2019, in *Arias-Villano v. Chang & Sons Enterprises, Inc.*, the Massachusetts Supreme Judicial Court limited the agricultural exemption to farmworkers working in har-

¹⁶ See 29 U.S.C. § 213(b)(13) (exempting agricultural employees from overtime under the FLSA). From the inception of the federal FLSA, the law included an agricultural exemption, and this has remained in the Act to date. See John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 486 (1939) (discussing the inclusive definition of agriculture under the exemption).

¹⁷ See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 114 (2011) (stating that Congress enacted the agricultural exemption with the intention of excluding Black Americans). By including the agricultural exemption, farm owners were able to continue to exploit the labor of predominantly African American farmworkers. See *id.* at 115 (explaining that the agricultural exemption was a way to sustain segregation and the status quo of the South).

¹⁸ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (deducing that agriculture has an increased need for overtime work to ensure produce reaches the market before spoiling and does not lend itself to the traditional forty-hour workweek). Farmers take an annual risk when engaging in the agricultural process because so much of farming is beyond the control of farm owners and workers. See *id.* at 2 (contending that a failure at any point in the process could result in catastrophic loss).

¹⁹ See *State Minimum Wage Laws*, U.S. DEP'T OF LAB. (Sept. 30, 2021), <https://www.dol.gov/agencies/whd/minimum-wage/state> [<https://perma.cc/696Q-T82J>] (listing all state minimum wage and overtime laws as of September 30, 2021).

²⁰ See MASS. GEN. LAWS ch. 151, § 1A(19) (2020) (containing the agricultural exemption).

²¹ *Id.* The Massachusetts legislature enacted the overtime statute thirteen years after the minimum wage laws, and initially, both exempted agricultural workers. See *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 838 (Mass. 2019) (discussing the legislative intent of the overtime statute).

²² See *id.* at 840 (determining that the statutory language and history of the agricultural exemption only entitles farmworkers working in post-harvesting to overtime pay); Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 4 (providing guidance for farmworkers who do both harvesting and post-harvesting work).

vesting.²³ Then, the Massachusetts Department of Labor Standards issued an advisory interpretation expanding upon *Chang & Sons*.²⁴

This Note argues that Massachusetts needs to abolish the agricultural exemption, which unfairly excludes farmworkers from overtime compensation.²⁵ Additionally, this Note contends that legislation, such as the Fairness for Farmworkers Act, is essential to rectifying the historic denial of farmworker labor protections.²⁶ Part I outlines the landscape of overtime compensation for farmworkers, at the federal and state level.²⁷ This Part then discusses the role of the Massachusetts agricultural exemption in the 2019 Massachusetts Supreme Judicial Court case *Chang & Sons* and the 2020 Department of Labor Standards's advisory regarding statutory interpretation of this exemption.²⁸ Part II focuses on the legislative intent of the Massachusetts agricultural exemption, the practical effects of the exemption, and highlights the New York overtime statute as a useful reference point for state-level reforms to provide overtime protections to farmworkers.²⁹ Part III argues that the Massachusetts legislature should abolish the agricultural exemption to rectify the Department of Labor Standards's interpretation of the agricultural exemption in light of *Chang & Sons*.³⁰ This Part asserts that the department's advisory undermines the central motivation of *Chang & Sons* and that, instead, the legislature should act to better protect farmworkers in Massachusetts.³¹

²³ See 118 N.E.3d at 840 (maintaining a narrow definition of farming under the statute to allow for overtime compensation for workers engaged in post-harvesting).

²⁴ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 4 (constructing a procedure for determining whether a farmworker who does both harvesting and post-harvesting should receive overtime compensation).

²⁵ See *infra* notes 213–258 and accompanying text. Massachusetts law defines an agency advisory ruling as an opinion issued by the agency at the request of an interested party. See MASS. GEN. LAWS ch. 30A, § 8 (2020) (noting that agencies need not comply with the regulation requirements when issuing an advisory). The Department of Labor Standards issued the advisory opinion at the request of effected parties. See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (responding to the *Chang & Sons* holding and answering the question of whether farmworkers who do both harvesting and post-harvesting qualify for overtime compensation).

²⁶ See H. 1979, 192d Gen. Ct., Reg. Sess. (Mass. 2021) (containing a petition to grant overtime pay to seasonal farmworkers); S. 1205, 192d Gen. Ct., Reg. Sess. (Mass. 2021) (petitioning for fair labor conditions for farmworkers); FAIRNESS FOR FARMWORKERS COAL., THE FRUITS OF THE PAST: THE UNFAIR CONSEQUENCES OF EXCLUDING MASSACHUSETTS FARMWORKERS FROM STATE LABOR LAW PROTECTIONS AND HOW THE FAIRNESS FOR FARMWORKERS ACT WILL REMEDY THAT INJUSTICE 4 (Aug. 2021), <https://www.masslegalservices.org/system/files/library/ResearchPaper.pdf> [<https://perma.cc/GV2N-86A3>] [hereinafter FAIRNESS FOR FARMWORKERS COAL.] (emphasis omitted) (emphasizing that the Fairness for Farmworkers Act supports the hard work and importance of farmworkers).

²⁷ See *infra* notes 32–142 and accompanying text.

²⁸ See *infra* notes 107–142 and accompanying text.

²⁹ See *infra* notes 143–212 and accompanying text.

³⁰ See *infra* notes 213–258 and accompanying text.

³¹ See *infra* notes 213–258 and accompanying text.

I. OVERTIME COMPENSATION, AGRICULTURAL EXEMPTION, AND THE EVOLVING LANDSCAPE OF FARM WORKERS' RIGHTS

Both the federal and state legislatures designed the FLSA and its state analogs to provide labor protections to employees who would otherwise be susceptible to exploitation.³² The agricultural exemption is an exception to this standard.³³ Consequently, farmworkers are at a greater risk for exploitation.³⁴ Due to their vulnerable position, farmworkers are often reluctant to enforce their rights.³⁵ In response, there are growing organizational resources and legislative responses that aim to expand the protections available to farmworkers.³⁶ Section A of this Part details the federal overtime statute alongside simi-

³² See Alonso Cano, *Planting the Seeds for Change: Protecting Washington's Most Vulnerable Workers*, 15 SEATTLE J. SOC. JUST. 193, 207–08 (2016) (addressing the FLSA as a sweeping piece of legislation meant to institute minimum requisites for health, safety, and well-being of employees); see, e.g., *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 839 (Mass. 2019) (describing the Massachusetts legislature as seeking to create comparable minimum wage and overtime statutes as the FLSA in the state statutes).

³³ See Cano, *supra* note 32, at 208 (maintaining that the exemption of farmworkers from the labor protections of the FLSA harms farmworkers and, potentially, places them in a precarious financial position). In some circumstances, farm owners can exclude workers from both overtime compensation and the minimum wage. See *id.* at 208–09 (including the FLSA exemption for minimum wage for farmworkers that work fewer “than 500 ‘man-days’” over three consecutive months). This means that under federal law, there are situations where farmworkers receive neither overtime nor minimum wage due to employer scheduling. See *id.* (using the example that a farm employing workers full-time from June to August would not have to pay its employees minimum wage because they would not put in 500-man days in a calendar quarter).

³⁴ See Guild & Figueroa, *supra* note 6, at 161, 164 (positing that farmworkers are also in a precarious position due to arduous work conditions and (potentially) their immigration status). In addition to farmworkers' exemption from overtime compensation, Congress also excluded these workers from many occupational sanitary provisions, including protections from unguarded machinery and ladder safety standards. See *id.* at 177 (citing 29 C.F.R. § 1928.21 (2021)) (discussing the pervasiveness of agricultural exceptionalism across labor laws); § 1928.21 (excluding agriculture from most occupational safety and health standards).

³⁵ See Guild & Figueroa, *supra* note 6, at 161 (stating that farmworkers fear employer retaliation if they speak out about labor conditions).

³⁶ See Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 497 (2004) (describing the social and political landscape affecting migrant workers in the United States). Among the organizational resources that assist farmworkers are workers centers, which are advocacy organizations that span across industries and seek to protect the rights of low-income workers. See Rebecca J. Livengood, *Organizing for Structural Change: The Potential and Promise of Workers Centers*, 48 HARV. C.R.-C.L. L. REV. 325, 325 (2013) (discussing the role of workers centers in three cities in the United States). Because the National Labor Relations Act (NLRA) of 1935 excludes farmworkers from coverage, meaning that the NLRA does not protect farmworkers from employer retaliation for attempted unionization, workers centers provide a less risky alternative. See 29 U.S.C. § 152(3) (excluding farmworkers from the statutory definition of “employee”); Livengood, *supra*, at 335 n.62 (maintaining that workers centers are not a form of collective organizing). Under the NLRA, an employee is employed by an employer, exempting specific types of employees, including agricultural workers, housekeepers, freelancers, supervisors, those working for immediate family, and those employed under the Railway Labor Act. 29 U.S.C. § 152(3).

lar state schemes, specifically focusing on Massachusetts and New York.³⁷ Section B outlines the 2019 Massachusetts Supreme Judicial Court case *Arias-Villano v. Chang & Sons Enters., Inc.*, and its influence on the agriculture exemption of the Massachusetts overtime statute.³⁸ Section C discusses the Massachusetts Department of Labor Standards's advisory issued in response to the *Chang & Sons* decision.³⁹

A. History of Overtime Statutes and the Agricultural Exemption at the State and Federal Level

Congress enacted the FLSA as a national baseline for labor standards and overtime compensation.⁴⁰ The FLSA has its origins in President Roosevelt's New Deal and the National Industrial Recovery Act (NIRA).⁴¹ Both attempted to assert legislative control on labor conditions in response to the challenges of the Great Depression.⁴² Today, the FLSA has retained much of the same struc-

³⁷ See *infra* notes 40–106 and accompanying text.

³⁸ See *infra* notes 107–128 and accompanying text.

³⁹ See *infra* notes 129–142 and accompanying text.

⁴⁰ See 29 U.S.C. §§ 201–219 (containing the FLSA in its entirety); *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/FJ7M-73TG>] (providing for national minimum wage, overtime compensation, and recordkeeping standards for private businesses and in government). The FLSA established guidelines for payment and working conditions, but also contains some exceptions for specific types of work that Congress deemed incompatible with the established standards. See *Handy Reference Guide to the Fair Labor Standards Act*, U.S. DEP'T OF LAB. (Sept. 2016), <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa> [<https://perma.cc/YV6H-HFKF>] (noting that wage is due for work completed during the standard workday and that overtime compensation applies for work done more than the standard forty-hour workweek). The FLSA divides the exemption into three categories: exemptions for overtime compensation and minimum wage together, for overtime pay alone, and partial overtime compensation exemptions—there are exemptions for farmworkers in both the first and second categories. See *id.* (providing that the legislature intended for employers to read the exemptions narrowly).

⁴¹ See Canny, *supra* note 15, at 362 (noting that the National Industrial Recovery Act (NIRA) was one of the initial laws of the New Deal). The NIRA established work programs and associations to develop minimum wage and workweek standards among industries. See *id.* (stating that President Roosevelt intended for the NIRA to institute wage and maximum hour protections for those in farming and manufacturing work). President Roosevelt designed the NIRA to inhibit exploitative and oppressive workplace environments. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 549 (1935) (describing Congress's perceived intentions with the NIRA).

⁴² See Canny, *supra* note 15, at 363–64 (providing that the FLSA built upon the NIRA's goals of fair competition and labor regulation). In 1935, in *Schechter Poultry*, the Supreme Court held that the NIRA was unconstitutional, and Congress began creating the FLSA. See *id.* at 363–64 (explaining that President Roosevelt sought legislation that regulated fair competition within the bounds of the Commerce Clause); *Schechter Poultry*, 295 U.S. at 550 (describing the scope of the Commerce Clause). The FLSA satisfies Commerce Clause requirements in its regulation of interstate commerce. See U.S. CONST. art. I, § 8, cl. 3 (governing Congress's ability to control interstate commerce); Canny, *supra* note 15, at 364 (describing Congressional intent to regulate interstate commerce by inhibiting harmful workplace conditions).

ture and underlying motivations as when Congress enacted it during the New Deal era.⁴³

Overtime compensation refers to the payment that employees are legally entitled to when they work for more hours than the legal workweek.⁴⁴ The FLSA contains exempt occupations for minimum wage and overtime compensation, including an agricultural exemption.⁴⁵

Massachusetts' overtime law provides protections comparable to the FLSA.⁴⁶ And like the FLSA, the Massachusetts law also contains an agricultural exemption, which excludes farmworkers from the overtime mandate.⁴⁷ Nonetheless, there are distinct differences between the two statutes regarding how they define the scope of the exemption, and thus, how they affect employees.⁴⁸

Federal law typically preempts state law when a conflict arises because federal law reigns supreme.⁴⁹ Nevertheless, federal law does not preempt state

⁴³ See Canny, *supra* note 15, at 364 (presenting the FLSA as an effort by Congress to reduce harmful workplace conditions and to remove barriers to employees receiving a sufficient wage).

⁴⁴ See 29 U.S.C. § 207(a)(1) (defining overtime compensation under the FLSA as paid at a rate of at least one and a half times the standard pay rate for hours worked past a forty-hour workweek).

⁴⁵ See *id.* § 213 (exempting specified occupations from the FLSA minimum wage, maximum hour, and child labor provisions, without providing alternative rules for the statutory treatment of these employees). Some employees excluded from receiving overtime under the FLSA include “any employee engaged in agriculture,” “seaman,” and “domestic service” employees. See *id.* (including some exemptions that apply to both minimum wage and maximum hours and others that apply exclusively to maximum hours). The FLSA describes the overtime provision using the phrase “[m]aximum hours” because of the workweek limits the statute places on employers. See *id.* § 207 (mandating that once a covered employee works longer than forty hours in a workweek, they are due overtime compensation).

⁴⁶ See *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 839 (Mass. 2019) (noting there are parallels between the Massachusetts statute and the FLSA because the state legislature used the FLSA as a model, but that the state employs a different definition of agriculture).

⁴⁷ See *id.* (stating that although the legislature modelled the Massachusetts law after the FLSA, the legislative history does not indicate that the legislature intended the agricultural exemption to be the same as the FLSA's).

⁴⁸ See *id.* (adding that the legislature intended for the Massachusetts overtime statute to have narrower exemptions than the FLSA). Compare 29 U.S.C. § 203(f) (defining “[a]griculture” as inclusive of activities directly related to farming and agriculture, as well as those tasks completed in relation to farming or by a farmer), with MASS. GEN. LAWS ch. 151, § 1A(19) (2020) (defining agriculture workers as those who work “in agriculture and farming on a farm”).

⁴⁹ See U.S. CONST. art. VI, § 2 (stating that federal law and the Constitution have primary control of the legal landscape in the United States when this conflicts with state laws). Cases such as *McCulloch v. Maryland* and *Gibbons v. Ogden* stand for the principle that the federal government has the constitutional ability to regulate interstate commerce and that state laws cannot inhibit Congress's ability to exercise these constitutionally allotted powers. See *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1, 211 (1824) (determining that federal law controls if there are conflicting state and federal laws pertaining to interstate commerce); *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 406 (1819) (positing that through the Constitution, federal law is the “supreme law” and that states cannot limit the power of Congress).

law when state law is equally or more protective than the federal law.⁵⁰ Accordingly, a state can provide more protections than those outlined by the FLSA.⁵¹ This means that although the FLSA does not require overtime compensation for farmworkers, a state can require this payment.⁵² Sub-section 1 of this Section outlines the FLSA, which serves as a backdrop to explore the policy rationales behind the state approaches.⁵³ Sub-section 2 assesses the state overtime compensation schemes of Massachusetts and New York and their different stances on the agricultural exemption.⁵⁴

1. Federal Level: The Fair Labor Standards Act (FLSA)

Congress passed the FLSA in 1938 to protect workers from exploitation following the Great Depression.⁵⁵ In its initial conception, the Congressional Fair Labor Standards Board (the Board) set limited fair wage and workweek standards.⁵⁶ The intent was to inhibit products developed in exploitative environments from reaching the market, while also not handcuffing employers from engaging in standard business practices.⁵⁷ Ultimately, the FLSA enacted

⁵⁰ Cf. 29 U.S.C. § 218 (providing that the FLSA does not preempt state laws that are more protective than the FLSA baseline). Under the doctrine of federalism, state and the federal governments recognize the authority of each other and engage in governmental actions jointly. See *Federalism*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing that under federalism, regional governments also interact with the state and federal system). The FLSA's relationship to state laws enables states to establish higher minimum wages than those contained in the FLSA. See 29 U.S.C. § 206 (containing the national minimum wage of \$7.25 per hour); MASS. GEN. LAWS, ch. 151, § 1 (2020) (setting the Massachusetts a \$13.50 per hour minimum wage). But see MASS. GEN. LAWS, ch. 151, § 2A (establishing an eight-dollar hourly minimum wage for Massachusetts farmworkers).

⁵¹ See 29 U.S.C. § 207(r)(4) (providing that Congress designed the FLSA as a floor for coverage, thereby permitting states to devise more protective legislation).

⁵² See *id.* § 213(b)(13) (exempting all farmworkers from overtime compensation under the FLSA); Gosia Wozniacka, *Less Than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIV. EATS (June 23, 2020), <https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/> [<https://perma.cc/E6GB-ZEHS>] (explaining that states are starting to pass laws that abolish their agricultural exemptions and, therefore, permit farmworkers to receive overtime pay).

⁵³ See *infra* notes 55–78 and accompanying text.

⁵⁴ See *infra* notes 79–106 and accompanying text.

⁵⁵ See Ann K. Wooster, Annotation, *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. Fed. 507 § 2(a) (2004) (noting that Congress utilized the FLSA to ameliorate the widespread poverty and economic downturn of the time). The FLSA prescribes the federal laws for wage, hour, and child labor. See Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 19 (2000) (drawing on the legislative history of the FLSA to assess power dynamics and the Act's overall fairness).

⁵⁶ See Forsythe, *supra* note 16, at 466 (providing that Congress intended the FLSA to be flexible and that the Congress designed the wage and hour standards to be minimally restrictive on employers).

⁵⁷ See *id.* (stating that Congress prohibited the Board from instituting a minimum wage that was greater than eighty cents an hour, not including compensation from overtime work). As the FLSA reached Congress and President Roosevelt, it underwent several changes, including the addition of a statutory requirement for one and one-half times normal pay-rate compensation for workweeks greater

minimum wage, overtime compensation, recordkeeping standards, and restrictions on child employment across sectors.⁵⁸ The FLSA overtime provision requires employers to pay employees overtime for work completed beyond the forty hour workweek at a rate of, at a minimum, time and a half the normal pay rate.⁵⁹ States are able to provide additional protections and offer overtime for employees excluded by the FLSA.⁶⁰

Prior to reaching Congress for a vote, the FLSA's drafters included in the statute an agricultural exemption for overtime compensation.⁶¹ This exemption

than forty-four hours. *See id.* at 473 (detailing that in its initial composition the FLSA contained a wage and hour scale that increased compensation and decreased number of hours in the workweek over the span of three years). Additionally, Congress designed the statute's exemptions to restrict the FLSA's scope. *See id.* (noting that some exemptions, like the agricultural exemption were explicit, whereas others depended on the regulation of an agency). In part, Congress developed the agricultural exemption following pressure from lobbyists and farm-owning legislators, who maintained that the agricultural industry was not conducive to overtime compensation or minimum wage. *See Canny, supra* note 15, at 367 (stating that lobbyists expressed concerns that agricultural producers could not financially sustain these wage provisions). Other factors that influenced the exemptions included Congress's desire to appease Southern lawmakers who wanted to exclude Black Americans, many of whom worked as farmworkers, from the FLSA's protections. *See id.* at 366–67 (explaining that to accommodate lawmakers' desires, the FLSA framed agriculture as intrastate and outside the scope of the Commerce Clause).

⁵⁸ *See Wages and the Fair Labor Standards Act, supra* note 40 (establishing the federal overtime rate as at least one and one-half times the regular pay-rate for work completed in excess of the standard forty-hour workweek).

⁵⁹ *See* 29 U.S.C. § 207(a)(1) (providing the standard overtime for employees working in some form of commerce); *Overtime Pay*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/overtime> [<https://perma.cc/XWF9-AQFG>] (providing that a workweek is seven consecutive twenty-four-hour terms, or 168 hours). The department notes that employees may develop a different workweek structure, with some conditions. *See Overtime Pay, supra* (stating that employers do not need to utilize the standard calendar week, but they cannot average employee hours over two or more weeks). The exemptions for minimum wage and maximum hour requirements include an agricultural exemption that apply to employees for employers who did not use over five hundred man-days in the past calendar year if the employee is a family member of the employer, is paid on a piece rate basis, or is under sixteen years old, or if the employee primarily works in livestock production. *See* 29 U.S.C. § 213(a)(6) (containing a broader list of exemptions that resemble those for overtime compensation); *see also id.* § 203(u) (defining man-days as days in which farmworkers complete at least one hour of work).

⁶⁰ *See* 29 U.S.C. § 218 (supplying that for states that have enacted their over overtime laws, employees are subject to both the state law and the FLSA, with the more protective standard applying). If the FLSA excludes a form of employment from overtime pay, the state may enact its own laws that qualify this form of employment for overtime. *See Wozniacka, supra* note 52 (noting that the California and New York legislatures have both acted to include farmworkers under state labor laws despite the agricultural exemption in the FLSA). A similar proposition applies for minimum wage laws. *See* 29 U.S.C. § 206 (establishing mandatory minimum wage for all employees unless they fall into an exemption).

⁶¹ *See* 29 U.S.C. § 203(f) (defining “[a]griculture” as inclusive of all branches of cultivation, such as dairying, harvesting, horticulture, beekeeping, and rearing animals for food and fur, animals used for food); *see also* Forsythe, *supra* note 16, at 486 (detailing the entirety of Congress's definition changes for “agriculture” leading up to the enactment of the FLSA). The FLSA definition underwent several iterations; initially, “agriculture” included all branches of farming and actions taken in conjunction with agricultural practices. *See Maneja v. Waiialua Agric. Co.*, 349 U.S. 254, 260 (1955) (citing S. 2475, 75th Cong., 1st Sess. (1937) (enacted)). Congress then broadened the definition to include steps

is attributable to compromises made to Southern legislators who felt that the Southern economy depended on the continued exploitation of African American farmworkers.⁶² Additionally, farm owners and agricultural employers historically have possessed significant political power.⁶³ Through their political influence, agricultural industry groups have enabled the agricultural exemption to persist today.⁶⁴

In its original form, the agricultural exemption excluded only work done by a farmer from the overtime compensation requirement.⁶⁵ On the Senate floor, Congress amended the definition of agriculture in 1937 to account for work completed on a farm not done by a farmer's hands.⁶⁶ This definition created two categories of agricultural work—work traditionally deemed farming, and work that is not traditional farming but are incidental to it.⁶⁷ In 1949, in *Farmers Reservoir & Irrigation Co. v. McComb*, the Supreme Court characterized these two categories as primary and secondary agriculture.⁶⁸ Primary agri-

taken to prepare the produce and deliver the products to market. *See id.* (making it so that the agricultural exemption excluded most everyone who worked in agriculture in some capacity).

⁶² *See* Perea, *supra* note 17, at 102 (noting that during the 1930s, when Congress passed the FLSA, Southern lawmakers uniformly voted in opposition to changes to segregation laws and the status quo). The exemption of agricultural and domestic workers resulted in the exclusion of many Black Americans, and therefore, the preservation of Jim Crow laws. *See id.* (noting that the exclusion of these workers extended beyond the FLSA to the Social Security Act of 1935 and the National Labor Relations Act of 1935).

⁶³ *See* Guild & Figueroa, *supra* note 6, at 160 (dating this relationship back to the 1890s when Congress intervened during agricultural labor shortages to provide workers). In addition to having congressional support, the existence of the U.S. Department of Agriculture (USDA), a federal agency that works to support and bolster agricultural production in America, has also advanced the interests of agricultural employers. *See id.* (noting that the USDA first came into existence in the late-1800s); *About the U.S. Department of Agriculture*, U.S. DEP'T OF AGRIC., <https://www.usda.gov/our-agency/about-usda> [<https://perma.cc/HB2Q-24PX>] (providing that the purpose of the USDA is to support the economic growth of rural America and national agriculture).

⁶⁴ *See* Guild & Figueroa, *supra* note 6, at 160 (maintaining that these employers and businesses are engaged in political discussions through industry groups like the American Farm Bureau Federation). The American Farm Bureau Federation is composed of farm owners and ranchers and advocates for the protection and promotion of farming. *See* *About*, FARM BUREAU, <https://www.fb.org/about/overview> [<https://perma.cc/F2VH-YEPM>] (noting that today, the Farm Bureau focuses its lobbying on sustainable production of food and commodities).

⁶⁵ *See* *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 767 (1949) (noting Senate objections to this narrow definition because the additional workers on a farm that are not “farmers”). Senators also raised concern that this definition was too narrow because it did not include other forms of agriculture, such as canning goods or fishing. *See* Canny, *supra* note 15, at 371 (addressing how this narrow definition posed loopholes around the exemption and how senators desired a more specific and inclusive definition).

⁶⁶ *See* *McComb*, 337 U.S. at 767 (providing that Congress amended the definition to account for wheat threshing companies with whom farmers contracted).

⁶⁷ *See* Canny, *supra* note 15, at 372 (synthesizing the history of the agricultural exemption).

⁶⁸ 337 U.S. at 762–63 (describing primary agriculture as harvesting work and secondary agriculture as post-harvesting work).

culture pertains to all forms of farming, such as cultivation of crops.⁶⁹ Secondary agriculture includes work that is not farming, but is essential to it, like preparing goods for market.⁷⁰

Today, the scope of the agricultural exemption under the FLSA is still far from clear.⁷¹ For example, the U.S. District Court for the Northern District of Iowa articulated a two-prong test to determine if a farmworker falls into the agricultural exemption.⁷² First, is the employee involved in primary agriculture?⁷³ If so, they are exempt from overtime compensation under the FLSA.⁷⁴ Second, if the answer to the first question is no, the court must determine whether the employee works in secondary forms of farming.⁷⁵ If so, they are excluded from the FLSA's overtime pay requirement.⁷⁶ If the answer to both the previous questions is no, however, then the employee does not fall within the scope of the agricultural exemption.⁷⁷ Despite these clarifying attempts, the

⁶⁹ See *id.* at 762 (characterizing primary agriculture as literal acts of farming). Primary agriculture specifically pertains to growing and cultivation practices. See *id.* at 762–63 (describing primary agriculture in the context of its technical FLSA definition as all forms of farming).

⁷⁰ See *id.* at 763 (using secondary agriculture to recognize those actions incidental to farming). Secondary agriculture refers to actions taken in concert with farm labor. See 29 C.F.R. § 780.105 (2021) (including actions that are not, on their own, farming).

⁷¹ See Canny, *supra* note 15, at 379 (citing *Jimenez v. Duran*, 287 F. Supp. 2d 979, 985 (N.D. Iowa 2003)) (noting that constructing a test for the exemption is a challenging task for the courts). The test today is more convoluted than the historical assessment because agriculture has evolved and became more complex. See *id.* at 379–80 (contrasting the current test with the historical assessment). Historically, courts used a narrow test to determine the applicability of the agricultural exemption: if the employee does not work for a farmer or if the employer does not own the farm, then the exemption does not apply to the worker. See *id.* at 380 (including features to consider when using this assessment today, such as farm size, employment numbers, and the relationship between the employees' work and traditional farming tasks).

⁷² See *id.* at 380. (presenting a manageable test for determining the applicability of the agricultural exemption).

⁷³ See *id.* (defining agriculture as traditional farming activities). Primary agriculture includes tasks such as propagating, plowing, and harvest taken from the FLSA definition of "agriculture" directly pertaining to farming practices. 29 C.F.R. § 780.105.

⁷⁴ See Canny, *supra* note 15, at 380 (citing *Jimenez*, 287 F. Supp. 2d at 985) (providing primary agriculture as the first threshold for inclusion under the agricultural exemption).

⁷⁵ See *id.* at 381 (referring to tasks "incidental to" farming). Secondary agriculture is a more expansive category because it extends beyond what one would traditionally consider farming. See *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996) (defining the scope of the agricultural exemption of the FLSA). Both the Court and the Department of Labor acknowledge the challenge of distinguishing activities that are within the scope of secondary agriculture as part of farm operations and those that are not. See *id.* at 408 (citing 29 C.F.R. § 780.144 (2021)) (addressing the differences among covered activities and non-covered activities as inaccessible to define).

⁷⁶ See Canny, *supra* note 15, at 381 (providing secondary agriculture as the second threshold for inclusion under the agricultural exemption).

⁷⁷ See *id.* (noting that an employee may still fall under another exemption to the FLSA); *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T LAB., <https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture> [<https://perma.cc/2G8J-D75H>] (Jan. 2020) (providing a general guide to the FLSA agriculture exemption, as it stands today). The FLSA may also exempt a farmworker from minimum wage in certain situations, such as if they are immedi-

evolving nature of the agricultural industry has expanded the definition of “agriculture,” and resulted in an increase in the number of excluded workers.⁷⁸

2 State-Based Approaches to Overtime Protection: Massachusetts and New York

Each state either has its own minimum wage and overtime laws or adopts the FLSA.⁷⁹ In the context of overtime laws, when there are differences in coverage between the FLSA and a state law, whichever law is more favorable to the employee applies.⁸⁰ Section a of this Part discusses the Massachusetts overtime statute and the agricultural exemption, with particular focus on the legislative intent behind the exemption.⁸¹ Section b summarizes New York’s Farm Laborer Fair Laborer Practices Act (FLFLPA) as an example of state abolition of the agricultural exemption.⁸²

a. Massachusetts Overtime Pay and Excluded Employees: Chapter 151, Section 1A of the Massachusetts General Laws

In the 1960s, the Massachusetts legislature enacted the overtime statute as a way to provide expansive labor protections and tackle poverty and economic hardship.⁸³ Although the statute initially only contained a minimum wage re-

ate family with the farm owner. *See id.* (providing a list of situational exemptions for minimum wage and overtime provisions). Otherwise, employers must pay farmworkers at least the minimum wage. *See id.* (noting that there are limited exceptions to the federal minimum wage law that affects coverage for farmworkers); Guild & Figueroa, *supra* note 6, at 169 (asserting that although the FLSA does ensure minimum wage laws for most farmworkers, those who are employed on small farms are particularly susceptible to exemption from these protections).

⁷⁸ *See Canny, supra* note 15, at 385 (arguing that the Congress needs to make changes to the FLSA’s treatment of farmworkers to address the growing strains that farmworkers are facing due to their exclusion). The agricultural industry is prominent in rural areas, where those most affected by the agricultural exemption are predominantly migrant workers and people of color. *See id.* (demonstrating that not only does this exemption harm the employees and their families, but the community’s economy because of the strain on resources and social services).

⁷⁹ *See State Minimum Wage Laws, supra* note 19 (providing that four states utilize the FLSA alone, and that forty-six states have some form of minimum wage and overtime laws). On a more granular level, of the states with their own overtime and minimum wage laws, some calculate overtime compensation based on hours worked in a day and hours worked in a week, whereas others determine overtime using solely hours worked in a week. *See id.* (noting that Alaska, California, Colorado, and Puerto Rico designate overtime compensation based on daily hours).

⁸⁰ *See* 29 U.S.C. § 218 (explaining that whichever overtime law will provide higher compensation to the employee is the applicable overtime standard). The more employee-favorable overtime standard allows states to depart from the federally established minimum wage, which provides a baseline standard. *See State Minimum Wage Laws, supra* note 19 (providing the applicable federal and state labor laws in each state).

⁸¹ *See infra* notes 83–96 and accompanying text.

⁸² *See infra* notes 97–106 and accompanying text.

⁸³ *See Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 839 (Mass. 2019) (discussing that the legislature’s intention was to ensure overtime was available for employees not protected

quirement, the legislature added the overtime provision in 1960 at the urging of the Governor.⁸⁴ In 1967, the legislature reformed the wage and hour statute by instituting minimum wage for farmworkers as a way to account for the interests of migrant workers.⁸⁵ The legislature was concerned that farmworkers' annual incomes were often less than the poverty level because of their seasonal work.⁸⁶ At the same time, the legislature sought to protect the interests of local farm owners, who wanted to avoid increased labor costs.⁸⁷ To balance the in-

by the FLSA); Brief for the American Civil Liberties Union of Massachusetts et al. as Amici Curiae Supporting Plaintiffs-Appellants at 14, *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835 (Mass. 2019) (No. SJC-12548), 2018 WL 5489620 [hereinafter *Amici Brief for the ACLU*] (citing S. REP. NO. 1303, 165th Gen. Court, Reg. Sess. (Mass. 1967)) (noting that this reform ensured that migrant farm labor facilities allow for freedom of movement, visitation, and other opportunities to prevent worker exploitation). The Massachusetts State Senate was particularly concerned with the financial stability of migrant farmworkers. See *Consol. Cigar Corp. v. Dep't of Pub. Health*, 364 N.E.2d 1202, 1208 (Mass. 1977) (including that the institution of minimum wage for farmworkers served to promote economic security).

⁸⁴ See *Swift v. AutoZone, Inc.*, 806 N.E.2d 95, 99–100 (Mass. 2004) (noting that the Legislature first contemplated adding the overtime provision in 1958). At the time of enactment in 1949, the minimum wage law did not contain a provision for overtime compensation. See *id.* (noting the legislature contemplated the overtime statute starting in 1958).

⁸⁵ See *Chang & Sons*, 118 N.E.3d at 838 (first citing MASS. GEN. LAWS ch. 432 (1947); then citing *id.* at ch. 813 (1960)) (noting that the legislature enacted the minimum wage in 1947 and overtime in 1960, both of which excluded domestic service and farm labor). A legislative report describing the economic hardships migrants and farmworkers faced due to the lack of protections currently in place informed the 1967 legislation. See *Amici Brief for the ACLU*, *supra* note 83, at 14 (describing concerns that farm laborers and migrant workers would inevitably live in poverty due to the nature of the work and lack of state or federal legal protections in place).

⁸⁶ See *Chang & Sons*, 118 N.E.3d at 839 (citing S. REP. NO. 1303, 165th Gen. Court, Reg. Sess. (Mass. 1967)) (noting that many farm laborers work for about six months out of the year). Because agriculture is seasonal, most farmworkers work around 150 days in a year, meaning they have a predictable source of income for approximately five months. See JEANNETTE WICKS-LIM, POL. ECON. RSCH. INST., ESTIMATES OF THE POTENTIAL COSTS AND BENEFITS OF EXTENDING OVERTIME PAY ELIGIBILITY TO ALL FARMWORKERS IN MASSACHUSETTS 9 (2020), <https://peri.umass.edu/publication/item/1300-estimates-of-the-potential-costs-and-benefits-of-extending-overtime-pay-eligibility-to-all-farmworkers-in-massachusetts> [<https://perma.cc/URC9-FSE5>] (explaining that the farmworkers' part-time work leads them to earn less annually, contributing to higher rates of poverty). For the remainder of the year, farmworkers must find other employment. Telephone Interview with Margaret Sawyer, *supra* note 1. The Massachusetts law attempted to remedy legislative concerns about farmworker welfare by instituting minimum wage and workplace inspections for migrant farming facilities. See *Chang & Sons*, 118 N.E.3d at 839 (describing chapter 151, section 1A of the Massachusetts General Laws as a response to the vulnerable position of farmworkers, whom Congress did not include under the FLSA minimum wage at the time, and as a corrective measure for the narrower protections afforded in the FLSA). Within the context of section 1A, the inspection applies to farm labor camps—facilities where workers are both employed and housed. See *Consol. Cigar Corp.*, 364 N.E.2d at 1206 (acknowledging that the legislature intended the 1967 reforms to “insulate” laborers from the historical exploitation that existed under these employment conditions).

⁸⁷ See *Chang & Sons*, 118 N.E.3d at 839 (stating that farm owners had an interest in keeping costs low for employees and avoiding overtime pay because they viewed the forty-hour workweek as incompatible with the agriculture industry). The agricultural exemption was part of the 1967 remedial measure dubbed “An act establishing minimum wage for farm workers and providing for the annual inspection of farm labor camps.” *Id.* at 838 (quoting MASS. GEN. LAWS ch. 718 (1967)).

terests of the farm owners and farmworkers, the legislature exempted farmworkers from the overtime provision because of the time-sensitive nature of harvesting.⁸⁸ According to the legislature, agriculture is not conducive to a forty-hour workweek.⁸⁹ Consequently, although minimum wage and overtime allowed most workers to earn greater income, the agricultural exemption kept farmworkers from achieving the same pay increase.⁹⁰

Generally, Massachusetts employees who work more than forty hours in a week are due overtime compensation at time and a half their standard pay.⁹¹ Although there are similarities between the FLSA and Massachusetts statute, the legislature designed chapter 151, section 1A of the Massachusetts General Laws to provide greater coverage than the FLSA.⁹² As such, the Massachusetts overtime statute's agricultural exemption is narrower than the FLSA's.⁹³ The statute only exempts workers that are exclusively involved in agriculture and farming (harvesting), rather than farmworkers engaged in harvesting and post-harvesting.⁹⁴ Therefore, in Massachusetts, a farmworker involved in post-

⁸⁸ See *id.* at 839 (reporting that farm owners believed that paying farmworkers overtime was debilitating because farming requires long hours due to the time-constraints of harvesting ripe produce). Farm owners raise similar arguments today as those from when the Massachusetts legislature passed the overtime statute. See Wozniacka, *supra* note 52 (stating farm owners' object to paying farmworkers overtime because it will result in an economic burden).

⁸⁹ See *Chang & Sons*, 118 N.E.3d at 839 (noting that overtime compensation for farmworkers could discourage farmers from harvesting the entirety of the yield, harming the business of Massachusetts farmers).

⁹⁰ See Amici Brief for the ACLU, *supra* note 83, at 15 (contending that the agricultural exemption left farmworkers at risk for exploitation, despite their inclusion under state minimum wage laws).

⁹¹ See MASS. GEN. LAWS ch. 151, § 1A (2020) (setting the standard overtime rate and containing twenty exemptions). The law declares that overtime compensation must be at least half the regular pay rate and that commissions, bonuses, and other forms of incentive payments do not count toward overtime. *Id.* The statute limits the payment of overtime to employees of an occupation contained in chapter 151, section 2 of the Massachusetts General Laws. See *id.* § 2 (containing the definitions for the Massachusetts minimum wage and overtime statutes). Section 2 defines "[o]ccupation" as a form of employment at a business that is for profit, but does not include agriculture or farm work; work at charitable organizations that are academic, religious, or rehabilitative in nature; seasonal work at religious summer camps; professional service work; or work completed by an employee who routinely sells products outside of their place of business and did not report to their employer on a daily-basis. *Id.* Section 2 defines "[a]griculture and farm work" as work on a farm and activities related to cultivating and picking crops, flowers, and plants. *Id.*

⁹² See *Chang & Sons*, 118 N.E.3d at 839 (comparing chapter 151, section 1A of the Massachusetts General Laws with the FLSA and assessing the legislative intent of each).

⁹³ See Amici Brief for the ACLU, *supra* note 83, at 8 (describing the FLSA as it compares to the Massachusetts agricultural exemption).

⁹⁴ See *id.* (containing the ACLU's textual analysis of the Massachusetts statute and the FLSA). The ACLU argues that that the language of the overtime statute requires a narrow construction that limit its scope to farmworkers who engage in harvesting exclusively. See *id.* (drawing on the Massachusetts legislature's intentions). By comparison, the FLSA exemption applies to work that is incident to farming and all forms of agriculture. See 29 U.S.C. § 203(f) (containing the FLSA definition of agriculture). This includes harvesting activities, as well as the post-harvesting of the products. See *id.* (defining agriculture broadly to encompass work done throughout the agricultural production process).

harvesting, such as packaging, is not exempt from overtime compensation.⁹⁵ Under both statutes, farmworkers engaged in harvesting, such as picking crops, are exempt from receiving overtime pay.⁹⁶

b. New York's Overtime Statute and the Changing Landscape for Agricultural Workers

At present, forty-four states include an agricultural exemption in their overtime statute, and six states have removed such an exemption.⁹⁷ In 2019, New York enacted the Farm Laborer Fair Labor Practices Act (FLFLPA), becoming one of the six states that no longer includes an agricultural exemption in their overtime statutes.⁹⁸

The Massachusetts statute, in contrast, covers only works on a farm, such as the picking of crops and cultivating of commodities. *See* MASS. GEN. LAWS ch. 151, § 2 (defining agriculture according to chapter 151, section 1A(19) of the Massachusetts General Laws). A commodity is a product, type of produce, or raw material used for commerce. *Commodity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁹⁵ *See* ch. 151, § 1A(19) (describing the agricultural exemption as applying to farmworkers who work on a farm); *Chang & Sons*, 118 N.E.3d at 840 (holding that the agricultural exemption narrowly applies to farmworkers engaged in harvesting). Conversely, under the FLSA, a farmworker who is engaged exclusively in post-harvesting work, such as preparing produce for market, is still exempt from overtime compensation. *See* 29 U.S.C. § 203(f) (defining in broad terms farmworkers exempted from the overtime statute, including those engaged in traditional farming work and those involved in post-harvesting, or secondary agriculture).

⁹⁶ *See* 29 U.S.C. § 213(b)(13) (containing the FLSA's overtime compensation agricultural exemption); ch. 151, § 1A(19) (applying narrowly to only those farmworkers engaged in traditional harvesting activities). In *Chang & Sons*, the court noted that the Massachusetts overtime statute is similar to the FLSA in its basic provisions, but that the legislature intended the exemption to be narrower than those of the FLSA. *See* 118 N.E.3d at 839 (rejecting the notion that the FLSA's definition of agriculture applies to the Massachusetts agricultural exemption).

⁹⁷ *See Overtime Map*, FARMWORKER JUST., <https://www.farmworkerjustice.org/overtime-map/> [<https://perma.cc/77LB-9HMF>] (providing a map of the agricultural labor laws in each state, and specifically noting those that have abolished the agricultural exemption or afford farmworkers overtime compensation in some capacity). The states that have removed the exemption include New York, California, Minnesota, Washington, Hawaii, and Maryland. *See, e.g.*, CAL. LAB. CODE § 860 (West 2021) (affording farmworkers overtime compensation when they work more than nine and a half hours in a day or fifty-five hours in a week); HAW. REV. STAT. § 387-3 (2021) (qualifying farmworkers for overtime pay when they work more than forty-eight hours in a workweek); MD. CODE ANN., LAB. & EMPL. § 3-420(c) (West 2021) (entitling farmworkers to overtime compensation when they work more than sixty hours in a workweek); MINN. STAT. § 177.23 subd. 7(2) (2020) (incorporating farmworkers under overtime compensation for work completed in excess of a forty-eight-hour workweek); N.Y. LAB. LAW § 163-a (McKinney 2021) (enabling farmworkers to receive overtime pay for workweeks longer than sixty hours). Importantly, the Fairness for Farmworkers Coalition has recently introduced a bill in the Massachusetts legislature to eliminate subminimum wage and afford farmworkers overtime compensation. *See* H. 1979, 192d Gen. Ct., Reg. Sess. (Mass. 2021) (containing the Fairness for Farmworkers Act provisions for seasonal workers); S. 1205, 192d Gen. Ct., Reg. Sess. (Mass. 2021) (containing the Fairness for Farmworkers Act provisions for expanded labor protections).

⁹⁸ *See* N.Y. LAB. LAW § 701(3)(c) (McKinney 2021) (defining “[f]arm laborers” as a broad category of anyone working on a farm, except individuals who are close relatives of the farm owner, work

The FLFLPA outlines requirements for overtime compensation for work completed beyond the legal workweek hours.⁹⁹ Moreover, it sets overtime compensation for farmworkers at one and a half times the normal pay rate for work completed in excess of sixty hours in a calendar week.¹⁰⁰ Although the workweek is higher than the forty-hour workweek defined by the FLSA, the FLFLPA is an example a more protective state law because it affords overtime compensation for the otherwise excluded farmworkers.¹⁰¹

When the New York legislature designed the FLFLPA, it considered the essential nature of the agricultural industry to the state.¹⁰² The legislature recognized that together the FLSA and the National Labor Relations Act (NLRA) exclude farmworkers from both overtime and collective bargaining protections.¹⁰³ In response, the legislature expanded the scope of the state law to extend these protections to farmworkers.¹⁰⁴ In addition, the FLFLPA provides for a

at the farm due to familial duty, or do not receive wages or other compensation); *N.Y. Vegetable Growers Ass'n v. Cuomo*, 474 F. Supp. 3d 572, 576 (W.D.N.Y. 2020) (recognizing that the Farm Laborer Fair Labor Practices Act (FLFLPA) entitled farmworkers to a broad selection of labor protections previously denied to them). The FLFLPA provides farmworkers with the right to overtime compensation, a non-working day, unemployment insurance, disability insurance and paid family leave, and the right to organize. *See* 2019–2020 N.Y. Laws. Ch. 105, § 2 (2019) (providing labor protections beyond those ascribed by the FLSA).

⁹⁹ *See* LAB. § 163-a (establishing the workweek at sixty hours for farmworkers).

¹⁰⁰ *Id.* Notably, the FLFLPA also establishes the Farm Laborers Wage Board which will review the overtime threshold and make recommendations regarding the overtime trigger to the Commissioner of Labor. *See* LAB. § 674-a (describing the Board as comprised of a member of the farm bureau, a member of the general public, and a member of the New York State AFL-CIO union federation).

¹⁰¹ *See* 29 U.S.C. § 218 (permitting states to enact more protective laws than those contained in the FLSA). This means that a farmworker in New York, regardless of the type of farming they conduct, qualifies for overtime compensation if they work over sixty hours in a week at a rate of one and a half-time their pay rate. *See N.Y. Vegetable Growers Ass'n*, 474 F. Supp. 3d at 576 (noting that all farmworkers qualify for overtime pay except for those who are employed by immediate family members). All the provisions of the FLFLPA work together, so an employer must provide farmworkers with at least one day of rest per workweek. *See id.* (citing LAB. §§ 161, 163-a) (explaining that if an employee elects to work on their day of rest, and subsequently works more than sixty hours in the week, the employer owes them overtime).

¹⁰² *See* 2019–2020 N.Y. Laws. Ch. 105, § 2 (finding that farming generates over \$5 billion per year for farms and the state). The legislature described the FLFLPA as adapting the existing labor laws to fit the modern agricultural industry. *See id.* (focusing on the stability of farming practices and agricultural labor relations).

¹⁰³ *See* 29 U.S.C. § 152(3) (excluding “agricultural laborer[s]” from the definition of “employee” under the NLRA); *id.* § 213(b)(13) (excluding agricultural workers from the maximum hour and overtime compensation of the FLSA); 2019–2020 N.Y. Sess. Laws. Ch. 105 (discussing the interaction between overtime compensation and collective bargaining for bolstering farmworkers rights). The legislature observed that farmworkers regularly work over forty hours in a week and that farming has dangerous work conditions. *See id.* (referencing pesticides, heavy equipment, and extreme weather). Without the ability to collectively bargain, the law deprives farmworkers of an avenue to advocate for improved labor protections, such as overtime or improved safety conditions. *See id.* (deducing that farmworkers are in the minority of workers for whom Congress denies these labor protections).

¹⁰⁴ *See* LAB. § 701(3)(c) (defining “[f]arm laborers” as anyone working in an agricultural environment). The FLFLPA definition of farmworkers is broad, including anyone allowed employment in

day of rest, which requires that agricultural employers provide farmworkers with at least one non-working day per calendar week.¹⁰⁵ In enacting the FLFLPA, the legislature was largely motivated by a desire to rectify historical labor discrimination against farmworkers and to level the playing field going forward.¹⁰⁶

B. Chang & Sons Background: Defining the Agricultural Exemption in Massachusetts

In March 2019, in *Arias-Villano v. Chang & Sons Enterprises, Inc.*, the Massachusetts Supreme Judicial Court limited the state's agricultural exemption to farmworkers engaged exclusively in harvesting.¹⁰⁷ In this case, the plaintiffs were ten agricultural workers who were previously employed by the defendant, Chang & Sons Enterprises, Inc.¹⁰⁸ The defendant was a crop production company that hydroponically harvested and sold bean sprouts in Massachusetts.¹⁰⁹ In a separate space not utilized for hydroponic growth, the plaintiffs prepared and packaged the bean sprouts for sale.¹¹⁰ The plaintiffs exclusively performed packaging and preparation tasks and did not enter the har-

an agricultural environment, except those who are the close relatives of the farm owner, who work at the farm due to familial duty, or who do not receive wages or other compensation. N.Y. Vegetable Growers Ass'n v. Cuomo, 474 F. Supp. 3d 572, 576 (W.D.N.Y. 2020) (noting that the expansion of the "[e]mployees[]" definition to include farmworkers is recent, as of 2019).

¹⁰⁵ See LAB. § 161(1) (describing farm labor as including all work employees complete on the farm and in association with harvesting). Under the statute, a day of rest means the employer's provision of an off day for an employee during a seven-day workweek. See *id.* (including that despite this provision, farmworkers can agree to work the seventh day).

¹⁰⁶ See *Governor Cuomo Signs Farm Workers Bill*, N.Y. GOVERNOR'S OFF. (July 17, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-farm-workers-bill> [<https://perma.cc/9ZP3-VKBN>] (stating the FLFLPA affords farmworkers the labor protections that the law previously denied them for nearly eight decades).

¹⁰⁷ See 118 N.E.3d 835, 840 (Mass. 2019) (applying a narrower definition for agriculture and farming compared to the FLSA, thereby qualifying farmworkers who participate in post-harvesting jobs for overtime compensation).

¹⁰⁸ *Arias-Villano v. Chang & Sons Enters., Inc.*, 2018 WL 6313656, *1 (Mass. Super. Ct. June 5, 2018) (providing that the plaintiffs worked at Chang & Sons at various times over the course of three years, generally working year-round), *rev'd*, *Chang & Sons*, 118 N.E.3d 835. During their employment, the plaintiffs worked over forty hours per week. See *id.* (observing that the plaintiffs worked up to seventy hours in a week).

¹⁰⁹ See *Chang & Sons*, 118 N.E.3d at 836 (noting that Chang & Sons operates twelve months out of the year, and that growing equipment filled most of the facility). Hydroponic growing is a way to grow plants in water, rather than in soil. See Sarah J. Morath, *Hydroponics: The End of Organic?*, 33 NAT. RES. & ENV'T 1, 2 (2018) (stating that hydroponics broadly refers to growing plants without soil).

¹¹⁰ See Amici Brief for the ACLU, *supra* note 83, at 5 (noting that the preparation tasks included cleaning, weighing, categorizing, packaging, refrigeration, and placement on the shipping pallets). According to the ACLU brief, the defendants excluded employees from approximately 17% of the Chang & Sons facility, which the company used for hydroponic growing; workers used the remaining 83% for the preparation, packaging, and shipping of the bean sprouts. See *id.* The plaintiffs' primary jobs included preparing the sprouts for delivery. See *Chang & Sons*, 2018 WL 6313656, at *1 (noting that none of the plaintiffs worked in the "growing rooms").

vesting rooms.¹¹¹ The plaintiffs consistently worked in excess of the standard forty-hour workweek but did not receive overtime compensation.¹¹² The issue in this case was whether Massachusetts's agricultural exemption's definition of "agricultural and farm work[]" encompassed the plaintiffs' work, and therefore, disqualified them for this payment.¹¹³

In the Superior Court of Massachusetts, the defendants argued that the court should rely on the definition supplied by chapter 128, section 1A of the Massachusetts General Laws to determine whether the plaintiffs were farmworkers, and thus exempt from the state's overtime compensation requirement.¹¹⁴ Section 1A contains a broad definition for agriculture, inclusive of all branches of farming, much like the FLSA.¹¹⁵ The Superior Court determined that this definition did not comport with the legislature's intention for the overtime statute because the legislature expressly rejected it during the drafting of the overtime statute for being over broad.¹¹⁶ Instead, the Superior Court ap-

¹¹¹ See Amici Brief for the ACLU, *supra* note 83, at 5–6 (explaining that Chang & Sons did not permit employees to work in the rooms designated for sprout cultivation to prevent contamination, and that the bean sprouts were monitored by computer). The defendants exclusively staffed the growing rooms by a small group of employees to prevent seed contamination. See *id.* at 6 (noting that computer systems monitored the fertilization and actual growing of the sprouts). The sale of sprouts accounted for over 90% of Chang & Sons annual profits; this motivated the heavily controlled growing conditions and work environment. See *Chang & Sons*, 2018 WL 6313656, at *1 (including that due to this heavily regulated workspace, the plaintiffs never worked directly in the growing or cultivation of the bean sprouts).

¹¹² See Amici Brief for the ACLU, *supra* note 83, at 6 (providing that the employees worked six days a week, sometimes up to seventy hours a week, twelve months a year). Chang & Sons was open six days a week, year-round, with employees processing the bean sprouts each day for fifteen hours, resulting in frequent overtime work. *Id.* This is consistent with the highly time sensitive nature of the agricultural industry. See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 2 (discussing the demanding nature of the agricultural industry).

¹¹³ See *Chang & Sons*, 118 N.E.3d at 840 (reviewing the Superior Court's construction of the agricultural exemption by assessing the legislative history of the statute and the exemption).

¹¹⁴ See *Chang & Sons*, 2018 WL 6313656, at *3 (providing that the motivation for this stance was that chapter 128, section 1A of the Massachusetts General Laws contains a broad definition of "farming" and "agriculture," making it more favorable to the defendants). This law defines "farming" and "agriculture," interchangeably, as inclusive of all branches of cultivation and harvesting, as well as rearing animals for fur or food, commercial horse breeding, lumbering and forestry performed by a farmer, and any action taken in accordance or subsidiary to farming practices. MASS. GEN. LAWS ch. 128, § 1A (2020).

¹¹⁵ See ch. 128, § 1A (mirroring the FLSA's definition of agriculture); *Chang & Sons*, 2018 WL 6313656, at *3 (noting that the defendants argued that the court should rely on chapter 128, section 1A's definition of agriculture because of its similarities to the FLSA, thereby enabling them to look at FLSA caselaw). The FLSA defines agriculture as including every type of farming, animal rearing and other animals for produce or commodities, and all those tasks that are incident to farming or work done on a farm. See 29 U.S.C. § 203(f) (providing that incidental work includes packaging, preparing, and delivering the products to sellers).

¹¹⁶ See *Chang & Sons*, 2018 WL 6313656, at *4 (drawing on the fact that the legislature enacted the overtime statute, chapter 151, section 1A of the Massachusetts General Laws, after both the enactment of the FLSA and chapter 128, section 1A). The court presumed that because the legislature chose a narrow definition of agriculture in the overtime statute, it did not intend to use the broader

plied the definition contained in chapter 151, section 1A of the Massachusetts General Laws, which narrowly defines agriculture as work done by someone working in farming and on a farm.¹¹⁷ The court resolved that the plaintiffs' occupation constituted farming because they were employed on a farm and engaged in activities associated with farming.¹¹⁸ Therefore, the Superior Court held that the agricultural exemption applied.¹¹⁹ Accordingly, the plaintiffs were exempt from receiving overtime pay.¹²⁰

The plaintiffs directly appealed to the Massachusetts Supreme Judicial Court.¹²¹ There, the court reversed the Superior Court's judgment, and concluded that the agricultural exemption narrowly defines farmworkers as those involved only in harvesting work.¹²² The court then held that the plaintiffs en-

definition included in the FLSA or chapter 128, section 1A. *See id.* (citing *Casseus v. E. Bus. Co.*, 89 N.E.3d 1184, 1194 (Mass. 2018)) (providing that because there is no evident legislative intent to utilize the federal definition, the court cannot apply this construction of the term). Similarly, the court posited that because the agricultural exemption uses language that differs materially from the FLSA, it is appropriate to reject the legal standards supported by the FLSA. *See id.* (citing *Globe Newspaper Co. v. Bos. Ret. Bd.*, 446 N.E.2d 1051, 1055 (Mass. 1983)) (determining that material differences in a state statute from its federal analog support the court's rejection of explicit and implicit standards contained in the federal analog).

¹¹⁷ *See* MASS. GEN. LAWS ch. 151, § 1A(19) (2020) (excluding agricultural workers, who are employees working as farmworkers and on a farm); *Chang & Sons*, 2018 WL 6313656, at *4 (maintaining that Chapter 151 is more appropriate because the legislature enacted it after Chapter 128 and the FLSA, meaning it was a conscious decision to narrowly define the exemption). The court also declined to use the FLSA definition of agriculture because the plain language of the two exemptions is distinctly different. *See Chang & Sons*, 2018 WL 6313656, at *4 (adding that the FLSA definition is more expansive).

¹¹⁸ *See Chang & Sons*, 2018 WL 6313656, at *5 (providing the chapter 151, section 1A(19) definition of agriculture as work done by someone employed in agriculture working on harvest-producing land). Using this definition, the court refused to distinguish between harvesting and post-harvesting activities when determining what constitutes agricultural work under the exemption. *See id.* (concluding that distinguishing between harvesting and post-harvesting work is counter to common sense).

¹¹⁹ *See id.* (noting that the Superior Court maintained that the definitions of farming and agriculture are broad and should evolve as the industry of farming evolves).

¹²⁰ *See id.* (maintaining that to apply the agricultural exemption to harvesting, but not to post-harvesting is an arbitrary distinction because they both occurred at the same farm). The court arrived at this conclusion based on the belief that farming is inclusive of activities beyond mere growing and harvesting—the court extended farming, within the scope of the statute, to include cleaning, sorting, distribution, and more. *See id.* (adding that the plaintiffs completed this “farming” work on the defendants' premises, which under the statute, is a farm).

¹²¹ *See Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 840 (Mass. 2019) (reversing the Superior Court's judgement).

¹²² *See id.* (reasoning that the legislature intended for the agricultural exemption to operate narrowly because the overtime statute is a remedial law designed to provide broader protections compared to the FLSA). Harvesting work is analogous to primary agriculture under the FLSA. *See* 29 U.S.C. § 203(f) (containing the entire FLSA definition of agriculture, including primary agriculture, which is all iterations of farming); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762 (1949) (describing primary agriculture as including harvesting of crops, caring for livestock, and other forms of farming).

gaged in post-harvesting work, which did not fall under the agricultural exemption.¹²³

According to the court, the legislative intent of the statute included balancing the welfare of farmworkers with the financial costs to farm owners.¹²⁴ When enacting the overtime provision, the Massachusetts government urged the legislature to afford broader protections than those provided by the FLSA.¹²⁵ Consequently, the legislature created an agricultural exemption that was narrower than that of the FLSA.¹²⁶ Under the overtime statute, the employer is exempt from paying overtime to an employee who works in farming (harvesting), but must pay overtime to an employee who works in post-harvesting work.¹²⁷ Notably, the court's holding in *Chang & Sons* leaves open the question of whether a farmworker who works fifty percent of the time in harvesting and the other fifty percent in post-harvesting qualifies for overtime payment.¹²⁸

C. Massachusetts Department of Labor Standards's Guidance on Chang & Sons

In March 2020, the Commonwealth of Massachusetts Executive Office of Labor and Workforce Development issued an advisory following the *Chang &*

¹²³ See *Chang & Sons*, 118 N.E.3d at 840 (relying on the plain language of the exemption to determine that the exemption encompassed only farmworkers engaged in harvesting work).

¹²⁴ See *id.* at 839 (citing S. REP. NO. 1303, 165th Gen. Court, Reg. Sess. (Mass. 1967)) (assessing the poverty levels of migrant farmworkers as they compared to the burden of overtime costs to farm owners). According to the court, the agricultural exemption represents a compromise between these interests that allows for farmworkers to receive minimum wage but excludes farmworkers from overtime pay. See *id.* (suggesting this compromise was based, in part, on the time-sensitive nature of agriculture and farm owners' reliance on workweeks beyond forty hours). The Massachusetts minimum wage law codifies the policy concerns for farmworkers, noting that it is a priority for the state legislature to ensure a living wage for agricultural employees. See MASS. GEN. LAWS ch. 151, § 2A (2020) (setting the minimum wage per hour for agriculture and farming at eight dollars).

¹²⁵ See *Swift v. AutoZone, Inc.*, 806 N.E.2d 95, 100 (Mass. 2004) (stating that prior to the statute's enactment, the Governor of Massachusetts expressly urged the legislature to design an overtime law that would encompass employees that the FLSA did not protect).

¹²⁶ See *Chang & Sons*, 118 N.E.3d at 839 (providing that the state legislature designed the overtime statute to provide greater protections for Massachusetts employees compared to the FLSA).

¹²⁷ See Amici Brief for the ACLU, *supra* note 83, at 8 (detailing the Superior Court's broader interpretation, the federal FLSA's agricultural exemption counterpart, and the plaintiff's argument for a narrow exemption construction).

¹²⁸ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (noting that *Chang & Sons* expressly leaves open this question, and instead, the case only addresses which work constitutes agriculture within the exemption and which work does not). During the hearing, one of the justices posed this exact question. See *id.* (observing that the court did not answer this question because none of the plaintiffs fell into this category). Due to the lack of clarity for this question in *Chang & Sons*, the Massachusetts Department of Labor Standards looked to the "primary duty" test—a corollary found in federal regulations for the overtime compensation of "Executive, Administrative, Professional, Computer and Outside Sales employees." See *id.* (citing 29 C.F.R. § 541.700 (2021)) (suggesting the court assessed the principal composition of the employee's job across both harvesting and post-harvesting to determine the employee's "primary duty").

Sons decision.¹²⁹ The advisory addresses whether farmworkers who perform both harvesting and post-harvesting work qualify for overtime pay.¹³⁰ It is important to note that agency advisory opinions are non-binding sources for guidance.¹³¹ Nonetheless, Massachusetts courts typically give deference to agency opinions, so long as the opinions are not contradictory to the statute's plain language or intent.¹³² In its advisory, the department developed a "'primary duty' test," which asks what an employee's "primary duty" is in their role.¹³³ If the "primary duty" falls within the exemption, then the employee would not receive overtime payment.¹³⁴ If the "primary duty" falls outside the scope of the exemption, however, then the employee qualifies for overtime compensation.¹³⁵ To help courts determine an employee's "primary duty," the

¹²⁹ See *id.* at 1 (responding to questions not addressed in the *Chang & Sons* opinion).

¹³⁰ See *id.* at 2–3 (noting that the nature of farm work as highly variable, with farmers and farm workers often working in both harvesting and post harvesting work). The department drew on the framework for federal overtime exemptions as guidance for how to structure the interpretation of the state exemption for farmworkers who perform both harvesting and post-harvesting work. See *id.* at 3 (citing 29 C.F.R. § 541.700). Federal regulation Section 541.700 contains the "primary duty" test, which outlines that a "primary duty" is the central or most important job the employee completes. See 29 C.F.R. § 541.700 (providing factors to consider when determining an employee's "primary duty," including the time spent on a task, their independence from supervision, and the dynamic between the employee's salary and the specific compensation the employee receives for non-exempt tasks they complete).

¹³¹ See *Sullivan v. Sleepy's LLC*, 121 N.E.3d 1210, 1216 n.11 (Mass. 2019) (citing *Mass. Gen. Hosp. v. Rate Setting Comm'n*, 359 N.E.2d 41, 44 (Mass. 1977)) (providing that agency opinions serve as a useful guide, but do not have legally binding force).

¹³² See *Swift v. AutoZone, Inc.*, 806 N.E.2d 95, 101 (Mass. 2004) (citing *Mass. Hosp. Ass'n v. Dep't of Med. Sec.*, 588 N.E.2d 679, 683 (Mass. 1992)) (supplying the proposition that administrative agencies receive substantial judicial deference for their statutory interpretation because their job is to engage in administration). Although courts give agency advisory letters deference, they do not carry the weight of the law. See *Rate Setting Comm'n*, 359 N.E.2d at 44 (noting that agencies can produce opinion letters without providing the opportunity for the public to receive notice or comment on the advisory's substance because it is non-binding). Therefore courts can deviate from these opinions where appropriate. See *Swift*, 806 N.E.2d at 101 (providing that courts may disregard agency opinions when they deviate from the plain language and intent of the statute).

¹³³ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (noting that the primary duties test was based on the same test designed for the overtime exemption for "Executive, Administrative, Professional, Computer and Outside Sales Employees" (EAP employees)). The Massachusetts Attorney General's Office expressed concern over the use of the primary duties test when the nature of agricultural work is markedly distinct from the work of EAP employees. See Letter from Cynthia Mark, Chief, Fair Lab. Div., Mass. Att'y Gen.'s Off., to Michael Flanagan, Dir., Mass. Dep't of Lab. Standards 1, 2 (Mar. 27, 2020) (on file with Professor Harris Freeman) (describing that "the 'primary duty' test" is one of four factors the court uses to determine if an EAP employee qualifies for overtime and maintaining that case law does not support the use of this test to determine overtime eligibility).

¹³⁴ See Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (observing that neither the court nor the Department of Labor Standards had previously applied the primary duties test to non-EAP employees).

¹³⁵ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (centering the focus of the "'primary duty' test" on the tasks that exemplified the employee's work). In the context of *Chang & Sons*, for example, this means that the test characterizes employees who perform primarily

Department of Labor Standards composed a comparison test.¹³⁶ This comparison test balances the harvesting work completed by the employee against the post-harvesting work to determine where the employee performed the majority of their work.¹³⁷ If the scales tip in favor of post-harvesting, then the primary duties test would categorize the employee as working in post-harvesting and qualifying for overtime compensation.¹³⁸ The Department concluded with the caveat that time is not a conclusive indicator of whether an employee falls within the exemption.¹³⁹ If an employee's principal role falls within the exemption, regardless of whether they spend over half of their work time completing those activities, then the employee is exempt from overtime compensation.¹⁴⁰

In response to the advisory, the Massachusetts Attorney General's office issued a letter expressing concern that the advisory could lead farm owners to disregard the narrow definition in *Chang & Sons* and continue to deprive workers engaged in post-harvesting their overtime pay.¹⁴¹ The Attorney General's office

harvesting activities as falling under the agricultural exemption. *See id.* (supplying that if an employee works in harvesting for four months out of the year, and post-harvesting for three months out of the year, then their "primary duty" is harvesting). The converse is similarly true except that employees working primarily in post-harvesting will fall outside the exception. *See id.* (defining agricultural work within the context of the exemption as applying only to those who work in growing and harvesting).

¹³⁶ *See id.* at 4 (providing the comparison test as a tool for courts to utilize when assessing the percentage of work an employee completes in harvesting versus post-harvesting work). According to the Department, the comparison test allows for one to balance an employee's involvement in exempt agricultural activities against their involvement in non-exempt activities to determine whether the agricultural exemption applies to the employee. *See id.* (citing 29 C.F.R. § 541.700(b) (2021)).

¹³⁷ *See id.* (looking at where employees complete most of their work). The comparison test is helpful in situations where employees spend a majority of their time on a task, as well as where an employee primarily works on a specific task based on other relevant features. *See* 29 C.F.R. § 541.700(b) (asserting that time is not a dispositive factor under the test).

¹³⁸ *See* Letter from Michal Flanagan to Interested Parties, *supra* note 12, at 4 (noting that the scales tip in favor of one form of work when the employee spends more than fifty percent of their time completing that type of work).

¹³⁹ *See id.* (stating that time is not the only factor considered under the primary duties test); *see also* 29 C.F.R. § 541.700(c) (providing examples of factors that contribute to an employee's "primary duty").

¹⁴⁰ *See* 29 C.F.R. § 541.700(a) (detailing a non-exclusive, factor-balancing test, which uses time spent on the exempt task, importance of the exempt task, and wages paid toward the exempt task to determine an employee's "primary duty"); Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 4 (concluding that the "comparison test" is useful for determining an instance where an employee's qualification for overtime is a closer call, but where an employee has a clear "primary duty," the "primary duty test" controls).

¹⁴¹ *See* Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (maintaining that agency opinions must align with the statute's plain meaning and legislative intent). The Massachusetts Supreme Judicial Court need not give deference to agency opinions that contravene plain statutory language and legislative intent. *See Swift v. AutoZone, Inc.*, 806 N.E.2d 95, 101 (Mass. 2004).

requested that the Department provide a different example of non-exempt work more in-line with *Chang & Sons*, but the Department has yet to issue one.¹⁴²

II. THE EXISTING LEGAL FRAMEWORK IN MASSACHUSETTS AND AN ASSESSMENT OF THE AGRICULTURAL EXEMPTION

The Massachusetts Supreme Judicial Court's narrow construction of the agricultural exemption in *Arias-Villano v. Chang & Sons Enterprises, Inc.* exemplified the protective nature of the overtime statute.¹⁴³ The Massachusetts Department of Labor Standards, however, deviated from this principle when issuing its advisory.¹⁴⁴ Consequently, the Department's opinion excludes a larger number of farmworkers from labor protections.¹⁴⁵ Section A of this Part discusses the agricultural exemption from the perspective of its supporters.¹⁴⁶ Section B addresses the arguments against the agricultural exemption from those who support its abolition.¹⁴⁷ Section C discusses the motivations for and removal of the agricultural exemption in New York.¹⁴⁸

A. The Perspective of Supporters of the Agricultural Exemption

Lawmakers and activists hotly debate whether to abolish the agricultural exemption.¹⁴⁹ Some see the agricultural exemption as a way to support farm

¹⁴² See Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (stating that a more on-point example would help farm owners and farmworkers to have clear expectations).

¹⁴³ See *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 838 (Mass. 2019) (citing *Woods v. Exec. Off. of Cmty. & Dev.*, 583 N.E.2d 845, 848 (Mass. 1992)) (maintaining that courts should strictly interpret exemptions because it is a specific exception to the general provision). Conversely, the courts interpret the overtime statute broadly to align with the legislature's intent for broad applicability. See *id.* (citing *Casseus v. E. Bus. Co.*, 89 N.E.3d 1184, 1194 (Mass. 2018)) (discussing the overtime statute in relation to the exemption for employees of licensed employers under the common carrier statute).

¹⁴⁴ Compare Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 4 (suggesting that the expansive "primary duty test" for agricultural workers that do both harvesting and processing work), with *Chang & Sons*, 118 N.E.3d at 840 (defining the agricultural exemption narrowly to align more closely with the legislative intent of having the Massachusetts overtime and minimum wage statute operate as a remedial law).

¹⁴⁵ See Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (recognizing that the Department of Labor Standards's opinion effectively permits farm owners to disregard the *Chang & Sons* decision).

¹⁴⁶ See *infra* notes 149–164 and accompanying text.

¹⁴⁷ See *infra* notes 165–195 and accompanying text.

¹⁴⁸ See *infra* notes 196–212 and accompanying text.

¹⁴⁹ See *Wozniacka*, *supra* note 52 (outlining the tensions between the exclusion of farmworkers from overtime compensation and the argument that overtime compensation is not compatible with the agricultural industry). Debates over overtime compensation for farmworkers originated with the United Farm Workers movement in California. See *id.* (noting that the United Farm Workers fought for overtime pay for farmworkers in the 1970s and won). Today, the United Farm Workers still advocate for improved labor conditions and protections for farmworkers and were instrumental in the 2016 California legislation that affords farmworkers overtime for hours worked in excess of eight hours.

owners' ability to sustain their business and think that abolition of the agricultural exemption threatens farm owners' economic stability.¹⁵⁰ Others see the exemption as an unjust exclusion of a vulnerable employee-base from labor protections.¹⁵¹ Proponents of the agricultural exemption put forth several arguments, predominantly rooted in the economic considerations of farm owners.¹⁵²

First, supporters of the agricultural exemption note that the drafters of the FLSA and the Massachusetts statute contemplated farming's evolving nature.¹⁵³ The fact that agricultural work manifests in new ways does not mean that the legislature should truncate the exemption.¹⁵⁴ Supporters contend that if the agricultural exemption applies less broadly, farmers will experience an increase in costs.¹⁵⁵

Second, the majority of states retain the agricultural exemption in their overtime statutes.¹⁵⁶ Supporters of the agricultural exemption view the perva-

See Our Vision, UNITED FARM WORKERS, <https://ufw.org/about-us/our-vision/> [<https://perma.cc/7H92-L5X8>] (addressing immigration and labor condition reform).

¹⁵⁰ See H. Claire Brown, *Farm Workers Still Don't Get Paid for Overtime in Most Places: "This Is the Very Definition of Structural Racism,"* THE COUNTER (Jan. 14, 2021), <https://thecounter.org/farm-workers-lack-overtime-pay-systemic-racism/> [<https://perma.cc/AZ5H-HBWP>] (questioning the feasibility of farm owners paying overtime for farmworkers). The Farm Bureau and other supporters of the agricultural exemption focus their argument on the affordability of overtime for farm owners. *See id.* (positing that the policy question that this debate should center on is the cost increase relative to a farm owner's total revenue). The Farm Bureau has significant influence over senators from states that rely heavily on agriculture, making changes to legislation in those states challenging. *See id.* (explaining that members advocate for the interests of farm owners and the agricultural industry); *About*, FARM BUREAU, *supra* note 64 (describing the American Farm Bureau Federation as a lobbyist organization that represents the interests of farm owners).

¹⁵¹ *See* Wozniacka, *supra* note 52 (noting the fact that agriculture consistently ranks as one of the most dangerous industries and the fact that farmworkers generally work over forty hours in a week are two reasons supporting the abolition of the agricultural exemption).

¹⁵² *See id.* (observing that some argue that the increases in minimum wage and decreased labor pool have made it so that farm owners cannot afford overtime compensation for employees). According to a representative of the Washington Farm Bureau, the seasonal and nature-dependent character of the agricultural industry and increasing costs of operating a farm make overtime compensation incompatible with the industry. *See id.* (calling overtime pay for farmworkers an "economic burden" on farm owners that will result in more costs and fewer hours worked).

¹⁵³ *See* Brief for the American Mushroom Institute as Amicus Curiae Supporting Defendants-Appellees at 11, 15, *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835 (Mass. 2019) (No. SJC-12548), 2018 WL 4963086 (asserting that at the state and federal level, courts have recognized ways in which agriculture has evolved into new forms that did not exist at the time the legislatures passed either statute).

¹⁵⁴ *See id.* at 9 (asserting that the evolving practices and legal treatments characterize the history of agriculture).

¹⁵⁵ *See* Susan Arbetter, *Farmers to Cuomo: Don't Lower Overtime Threshold for Farm Workers*, SPECTRUM NEWS (Dec. 1, 2020), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/01/farmers-to-cuomo-don-t-lower-overtime-threshold-for-farm-workers> [<https://perma.cc/N82X-7BH9>] (stating that farmers have expressed concerns about the sustainability of their business with the increase in costs resulting from overtime pay of farmworkers, maintaining that the increased costs will force them to reduce employee hours).

¹⁵⁶ *See Overtime Map*, *supra* note 97 (providing a map that highlights the six states that afford farmworkers overtime compensation). In Massachusetts, the legislature instituted the agricultural ex-

siveness of the exemption as indicative of the fact that agricultural work is not conducive to overtime compensation.¹⁵⁷ In particular, supporters of the exemption emphasize the seasonal nature of the work, the role of nature, and the time-sensitive aspect of harvesting perishable produce.¹⁵⁸ To supporters, these features make agriculture unsuited for overtime pay because they result in an increased reliance on overtime.¹⁵⁹ Thus, should the legislature remove the agricultural exemption, farm owners would see an increase in the costs of labor expenses.¹⁶⁰ In Massachusetts, Dr. Jeannette Wicks-Lim estimated that annually, farm owners spend approximately \$188.7 million on wages without paying overtime to farmworkers.¹⁶¹ When Dr. Wicks-Lim added overtime compensation to the equation, the total cost to farm owners increased to nearly \$198 million.¹⁶² This increase in cost could leave farm owners at a competitive disadvantage compared with farm owners who live in states that retain their agricul-

emption in 1967 as a narrower construction of the federal exemption and has existed in its original form since its enactment. See *Chang & Sons*, 118 N.E.3d at 839.

¹⁵⁷ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (detailing the risks taken by farm owners when entering harvesting seasons). Considering the risks farm owners face, the question becomes whether it is fair to exclude farmworkers from access to overtime and (sometimes) minimum wage, when this population of workers largely lacks bargaining power to advocate for themselves. See Harris, *supra* note 55, at 163–64 (concluding that the tension between wage and fairness persists within the FLSA since its inception).

¹⁵⁸ See *Schwarzenegger Vetoes Agricultural Worker Overtime Bill*, WOLTERS KLUWER, [http://www.employmentlawdaily.com/index.php/news/schwarzenegger-vetoes-agricultural-worker-overtime-bill/\[https://perma.cc/72K6-DG4Q\]](http://www.employmentlawdaily.com/index.php/news/schwarzenegger-vetoes-agricultural-worker-overtime-bill/[https://perma.cc/72K6-DG4Q]) (quoting Governor Arnold Schwarzenegger who suggested that regardless of the positive effects overtime compensation may have on the lives of farmworkers, it would result in increased burdens for farm owners, higher rates of unemployment, and decreased wages to compensate for the additional expense).

¹⁵⁹ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (maintaining that the timing demands of harvesting result in unpredictable work schedules). Because farmworkers must complete the harvesting and packaging when the produce is ripe, the industry is not conducive to a typical forty-hour workweek. See *id.* (observing that it is a paramount objective of farming to ensure the products reach market before they decay).

¹⁶⁰ See WICKS-LIM, *supra* note 86, at 3 (determining that the increase in expenses for farm owners is around 5% at a rate of one and a half times the pay-rate).

¹⁶¹ See *id.* at 11 (separating the expenses out by season, Dr. Wicks-Lim estimates that a farmer's summer wage bill is nearly \$60 million, and the winter wage bill is approximately \$27 million). Dr. Wicks-Lim notes that proportionate to the higher summer bill, the percentage of hours worked overtime is also higher—at about 20%. *Id.* Conversely, in the winter, the percent of overtime worked is around 10%. *Id.* One estimate places the average full-time agricultural worker in the United States as completing approximately 49.4 hours of work per week. See Canny, *supra* note 161, at 384 (deriving this estimate from 2005 data). Despite the above average overtime hours, it is questionable whether farmers, particularly those in Massachusetts, can afford to compensate farmworkers for these additional hours. See Brown, *supra* note 150 (noting that although legislators contest whether farm owners can pay workers overtime compensation, economists believe the industry could absorb the costs).

¹⁶² See WICKS-LIM, *supra* note 86, at 13 (determining the total was an increase of \$9.3 million in the yearly wage bill). According to Dr. Wicks-Lim, the estimate cost increase for total expenses is relative and varies by farmer and by season. See *id.* (noting that regardless of overestimates for the bills, the relative cost increase would remain at 4.9%).

tural exemption.¹⁶³ Consequently, an overtime compensation requirement may result in farm owners decreasing employees and production to save costs.¹⁶⁴

B. The Perspective of Opponents to the Agricultural Exemption

Opponents to the agricultural exemption scrutinize the exemption based on two categories of costs caused by the exemption: harm to farmworkers and the overarching effect on the agricultural industry.¹⁶⁵ Section 1 addresses the social and economic costs of the agricultural exemption on farmworkers.¹⁶⁶ Section 2 considers the limited cost of overtime compensation on farm owners and the natural advancement of farmworkers' labor rights.¹⁶⁷

1. Social and Financial Cost of the Agricultural Exemption on Farmworkers

Opponents of the agricultural exemption argue that the low wages and lack of overtime for farmworkers contributes to their high rate of poverty.¹⁶⁸ In Massachusetts, the average farmworker earns between \$10 and \$13.75 an hour, working around thirty-three to thirty-six hours per week, although this number varies depending on the harvesting demands.¹⁶⁹ Notably, the national minimum wage is \$7.25 per hour for employees covered under FLSA, but this is lower than the median hourly wage for all employees (\$19.33 per hour).¹⁷⁰ Assuming

¹⁶³ See Chris Torres, *New York May Join 4 States Requiring Farmworker Overtime Pay*, AM. AGRICULTURALIST (May 15, 2019), <https://www.farmprogress.com/farm-policy/new-york-may-join-4-states-requiring-farmworker-overtime-pay> [<https://perma.cc/MM8B-H3KX>] (maintaining that affording farmworkers overtime compensation is potentially competitively detrimental to New York farm owners because not all states mandate overtime pay for farmworkers).

¹⁶⁴ See *id.* (stating that farm owners may decrease labor and production because they are unable to pass the additional costs to customers or unable to rely on federal seasonal worker programs).

¹⁶⁵ See *infra* notes 168–195 and accompanying text (discussing how the agricultural exemption perpetuates high poverty rates and a subminimum wage for farmworkers in Massachusetts).

¹⁶⁶ See *infra* notes 168–186 and accompanying text.

¹⁶⁷ See *infra* notes 187–195 and accompanying text.

¹⁶⁸ See Brown, *supra* note 150 (referencing that in Massachusetts, farmworkers experience rates of poverty at twice the state average). Brown argues that overtime compensation has the potential to significantly increase the wage of farmworkers, without substantially costing farm owners. See *id.* (relying on Dr. Wick-Lim's estimates that overtime compensation would cost farm owners approximately 2% of total revenue).

¹⁶⁹ See WICKS-LIM, *supra* note 86, at 3 (maintaining that the current pay rate is insufficient for farmworkers to maintain an adequate standard of living); Saurav Sarkar, *Undocumented Workers Hit Hard by COVID-19 Crisis*, LAB. NOTES (Apr. 6, 2020), <https://labornotes.org/2020/04/undocumented-workers-hit-hard-covid-19-crisis> [<https://perma.cc/JD27-VL87>] (noting that Massachusetts farmworkers typically make between \$10 and \$13 per hour). Dr. Wicks-Lim's prepared her research in response to *Chang & Sons* and the Massachusetts Department of Labor Standards's advisory on overtime compensation for agricultural workers. See WICKS-LIM, *supra* note 86, at 3 (seeking to address confusion surrounding the agricultural exemption following the Department of Labor Standards's advisory).

¹⁷⁰ See 29 U.S.C. § 206(a)(1) (establishing the federal minimum wage for employees working in commerce, goods production, or some commercial endeavor); Elise Gould, *State of Working America Wages 2019*, ECON. POL'Y INST. (Feb. 20, 2020), <https://www.epi.org/publication/swa-wages-2019/>

that farmworkers are paid \$13.75 per hour, they would earn roughly \$25,000 per year.¹⁷¹ For reference, the official poverty line for one adult falls at \$13,171 per year and the near poverty line is \$26,900 per year.¹⁷² In Massachusetts, an adequate living standard is around \$39,803 per year, meaning that the average farmworker in Massachusetts does not earn sufficient income to sustain this standard.¹⁷³ To this point, the poverty rate among farmworkers in Massachusetts is more than double the rate across other industries in the state, with 55.6% of farmworkers living in poverty compared to 25.2% of all workers.¹⁷⁴

[<https://perma.cc/9VDE-FUMC>] (calculating the median hourly wage of a full-time employee as \$19.33). Earning \$19.33 per hour is approximately a salary of \$40,000 per year. *See id.* (recognizing that there is a large wage gap among workers and that the \$40,000 per year figure may not represent the average worker).

¹⁷¹ *See* WICKS-LIM, *supra* note 86, at 10 (recognizing that many farmworkers do not actually work year-round and earn closer to \$12,000 per year). The living standard decreases if the employee works part of the year or has other family members to support. *See id.* at 9 (including that as caretaking obligations increase, farmworkers increasingly fall below the near-poverty level). If farmworkers qualified for overtime compensation, they could increase their weekly income substantially. *See id.* (using the example that a farmworker who worked twenty overtime hours, earning \$13.75 per hour, could increase their overall pay by 16.7%). The seasonal nature of the agriculture industry is one of the central drivers of poverty levels among farmworkers in Massachusetts. *See id.* at 6, 9 (determining that approximately 17.6% of farmworkers and their families are at or below the official poverty level and that 38% of farmworkers and their families have incomes that fall 200% below the official poverty line). In 2020, Wicks-Lim was using an official poverty line for one adult that the U.S. Census placed at \$13,500 per year. *Id.* at 6. For 2021, the U.S. Department of Health and Human Services places the poverty line for one adult at \$12,880 per year. *See HHS Poverty Guidelines for 2021*, U.S. DEP'T HEALTH & HUM. SERVS. (Jan. 13, 2021), <https://aspe.hhs.gov/poverty-guidelines> [<https://perma.cc/82CQ-YJNN>].

¹⁷² *Poverty Thresholds*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-thresholds.html> [<https://perma.cc/8K9D-5ZU5>] (Aug. 9, 2021) (providing the official poverty line for 2020); WICKS-LIM, *supra* note 86, at 7, 9 (providing that the annual earning of an agricultural worker in Massachusetts falls roughly 7% below the national “near poverty” line).

¹⁷³ *See Family Budget Calculator*, ECON. POL'Y INST., <https://www.epi.org/resources/budget/> [<https://perma.cc/V4BA-LUK3>] (using the budget estimates for a single adult in Worcester County, Massachusetts); WICKS-LIM, *supra* note 86, at 6. Worcester County has the largest concentration of farmland in Massachusetts. *See* WICKS-LIM, *supra* note 86, at 6 (providing that the Economic Policy Institute's living wage estimate of \$26,000 per year is nearly double the official poverty line of \$13,500 per year). The United Nations includes sufficient sustenance, shelter, and economic stability within its description of an adequate living standard. *See International Standards on the Right to Housing*, OFF. OF THE HIGH COMM'R, HUM. RTS., UNITED NATIONS, <https://www.ohchr.org/en/issues/housing/pages/internationalstandards.aspx> [<https://perma.cc/H8NQ-9JNS>] (referencing the Universal Declaration of Human Rights).

¹⁷⁴ *See* WICKS-LIM, *supra* note 86, at 6 (providing that 17.6% of farmworkers live below the poverty line and 38% live in “near poverty,” compared to the 8.3% of all workers living below the poverty line and 16.9% of all workers living “near poverty”). “Near poverty” is a threshold description for individuals whose income falls within 100%–125% of the poverty line. *See* CHARLES HOKAYEM & MISTY L. HEGGENESS, U.S. CENSUS BUREAU, *LIVING IN NEAR POVERTY IN THE UNITED STATES: 1966–2012*, at 1 (2014), <https://www.census.gov/prod/2014pubs/p60-248.pdf> [<https://perma.cc/8P7G-RS2X>] (comparing annual income to the near poverty threshold to determine whether one's income falls within the near poverty).

Many farmworkers do not work full-time, and instead are only employed during harvesting seasons, cutting their annual income in half to be \$12,000 per year.¹⁷⁵ Furthermore, the Massachusetts minimum wage statute affords farmworkers a lower minimum wage, of \$8 per hour.¹⁷⁶ This means that not only are farmworkers not receiving compensation for hours worked beyond the forty-hour workweek, but the compensation they do receive may be below the standard state minimum wage.¹⁷⁷ Without addressing the farmworkers' sub-minimum wage, the Department of Labor Standards's advisory expanded the agricultural exemption to include dual-job farmworkers.¹⁷⁸ Farmworkers' lower minimum wage combined with the Department of Labor Standards's broad exclusion of farmworkers from overtime pay results in a lower total income and higher rates of poverty among farmworkers.¹⁷⁹

It is through the aforementioned lack of protection that the original discriminatory intent of the FLSA's agricultural exemption persists.¹⁸⁰ Today, the agricultural exemption in Massachusetts predominantly affects Latine, non-white, and farmworkers born abroad.¹⁸¹ Because the Massachusetts overtime statute and its exemptions mirror the FLSA, with the statute's passage, the Legislature imported the structural racism of the federal statute into the state's labor stand-

¹⁷⁵ See WICKS-LIM, *supra* note 86, at 9 (noting that most farmworkers work for about one hundred and fifty days out of the year, and most also have additional responsibilities, such as caretaking).

¹⁷⁶ See MASS. GEN. LAWS ch. 151, § 2A (2020) (determining that the minimum wage for agriculture and farming is \$8 per hour).

¹⁷⁷ Compare *id.* (setting an \$8 per hour minimum wage for farmworkers), with *id.* § 1 (setting the state minimum wage at \$13.50 per hour for the 2021 calendar year). Although the hourly minimum wage for farmworkers is \$8 per hour, many employers pay workers between \$10 and \$13.65 per hour. See Sarkar, *supra* note 169 (asserting that subminimum wage is only one hardship among many faced by farmworkers on a daily basis). Notably, the Massachusetts minimum wage for farmworkers is still higher than the federal minimum wage. See 29 U.S.C. § 206 (establishing the federal minimum wage at \$7.25 per hour).

¹⁷⁸ See Letter from Harris Freeman, Professor, W. New Eng. Univ. Sch. of L., to Gen. Couns., Dep't of Lab. Standards (Mar. 9, 2020) (on file with Professor Harris Freeman) (contending that the Department of Labor Standards advisory letter should address the sub-minimum wage of farmworkers and afford dual-job employees overtime compensation).

¹⁷⁹ See WICKS-LIM, *supra* note 86, at 6 (observing that farmworkers experience twice the rate of poverty compared to all other industries in Massachusetts); Sarkar, *supra* note 169 (suggesting that farmworkers, particularly undocumented workers, are vulnerable because they are earning a low wage and may be excluded for relief aid for citizens).

¹⁸⁰ See Perea, *supra* note 17, at 114 (stating that racism was an underlying factor to several of the New Deal legislations because this solidified the support of Southern lawmakers). Notably, although the labor force affected by the agricultural exemption has changed, the original exploitative intent persists, and a larger portion of agricultural workers live in poverty. See *id.* at 127 (recognizing that as of 2011, 30% of farmworkers lived below the poverty line, with a median yearly income of approximately \$7,500 per year).

¹⁸¹ See WICKS-LIM, *supra* note 86, at 5 (determining that 34% of farmworkers are non-white (including Hispanic), 24% are Hispanic, and 30% are foreign-born). As a whole in Massachusetts only 26% of workers are non-white (including Hispanic), 10% are Hispanic, and 21% are foreign-born. *Id.*

ards.¹⁸² In Massachusetts, this discriminatory effect manifests through Black and Latine people earning an income that is approximately forty percent below the state minimum wage.¹⁸³ In addition to the subminimum wage and overtime exemption, a Pioneer Valley Planning Commission study determined that Latine farmworkers have a greater likelihood of living in low-income and segregated neighborhoods.¹⁸⁴ According to the Fairness for Farmworkers Coalition, the agricultural exemption, along with the challenges associated with immigration and with living in poverty, lead to health and safety concerns for Massachusetts farmworkers.¹⁸⁵ Scholars have pointed to the disparate effect of this exception on migrant workers and communities of color as one reason to support abolishing the agricultural exemption.¹⁸⁶

2. Limited Costs of Abolishing the Agricultural Exemption to Farmers and the Farming Industry

Opponents of the agricultural exemption contend that eliminating the exemption would not significantly burden farm owners.¹⁸⁷ They maintain that in-

¹⁸² See *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 839 (Mass. 2019) (observing that the Massachusetts legislature intentionally modeled the state overtime statute from the FLSA, with a few deviations). Activists and scholars have described the agricultural exemption as an example of structural racism due to its persistent impact on workers of color and immigrants since its inception in the FLSA in the 1930s. See Brown, *supra* note 150 (deducing that the exploitative element of the agricultural industry is foundational to how farm owners structure their businesses). Structural racism focuses on the inter-institutional systems and interactions, looking particularly to ideologies and processes that result in and perpetuate discrimination. See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796 (2008) (identifying structural racism as a model for recognizing the “cumulative” effects of racism).

¹⁸³ See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 9 (first citing WICKS-LIM, *supra* note 86, at 5; then citing CONNECTICUT RIVER VALLEY FARMWORKER HEALTH PROGRAM DEMOGRAPHIC REPORT, CONN. RIVER VALLEY FARMWORKER HEALTH PROGRAM (Mar. 1, 2021) (on file with Amy Shepard, Senior Dir., Connecticut River Valley Farmworker Health Program)) (observing that the state’s exemption of farmworkers from overtime and minimum wage has resulted in decreased access to quality housing, inequalities in health, and increased rates of poverty).

¹⁸⁴ See *id.* at 28 (stating that in Springfield, Massachusetts, farmworkers largely live in the three neighborhoods with the highest rates of poverty and the third highest level of segregation among Hispanic-White populations in the United States).

¹⁸⁵ See *id.* (first citing Thomas A. Arcury & Sara A. Quandt, *Conclusions: An Updated Agenda for Farmworker Social Justice in the Eastern United States* 263, 269–77, in *LATINX FARMWORKERS IN THE EASTERN UNITED STATES* (Thomas A. Arcury & Sara A. Quandt, eds., 2d ed. 2020) (2009); then citing Margot Kushel, Reena Gupta, Lauren Gee & Jennifer S. Haas, *Housing Instability and Food Insecurity as Barriers to Health Care Among Low-Income Americans*, 21 J. GEN. INTERNAL MED. 71 (2006)) (remarking that farmworkers who are undocumented face additional challenges of obtaining driver’s licenses, housing, and food assistance from the state).

¹⁸⁶ See Wozniacka, *supra* note 52 (discussing the racist history of the exemption and state responses to abolish it); WICKS-LIM, *supra* note 86, at 5 (calculating that the average farmworker in Massachusetts is non-White and/or foreign-born).

¹⁸⁷ See WICKS-LIM, *supra* note 86, at 3 (calculating a minimal increase in farm annual production costs with the inclusion of overtime payment). There is contention among those in the agricultural industry regarding whether it is financially feasible for farm owners to compensate farmworkers for

creasing accessibility to overtime pay to all Massachusetts farmworkers would only increase a farm's average annual production costs by 1–2% of the farm's total revenue.¹⁸⁸ At the same time, granting farmworkers overtime pay could increase the average farmworker's weekly income by 16.7%.¹⁸⁹ Additionally, overtime compensation would likely have a positive effect on employee retention because increases in payrate also increase employee satisfaction.¹⁹⁰ With a lower turnover in employees, farm-owners can avoid incurring greater expenses associated with labor turn-over while only increasing the labor costs by 1.3% of total revenue.¹⁹¹ This is a slight increase in cost for farm owners, but has the potential to meaningfully impact the wage of farmworkers during the weeks they work overtime.¹⁹²

Furthermore, supporters of the exemption's abolition highlight that states are increasingly eliminating their agricultural exemption.¹⁹³ They argue that

overtime, but there are various ways farmers can shift the costs of overtime to distributors and consumers. See Brown, *supra* note 150 (arguing that consumers could take on small cost increases without noticing). One way that farmworkers have engaged with distributors is through the Coalition of Immokalee Workers' Campaign for Fair Food, in which corporate distributors and restaurants agree to only support farms that ensure fair wages and safe workplace conditions. See *Campaign for Fair Food*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/campaign-for-fair-food/> [<https://perma.cc/5FGN-VU28>] (using corporate partnerships to improve labor conditions for farmworkers).

¹⁸⁸ See WICKS-LIM, *supra* note 86, at 22–23 (stating that the expenses incurred from the expansion of overtime compensation are comparable to other low-wage jobs that have recently undergone amendments to afford workers overtime).

¹⁸⁹ See *id.* at 3 (basing this percentage on a farmworker who works thirty-three to thirty-six hours per week and earns \$13.75 per hour). For comparison, if a farmworker works sixty hours in a week, earning \$13.75 per hour, without overtime, they will earn \$825 in a week. See *id.* at 10 (resulting in annual earnings of \$25,000). According to Margaret Sawyer from the Pioneer Valley Workers Center, the average Massachusetts farmworker works up to sixty hours per week during the harvesting season. Telephone Interview with Margaret Sawyer, *supra* note 1.

¹⁹⁰ See WICKS-LIM, *supra* note 86, at 20 (relying on the statistic that increases in minimum wage had a positive effect on employee retention). The increased employee retention balances the increased costs associated with overtime compensation. See *id.* at 17 (concluding that increase in costs from overtime compensation is approximately 1.6% depending on farm size).

¹⁹¹ See *id.* at 20 (noting that increases in wage for employees in low-wage industries tend to result in decreased worker turnover, which saves employers money in the long-run because they spend less on recruiting and training). The cost of employee turnover depends on the industry rate of turnover and the costs associated with employee replacement. See Robert Pollin & Jeannette Wicks-Lim, *A \$15 U.S. Minimum Wage: How the Fast-Food Industry Could Adjust Without Shedding Jobs*, 50 J. ECON. ISSUES 716, 729 (2016) (touching on research that addresses the influence a higher wage floor has on reducing worker turnover in low-wage industries).

¹⁹² See Brown, *supra* note 150 (estimating that farmworkers could see nearly a 17% increase in their wage for a week where they work overtime). Due to farmworkers' precarious financial position and proximity to the poverty line, this increase could make a significant difference for employees. See *id.* (suggesting that the rate of poverty among farmworkers supports the provision of overtime compensation to balance their low wages).

¹⁹³ See, e.g., CAL. LAB. CODE § 860 (West 2021) (codifying California's Phase-In Overtime for Agricultural Workers Act of 2016); HAW. REV. STAT. § 387-3 (2020) (mandating overtime for farmworkers for hours worked beyond forty-eight hours); MD. CODE ANN., LAB. & EMPL. § 3-420(c) (West 2021) (including that farmworkers should receive overtime compensation for hours completed

these efforts to abolish the exemption indicate that many states recognize that despite the distinctive features of the industry, agriculture is not incompatible with traditional labor protections.¹⁹⁴ Accordingly, the Massachusetts Legislature should likewise treat farmworkers similarly to workers in other industries, and provide farmworkers with overtime protections.¹⁹⁵

C. Instances of State-level Reform and the Inclusion of Farmworkers in Overtime Provisions: New York Farm Laborers Fair Labor Practices Act

The disparate impact of the agricultural exemption on communities of color persists today.¹⁹⁶ In response to growing awareness of the exploitative agricultural labor market, state legislatures around the country have begun expanding farmworkers' labor rights.¹⁹⁷ In New York, farmworkers received the right to overtime compensation in January 2020, following nearly two decades of advocacy.¹⁹⁸ The New York Legislature intended the FLFLPA to afford farmworkers broad labor rights, including overtime compensation.¹⁹⁹ The statute includes farmworkers within a labor protections scheme from which they were

beyond sixty hours in a workweek); MINN. STAT. § 177.23 subd. 7(2) (2020) (entitling farmworkers to overtime compensation if they fit within the definition of employee); N.Y. LAB. LAW § 163-a (McKinney 2020) (affording farmworkers overtime rights under the rights of employees' law); *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 475 P.3d 164, 174 (Wash. 2020) (holding that it is illegal to exempt farmworkers from overtime under the state constitution).

¹⁹⁴ See Wozniacka, *supra* note 52 (noting that in the past two years New York and Washington have abolished their agricultural exemptions).

¹⁹⁵ See Cano, *supra* note 32, at 219 (providing that although farmworkers work longer hours due to the perishable nature of the goods, it is unfair for legislators and employers to expect employees to work these hours without receiving the same type of overtime that employees in other industries receive).

¹⁹⁶ See Perea, *supra* note 17, at 127 (discussing the effect of the agricultural exemption today). Today, although the demographics have changed, a large percentage of farmworkers live below the poverty line due to the same systematic efforts meant to keep African American workers impoverished in the 1930s. See *id.* (addressing the intent of Southern lawmakers to ingrain systems that disenfranchise employees of color).

¹⁹⁷ See WICKS-LIM, *supra* note 86, at 2 (citing statutory changes in three states as reference points); FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 32–33 (discussing seven different state reform measures, including New York, as examples for Massachusetts to follow in eliminating the agricultural exemption).

¹⁹⁸ See Wozniacka, *supra* note 52 (referencing the reform efforts in New York starting in the early 2000s). In the past, various iterations of the FLFLPA have passed the New York Assembly but failed in the State Senate. See *id.* (noting that Governor Andrew Cuomo's support of farmworkers' ability to organize suggested that the FLFLPA would pass the Senate).

¹⁹⁹ See 2019–2020 N.Y. Laws. Ch. 105, § 2 (2019) (finding that farmworkers are among the few categories of employees that are excluded by both the FLSA and the National Labor Relations Act); Wozniacka, *supra* note 52 (noting that the FLFLPA provides farmworkers with collective bargaining rights, a day of rest, disability benefits, unemployment benefits, paid family leave protections, and overtime compensation).

previously excluded.²⁰⁰ Although this law is an example of how a state can abolish the agricultural exemption, the FLFLPA was not passed without opposition.²⁰¹ On the one hand, opponents have called this legislation a “death sentence” because of the increased costs.²⁰² On the other hand, this legislation also ushered in a significant expansion of farmworkers’ rights, particularly compared to other similar state legislation.²⁰³ It was the underlying motivation of the FLFLPA—the Legislature’s desire to address the structural racism inherent in the agricultural exemption—that ultimately served as a persuasive reason to pass this legislation.²⁰⁴

²⁰⁰ See Governor Cuomo Signs Farm Workers Bill, *supra* note 106 (quoting Senator Andrea Stewart-Cousins’s as saying, “[t]he [FLFLPA] . . . will help build a stronger and fairer agricultural industry throughout New York State”). One of the motivations for the FLFLPA was Governor Cuomo’s desire to rectify historical discrimination innate to the agricultural exemption. See *id.* (calling the FLFLPA “a milestone in the crusade for social justice”).

²⁰¹ See Mark Weiner, *NY Assembly Grants Farmworkers Right to Unionize, Overtime Pay*, SYRACUSE.COM (June 19, 2019), <https://www.syracuse.com/politics/2019/06/ny-assembly-grants-farmworkers-right-to-unionize-overtime-pay.html> [<https://perma.cc/UKL2-MVPM>] (discussing the agricultural industry’s resistance to the bill and push to increase the workweek to sixty hours). Democratic members of the State Senate supported this bill, whereas Republican lawmakers were in opposition. See *id.* (noting concerns that the FLFLPA hurt farmers more than it would help farmworkers). Farm owners echoed these concerns about the potential increases in expenses. See Arbetter, *supra* note 155 (containing an interview with a board representative for the Northeast Dairy Producers Association, explaining the opposition many farmer owners have to the FLFLPA).

²⁰² See Weiner, *supra* note 201 (arguing that farm owners are already struggling due to increased costs and that overtime compensation would exacerbate their financial burden). The other two provisions of the bill to which farm owners objected were the day of rest and the right to organize. See Wozniacka, *supra* note 52 (noting that the FLFLPA contains a no-strike clause, which was a concession to farm owners). According to Lisa Zucker, a legislative attorney for the New York Civil Liberties Union, passing the FLFLPA was a challenge due to the power of the Farm Bureau and the agricultural industry. See Brown, *supra* note 150 (noting the influence that the agricultural industry has over legislators who are concerned about re-election). The Farm Bureau is a non-profit composed of farm and ranch owners and their families. See *About*, FARM BUREAU, *supra* note 64 (maintaining that the Farm Bureau’s mission is to support the well-being of farm owners, their farms, and their communities).

²⁰³ See DAVID DYSSEGAARD KALLICK, MARGARET GRAY & OLIVIA HEFFERNAN, FARM WORKERS’ OVERTIME PAY IS AFFORDABLE AND LONG OVERDUE 3 (2019), <https://fiscalpolicy.org/wp-content/uploads/2019/05/Support-the-Farm-Worker-Fair-Labor-Practices-Act.pdf> [<https://perma.cc/EHF3-DMNP>] (noting that the benefits of the FLFLPA will reach beyond raise in income for farmworkers and benefit the local communities in which farmworkers live). Although the agricultural landscape is different, the FLFLPA parallels California’s Agricultural Labor Relations Act by including provisions to protect farmworkers’ ability to unionize and coordinate walkouts. See Benjamin Burdick, *Hernandez v. State: The Fundamental Right to Organize Under New York’s Constitution*, 41 BERKELEY J. EMP. & LAB. L. 409, 424 (2020) (noting that strike prohibitions on exclusively benefit farm owners, not farmworkers). Other states that have passed overtime reforms have also looked to California for inspiration, but New York’s use of collective bargaining is unique and draws on the legacy of the United Farm Workers. See Wozniacka, *supra* note 52 (maintaining that the United Farm Workers was one of the first entities to pursue collective bargaining rights for farmworkers).

²⁰⁴ See Brown, *supra* note 150 (discussing the ways in which the racist history of the agricultural exemption persists in the legislation today). In passing reform laws, lawmakers’ expectations were that farm owners could no longer exploit their workers because the laws required farm owners to pay overtime and minimum wage. See Wozniacka, *supra* note 52 (addressing the harmful effects of farm-

The New York Legislature designed the FLFLPA to require farm owners to pay overtime for hours worked beyond sixty hours in a week.²⁰⁵ The FLFLPA also established the Farm Laborers Wage Board to evaluate the overtime threshold and make recommendations to the New York State Labor Commissioner about whether they should lower the threshold.²⁰⁶ In December 2020, the Farm Laborers Wage Board recommended that, in light of the coronavirus pandemic, the Commissioner retain the sixty-hour overtime threshold.²⁰⁷

In May 2019, the Fiscal Policy Institute estimated that when the FLFLPA eventually lowers the overtime threshold to forty hours, farmworkers would see an increase in wages between thirty-four dollars and ninety-five dollars per week.²⁰⁸ Additionally, the Fiscal Policy Institute estimates that, at most, farm owners will see a nine percent cost to net income.²⁰⁹ At the same time, farm owners would experience benefits from greater employee retention and in-

workers exclusion from federal and state work protections). Although state legislation addressing these exclusions is instrumental to providing farmworkers more robust labor protections, legislative action is still relatively uncommon. *See id.* (providing that only a few states have comprehensive reform laws). Instead, a common source of advocacy and rights for farmworkers comes through non-profits. *E.g.*, *Fair Food Program*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/fair-food-program/> [<https://perma.cc/2MJT-VDAJ>] (identifying the Coalition of Immokalee Workers as a non-profit organization through which farmworkers can advocate for safer working conditions).

²⁰⁵ *See* Jimmy Vielkind, *New York Farmers Await State Decision on Overtime*, WALL STREET J. (Dec. 28, 2020), <https://www.wsj.com/articles/new-york-farmers-await-state-decision-on-overtime-11609160400> [<https://perma.cc/V8V8-2S8Y>] (stating that the sixty-hour threshold represented a compromise between farm owners' cost concerns and farmworker and labor union interests).

²⁰⁶ *See id.* (noting that the Farm Laborers Wage Board considers a range of issues, such as cost to farm owners, cost to customers, and effect on farmworkers, when making recommendations about the overtime threshold). The FLFLPA tasked the Farm Laborers Wage Board with recommending an overtime threshold between forty hours and sixty hours per week. *See* Sally Colby, *Changing Work Laws in New York*, COUNTRY FOLK (July 27, 2021), <https://countryfolks.com/changing-work-laws-in-new-york/> [<https://perma.cc/323V-L65G>] (explaining that the Farm Laborers Wage Board is comprised of a community representative, a union representative, and a Farm Bureau representative).

²⁰⁷ *See* Colby, *supra* note 206 (noting that the Farm Laborers Wage Board held multiple hearings to determine the recommendation, considering appropriate influencing conditions); Arianna Fishman, *New York Farm Laborer Wage Board Refuses to Set 40-Hours Overtime*, ACLU OF N.Y. (Dec. 31, 2020), <https://www.nyclu.org/en/press-releases/new-york-farm-laborer-wage-board-refuses-set-40-hour-overtime> [<https://perma.cc/8K8P-D8NC>] (contending that the Farm Laborers Wage Board's recommendation to retain the sixty-hour overtime threshold represents a choice to use the pandemic to undervalue farmworkers). The Farm Laborers Wage Board will reconvene in December 2021 to reevaluate the overtime threshold recommendation for the coming years. *See* Colby, *supra* note 206 (suggesting that the Farm Laborers Wage Board could decrease the threshold as low as forty hours).

²⁰⁸ *See* KALLICK, GRAY & HEFFERNAN, *supra* note 203, at 1 (determining the wage increase range based on estimated overtime hours completed by farmworkers across farming branches). For example, Kallick, Gray, and Heffernan estimate that farmworkers working on fruit and vegetable farms work between 49 and 47.7 hours in a week, causing them to earn \$34 in overtime. *See id.* at 3 (suggesting that, farmworkers will benefit from greater recognition and appreciation by employers because of their inclusion under state labor laws).

²⁰⁹ *See id.* at 7 (stating that this percentage is comprised of costs associated with paying wages above minimum wage along with paying overtime).

creased productivity.²¹⁰ With respect to passing costs onto consumers, the Fiscal Policy Institute approximated that overtime compensation would cause prices to increase by around two percent.²¹¹ Although the long term benefits of the FLFLPA are not yet available, similar laws passed in other states have demonstrated that overtime payments compensate farmworkers fairly for their hours worked, while not significantly affecting farm owners and consumers.²¹²

III. A LEGISLATIVE SOLUTION IS NEEDED TO RECTIFY THE MASSACHUSETTS DEPARTMENT OF LABOR STANDARDS'S ADVISORY

This Note argues that Massachusetts should abolish the agricultural exemption to resolve the decreased worker protections resulting from the Massachusetts Department of Labor Standards's advisory.²¹³ Although agency advisories are non-binding, they serve as a guide post for the public and the courts.²¹⁴ This is notable because the Massachusetts Supreme Judicial Court in *Arias-Villano v. Chang & Sons Enters., Inc.*, did not address the same question as the Department of Labor Standards.²¹⁵ The court in *Chang & Sons* interpreted the agricultural

²¹⁰ See *id.* at 6 (suggesting that employee retention and increased productivity will likely lower the cost of overtime to farm owners' overall bottom line). Because overtime compensation helps farm owners attract and retain employees, it helps reduce costs of training and recruiting, which in turn offsets bottom line costs from overtime pay. See David Dyssegaard Kallick & Daniel Costa, *Farmworkers in New York Deserve Overtime Pay*, ECON. POL'Y INST.: WORKING ECON. BLOG (June 7, 2019), <https://www.epi.org/blog/farmworkers-in-new-york-deserve-overtime-pay/> [<https://perma.cc/7Z5V-LAGU>] (refuting claims by the New York Farm Bureau that the FLFLPA will debilitate farm owners).

²¹¹ See KALICK, GRAY & HEFFERNAN, *supra* note 203, at 7 (noting that this is an aggressive estimate in response to cost concerns expressed by parties opposing the FLFLPA). Represented in dollars, this 2% increase would be an increase of a few cents per pound); see Kallick & Costa, *supra* note 210 (using the increase in cost of farmer's market apples from \$1.50 to \$1.53 per pound as an example).

²¹² Cf. Kallick & Costa, *supra* note 210 (pointing to the successful enactment of farmworker overtime pay in California, the largest agricultural producer in the country); Wozniacka, *supra* note 52 (framing California's overtime law as a model for other states to follow).

²¹³ See *infra* notes 213–258 and accompanying text.

²¹⁴ See *Sullivan v. Sleepy's LLC*, 121 N.E.3d 1210, 1216 n.11 (citing *Mass. Gen. Hosp. v. Rate Setting Comm'n*, 359 N.E.2d 41 (Mass. 1977)) (providing that agency opinion are non-binding, but courts typically give them deference). Although Massachusetts courts typically defer to agencies' reasonable interpretation, the court does not need to give deference to opinions that are at odds with the plain language and objective of the statute. See *Swift v. AutoZone, Inc.*, 806 N.E.2d 95, 101 (Mass. 2004) (discussing the overtime statute in the context of crediting payment rather than paying time and a half for overtime hours).

²¹⁵ 118 N.E.3d 835, 840 (Mass. 2019) (holding that farmworkers who work in post-harvesting qualify for overtime pay, but farmworkers who work in harvesting do not); Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (noting that the court in *Chang & Sons* expressly declined to address whether farmworkers who do both harvesting and post-harvesting work qualify for overtime compensation). Because the court did not address whether farmworkers who engage in both harvesting and post-harvesting qualify for overtime, the Department of Labor Standards sought to clarify the issue in its advisory. See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 1 (seeking to provide clarity to farm owners).

exemption in a binary of harvesting versus post-harvesting works.²¹⁶ Conversely, the Department of Labor Standards addressed how workers doing both harvesting and post-harvesting work qualify for overtime compensation.²¹⁷ For this reason, the department was able to expand the scope of the agricultural exemption.²¹⁸ Consequently, a legislative solution abolishing the exemption, such as the Fairness for Farmworkers Act, is an important means to resolve the conflict between *Chang & Sons* and the Department of Labor Standards's opinion.²¹⁹ Section A of this Part argues that the remedial nature of the Massachusetts overtime statute supports the abolition of the agricultural exemption.²²⁰ Section B contends that abolishing the exemption rectifies the statutes' discriminatory effects.²²¹ Section C maintains that farm owners and the market can handle the cost increase from mandating overtime pay for farmworkers.²²²

A. The Remedial Overtime Statute and Farmworker Advocacy

The Massachusetts Legislature intended the overtime statute to provide broader protections to workers than those offered by the FLSA.²²³ This remedial nature is in contrast to the recent Department of Labor Standards's advisory opinion which broadened the scope of the agricultural exemption from *Chang &*

²¹⁶ See *Chang & Sons*, 118 N.E.3d at 840 (concluding that the definition of "agriculture and farming" in the context of the overtime statute does not include post-harvesting work). The overtime statute narrowly defines agriculture (in the exemption) as agriculture that occurs on a farm, so the court relied on legislative history and intent in making this determination. See MASS. GEN. LAWS ch. 151, § 1A(19) (2020) (containing the agricultural exemption); *Chang & Sons*, 118 N.E.3d at 838 (determining that the legislative history supports a narrow interpretation of agriculture under the exemption).

²¹⁷ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 3 (analogizing to the federal overtime regulation for "Executive, Administrative, Professional, Computer and Outside Sales employees" to devise a formula for paying overtime to farmworkers doing dual-job work).

²¹⁸ See Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (providing that Massachusetts courts will defer to the Department's opinion when interpreting the agricultural exemption in future cases).

²¹⁹ See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 30–31 (discussing the broad-sweeping benefits of affording farmworkers overtime pay); Cano, *supra* note 32, at 211 (proposing the legislative abolition of the agricultural exemption in Washington State, which like Massachusetts, has a history of progressive policy reforms). The Washington Supreme Court recently held that the agricultural exemption is unconstitutional in *Martinez-Cuevas v. DeRuyter Bros. Dairy.*, 475 P.3d 164, 174 (Wash. 2020) (concluding that the agricultural exemption violates the Special Privileges and Immunities Prohibition of the Washington Constitution, meaning that it excludes agricultural workers from an essential labor protection); see WASH. CONST. art. 1, § 12 (providing that the state cannot enact laws that exclude or provide special privileges to any worker or business).

²²⁰ See *infra* notes 223–233 and accompanying text.

²²¹ See *infra* notes 234–242 and accompanying text.

²²² See *infra* notes 243–258 and accompanying text.

²²³ See *Chang & Sons*, 118 N.E.3d at 838 (citing *Casseus v. E. Bus. Co.*, 89 N.E.3d 1184, 1194 (Mass. 2018)) (supplying the notion that the Massachusetts overtime statute is remedial, and that the court should read the statute broadly to comply with the legislative intent).

Sons's narrow construction.²²⁴ Although the advisory letter is non-binding, Massachusetts courts typically give considerable deference to agency opinion letters.²²⁵ Because the advisory opinion runs counter to the *Chang & Sons* guidance and to the legislative history of the Massachusetts overtime statute, a legislative solution will not only clarify expectations, but also expands farmworkers' access to overtime protections.²²⁶

Because farmworkers are often in a vulnerable position and do not have protection against employer retaliation for organizing or personal advocacy, abolishing the agricultural exemption and expanding access to overtime compensation helps level the playing field.²²⁷ Recently, the Fairness for Farmworkers Coalition introduced a bill in the Massachusetts legislature to abolish the agricultural exemption.²²⁸ The Coalition designed the bill to provide farmworkers with fair

²²⁴ See Letter from Michael Flanagan to Interested Parties, *supra* note 12, at 4 (providing that the "primary duty test" could result in an employee who works in post-harvesting being exempt from overtime because their "primary duty" is harvesting). The Massachusetts Attorney General's Office responded to the Department of Labor Standards's advisory letter, noting that under the "'primary duty' test," farm owners could ignore the *Chang & Sons* guidance and enact policies that run counter to the existing standards. See Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (requesting additional clarification on the agricultural exemption considering the harmful effect the advisory could have on the *Chang & Sons* decision).

²²⁵ Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (stating that although courts give deference to agency opinions because they do not carry the weight of law, courts do not need to follow the agency guidance if it is contrary to the legislative intent and common meaning of the statutory text). The Attorney General's office expressed concern that because of the nature of the advisory, courts may not give the opinion deference in the future. See *id.* (citing *Sullivan v. Sleepy's LLC*, 121 N.E.3d 1210, 1216 n.11 (Mass. 2019)).

²²⁶ See Interview with Margaret Sawyer, *supra* note 1 (noting that this is the first bill concerning farmworkers that the Massachusetts legislature has considered in a long time).

²²⁷ See *Cano*, *supra* note 32, at 211 (arguing in favor of state legislative action removing the agricultural exemption, setting the stage for a future federal measure). A state legislative solution has the potential to affect farmworkers more expeditiously and at lower stakes than federal legislation. See *id.* at 216 (suggesting state laws are lower stakes because they are not applicable nationwide). Farmworkers do not receive protection against employer retaliation for unionizing because the National Labor Relations Act excludes farmworkers from its protections. See Kent Wong, *A New Labor Movement for a New Working Class: Unions, Worker Centers, and Immigrants*, 36 BERKELEY J. EMP. & LAB. L. 205, 211 (2015) (providing that the workers center movement started due to a desire among low-wage workers to advocate for their rights and to expand their personal knowledge about the rights available to them).

²²⁸ See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 2 (providing that the Fairness for Farmworkers Coalition is comprised of Pioneer Valley Workers Center, ACLU of Massachusetts, and Connecticut River Valley Farmworkers Health Program, among other groups); Interview with Margaret Sawyer, *supra* note 1 (discussing the Pioneer Valley Workers Center's connection to the *Chang & Sons* case and the various modes of advocacy that individuals and institutions across Massachusetts engage in on behalf of farmworkers). The proponents drafted the bill to resemble the FLFLPA, and it contains a similar day of rest provision that accounts for the arduous working conditions of farmworkers. See *id.* (noting that the current draft sets overtime at hours worked beyond fifty-five hours rather than sixty hours in a workweek). Like the FLFLPA, a desire to rectify historic exclusions from labor protections that prevent fair compensation to vital workers in the farming industry underlies the Fairness for Farmworkers Act. See KALLICK, GRAY & HEFFERNAN, *supra* note 203, at 8 (contending that

compensation and treatment without significantly burdening farm owners.²²⁹ The Fairness for Farmworkers Act, like the FLFLPA, provides for a day of rest and overtime compensation.²³⁰ By expressly requiring overtime compensation, Massachusetts could resolve the contradictory interpretation between *Chang & Sons* and the Department of Labor Standards's advisory.²³¹ In so doing, the legislature could prevent a situation where farm owners rely on the Department of Labor Standards's advisory letter to deny farmworkers overtime compensation.²³² Consequently, clear legislation abolishing the agricultural exemption would establish explicit overtime standards by which farm owners must abide.²³³

B. Abolishing the Agricultural Exemption Rectifies Historical Discrimination

Following in suit with New York and like states, abolishing the agricultural exemption will enable Massachusetts to rectify the effects of a historically discriminatory policy.²³⁴ Agricultural workers today face similar hardships as they did when the Congress passed the FLSA—limited income, unpredictable work,

farmworkers work consistently long hours and deserve compensation that represents those hours worked); FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 34 (acknowledging that the agricultural exemption predominantly affects immigrant and Latine workers, who are entitled to labor protects like any other worker).

²²⁹ See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 29 (stating that the bill will likely only result in a 1.3 % increase in prices to account for the newly incurred labor costs).

²³⁰ See *id.* at 4 (delineating the provisions of the Fairness for Farmworkers Act); N.Y. LAB. LAW § 161(1) (McKinney 2021) (providing one day of rest in a seven-day workweek for farmworkers). The Fairness for Farmworkers Act provides for overtime compensation for farmworkers who choose to work on their day off, as well as overtime pay for seasonal workers for hours worked beyond fifty-five hours in a week and for year-round workers for hours worked beyond forty hours per week. See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 4 (noting that the Fairness for Farmworkers Act replaces the sub-minimum wage for farmworkers with the state standard minimum wage).

²³¹ See Letter from Cynthia Mark to Michael Flanagan, *supra* note 133, at 2 (observing that the discrepancy between the Department's opinion and the *Chang & Sons* decision may result in farm owners disregarding the *Chang & Sons* holding).

²³² See *id.* at 2 (stating that if a farm owner were to rely on the advisory letter, a farmworker could potentially sue them for wrongful denial of overtime pay).

²³³ See *id.* (contending that farm owners need guidance following the Department's advisory).

²³⁴ See Brown, *supra* note 150 (arguing that the New Deal era labor laws were designed to appease Southern lawmakers' desire to exclude people of color from labor protections); *Governor Cuomo Signs Farm Workers Bill*, *supra* note 106 (including Governor Cuomo's remarks that the FLFLPA is an important practical achievement). The FLFLPA affords overtime compensation, along with the protections for collective bargaining, a day of rest, and the enforcement of sanitary codes to agricultural institutions across New York. See *id.* (stating that the FLFLPA affected one hundred thousand individuals). In Massachusetts, approximately 25,920 individuals work in the agricultural industry, so legislation affording employees overtime compensation has the potential to impact a significant portion of the workforce. See Myron Inglis, *Agricultural Resources Facts and Statistics*, MASS.GOV, <https://www.mass.gov/info-details/agricultural-resources-facts-and-statistics> [https://perma.cc/VKR3-53EA] (stating that the average Massachusetts farm reaps over \$65,000 in commodities and that the state has 7,241 farms).

high rates of poverty, and limited union access.²³⁵ In adopting legislation that encompasses farmworkers within the scope of overtime compensation, states such as New York are lowering the barrier to a sustainable wage and a healthy work environment.²³⁶ Like the FLFLPA, the Fairness for Farmworkers Act would not only afford overtime compensation to farmworkers, but would lead to broader benefits like reduced social and economic inequality.²³⁷ By amending the Massachusetts overtime law, the legislature can more fully embody the constitutional assurance of equal protection and strengthen the labor protections afforded to vulnerable workers.²³⁸ Moreover, Massachusetts could join New York, and like states, in advancing social justice through labor laws.²³⁹

Furthermore, one of the primary overarching benefits of passing state legislation that allots overtime compensation for agricultural workers is that the state

²³⁵ See Wozniacka, *supra* note 52 (stating that farmworkers have one of the lowest unionization rates at less than 1%). As the rate of “guest workers[.]” increases through the H-2A program, the percentage of farmworkers supported by unions decreases. See *id.* (stating these workers come to the U.S. through a formal federal program). An H-2A “guestworker” is an individual employed in the U.S. on a temporary work visa by an employer who was unsuccessful in hiring U.S. workers. See Guild & Figueroa, *supra* note 6, at 158 n.1, 165 (describing the program as flawed due to the dependence that these workers have on their employers, the lack of citizenship opportunities, and the frequency of guestworkers living in employer-provided housing). The H-2A visa is part of a larger program through the Immigration and Nationality Act, which implemented a range of programs for foreign nationals to receive authorization to work and live in the United States. See Abigail Rosenfeld, Note, *Consider the Caregivers: Reimagining Labor and Immigration Law to Benefit Home Care Workers and Their Clients*, 62 B.C. L. REV. 315, 332 (2021) (noting that this program stratifies applicants based on their skills and capabilities).

²³⁶ See Brown, *supra* note 150 (discussing measures taken by states that lower the threshold for farmworkers to access overtime, including discussions in New York to lower the required overtime standard from sixty hours to forty hours).

²³⁷ See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 31 (maintaining that the Fairness for Farmworkers Act will help reduce food shortages and insecurity faced by farmworkers, make affordable and safe housing more accessible, and boost the economies where farmworkers live and work); KALLICK, GRAY & HEFFERNAN, *supra* note 203, at 4–5 (detailing that the FLFLPA will show that farmworkers are an essential part of the state workforce, reduce exploitative labor practices, and allow farmworkers to reap the benefits of increased wages).

²³⁸ See Perea, *supra* note 17, at 135–36 (arguing that legislators have a constitutional duty to repeal discriminatory laws, including the agricultural exemption of the FLSA). Although Perea discusses this notion at the federal level, the argument extends to Massachusetts, where the agricultural exceptionalism disproportionately harms farmworkers. See Sarkar, *supra* note 169 (noting that Massachusetts has a lower minimum wage for farmworkers).

²³⁹ See Telephone Interview with Margaret Sawyer, *supra* note 1 (maintaining that the proposed Massachusetts farmworkers overtime compensation bill is based on the FLFLPA because the FLFLPA addresses social justice concerns). The FLFLPA and the Fairness for Farmworkers Act are both motivated by the recognition that the agricultural exemption is a lasting example of structural racism that states should remedy through legislative reforms. See KALLICK, GRAY & HEFFERNAN, *supra* note 203, at 8 (stating that the agricultural exemption is a Jim Crow-era relic, which the FLFLPA necessarily eliminated); FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 34 (contending that the Fairness for Farmworkers Act will serve to rectify the structural racism perpetuated through the Massachusetts agricultural exemption).

law can set the stage for future federal legislation.²⁴⁰ Massachusetts has a history of progressive legislation and can be among the states broadening farmworker labor protections.²⁴¹ Overtime compensation for farmworkers has the potential to fulfill the public policy of expanding protections for employees and their families, while also sustaining the economic feasibility of continued work in the agricultural industry.²⁴²

C. The Costs of Abolishing the Agricultural Exemption Are Reasonable

If Massachusetts enacts legislation abolishing the agricultural exemption, such a policy would require monitoring and adjustment to balance the interests of farmworkers and farm owners.²⁴³ Agriculture accounts for nearly twenty-six thousand jobs in Massachusetts, with over seven thousand farms within its boundaries—this is a significant number, and the legislature should consider the interests of farm owners.²⁴⁴ Nevertheless, concerns from farm owners, particularly regarding costs, need not be a barrier abolishing the agricultural exemption.²⁴⁵

²⁴⁰ See *Cano*, *supra* note 32, at 211 (discussing the same motivation within the Washington legislation). The U.S. Supreme Court has addressed state legislative solutions. See *id.* at 216 (referencing judicial encouragement of state policy experimentation). Justice Louis D. Brandeis acknowledged that states could engage in new social and political programs without impacting the entire country. See *id.* (describing state legislation as a way to experiment new social or economic policies). This is the case with Washington—by being one of the first states to abolish the agricultural exemption, it can afford greater labor protections to farmworkers and serve as a guide to other states for how these types of laws can operate. See *id.* (contending a state-level solution allows for pioneering and experimentation).

²⁴¹ See *id.* at 211 (discussing that Washington routinely enacts progressive legislation and presenting an argument in favor of Washington abolishing the agricultural exemption). Like Massachusetts, Washington was one of the first states in the country to legalize same-sex marriage laws. See WASH. REV. CODE § 26.04.010 (2021) (affording marriage rights to two persons of any gender identity). Washington was also one of the first states to afford agricultural workers overtime compensation. See *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 475 P.3d 164, 174 (Wash. 2020) (discussing overtime compensation for dairy employees, a sub-category of agricultural workers). Massachusetts was the first state to legalize same-sex marriage in 2003, and when the state enacted Chapter 151, it was a leader in labor rights for workers compared to the national standard. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (legalizing same-sex marriage); *Arias-Villano v. Chang & Sons Enters., Inc.*, 118 N.E.3d 835, 838 (Mass. 2019) (addressing the original legislative intent of Chapter 151 as affording greater protections than the FLSA).

²⁴² See WICKS-LIM, *supra* note 86, at 23 (addressing the positive effects of overtime compensation for agricultural workers, focusing particularly on the increased living standard that is associated with increased wages).

²⁴³ See *Wozniacka*, *supra* note 52 (noting that farm owners' concerns about the increased costs is the principal point of resistance to overtime compensation).

²⁴⁴ See *Inglis*, *supra* note 234 (noting that “[t]he agricultural industry directly provides employment to 25,920 individuals”).

²⁴⁵ See WICKS-LIM, *supra* note 86, at 3 (distilling the average increase in yearly costs for farms). Estimates provide that encompassing farmworkers within the protections of overtime compensation would only result in approximately a 5% increase in a farm's labor costs, which translates to a total

Affording farmworkers overtime pay is not inherently overly expensive for farm owners.²⁴⁶ Requiring farm owners to pay overtime would only cause an increase in costs representative of approximately 1.6% of the overall revenue.²⁴⁷ A cost saving measure can include off-setting the increase in price by slightly increasing the sale cost to corporate distributors.²⁴⁸ A similar program to this already exists in Florida with the Coalition of Immokalee Workers.²⁴⁹ This organization partnered with corporate retailers and chain restaurants to sell produce from farms that provide robust protections to the farmworkers.²⁵⁰ As food prices naturally rise on their own, it is feasible that consumers would willingly absorb the slight increase in price.²⁵¹

increase in cost for revenue of between 1% and 2% depending in the size of the farm. *See id.* at 3, 20 (noting that the average farm would incur an increase in labor costs of 1.6% relative to total revenue).

²⁴⁶ *See id.* at 17–18 (discussing the similarities between an increase in minimum wage and the adoption of overtime laws for farmworkers). Massachusetts minimum wage laws are like the state overtime laws because they both provide stronger protections than the FLSA. *See id.* at 18 (comparing the Massachusetts minimum wage of \$12.75 per hour to the federal minimum wage of \$7.25 per hour). Because employers in labor intensive, low wage industries adapted well to minimum wage laws, Wicks-Lim posits that farm owners and the farming industry could withstand overtime compensation for farmworkers. *See id.* (stating that minimum wage is sufficiently like overtime compensation that past changes to minimum wage are a helpful reference point).

²⁴⁷ *See id.* at 3 (concluding that an increase of 5% of labor costs from the overtime payments would only constitute 1.6% of gross sales from the standard farm).

²⁴⁸ *See id.* (providing that consumers likely would not realize a slight increase in cost); Guild & Figueroa, *supra* note 6, at 175–76 (providing that cost increases to corporate distributors along with statutorily mandated disclosures is part of corporate sustainability practices). Laws such as the California Transparency in Supply Chains Act of 2010 mandates that corporate entities disclose the labor conditions of farms with which they do business and raise awareness for the labor conditions under which farmworkers work. *See* CAL. CIV. CODE § 1714.43 (2021) (implementing the California Transparency in Supply Chains Act of 2010 as an effort to eliminate slavery and human trafficking); Guild & Figueroa, *supra* note 6, at 176 (framing corporate social responsibility through disclosures to incentivize the promotion of products and investigation of non-participatory corporations). Outside the scope of state action, there are organizations around the country that partner with corporations to encourage social responsibility with respect to farmworker rights. *See* Guild & Figueroa, *supra* note 6, at 175 (listing various programs that establish baseline working conditions and supply chain requirements for corporations to improve the living and working conditions of farmworkers). One of the most prominent is the Fair Food Program from the Coalition of Immokalee Workers, which partners with corporations to support wage increases for farmworkers by paying an additional few cents per pound on produce. *See Campaign for Fair Food, supra* note 187 (stating that the program educates companies and consumers on the exploitation of farmworkers with respect to wage and hours).

²⁴⁹ *See Fair Food Program, supra* note 204 (explaining that the Coalition of Immokalee Workers' Fair Food Program draws on a code of conduct and monitoring and enforcement mechanisms to advance farmworker welfare). The Fair Food Program's Code of Conduct outlines requirements for participating farms and buyers concerning workplace practices. *See id.* (requiring that farm owners will institute human-rights-based workplace practices to support farmworkers' quality of life).

²⁵⁰ *See id.* (partnering with corporations, including fast food restaurants and large retail grocers, through binding agreements that include fair labor practice agreements from farm owners).

²⁵¹ *See* Brown, *supra* note 150 (stating that given the slight rise in food costs due to the pandemic, consumers may not even realize the increase in prices due to the compensation of farmworkers for overtime hours). A potential advantage to farm owners for paying farmworkers overtime is that they

Although there is no concrete example of a state that has implemented a corporate/farm partnership program, the possibility of corporate cooperation informed California's and New York's legislative efforts to remove the agricultural exemption.²⁵² In both states, the rationale for abolishing the agricultural exemption at the expense of increased commodity costs is rooted in notions of sustainability and (corporate) social responsibility.²⁵³ Corporations are increasingly enforcing labor standards and engaging with ways of incentivizing against exploitation of workers, indicating a potential willingness to absorb increased costs.²⁵⁴

Even if a corporate-based solution is not available, the total increased costs to farm owners providing overtime compensation to farmworkers is minimal, at approximately one to two percent of overall revenue.²⁵⁵ As a whole, the legisla-

can market the goods as coming from a farm that supports farmworker labor rights. See WICKS-LIM, *supra* note 86, at 21 (discussing the profitability of sustainable products).

²⁵² See Alison Moodie, 'A Historic Change': California First State to Pass Overtime Pay for Farm Workers, THE GUARDIAN (Sept. 14, 2016), <https://www.theguardian.com/sustainable-business/2016/sep/14/california-overtime-farm-workers-union> [<https://perma.cc/ARC8-HD6B>] (expressing that consumer knowledge around the conditions of agricultural work is increasing and that overtime compensation and improved work conditions are points of sustainability that consumers may support); Wozniacka, *supra* note 52 (addressing the countervailing ignorance tied to consumers focusing solely on small-scale local food sources and ignoring the exploitation of farmworkers that occurs at larger-scale enterprises). In New York, those who primarily consume locally grown food may be ignorant to the practices of large farms, so spreading information about the conditions in which farmworkers work as well as information about potential legislation is vital. See *id.* (describing locavores as people who rely on local food but idealize small farm practices, thereby disregarding the exploitative practices at larger farms).

²⁵³ See Guild & Figueroa, *supra* note 6, at 173 (acknowledging that farmworkers suffer at the expense of corporations and farm owners seeking to avoid accountability for working conditions). Traditionally, fast food restaurants and grocery stores have maintained that they cannot control the working conditions of farmworkers, and farm owners have argued that they needed to cater to the demands of corporations. See *id.* (noting that farmworker advocacy organizations have urged consumers to pressure distributors to demand better work conditions and pay for farmworkers). As societal perspectives and knowledge about the agricultural industry evolve, pressures for corporations to recognize their role in the system increases as states begin to afford greater rights to farmworkers. See *id.* at 174 (recognizing that corporations are beginning to enact policies that encourage the farming industry to sustain safer working conditions); *About the Fair Food Program*, FAIR FOOD PROGRAM, <https://www.fairfoodprogram.org/about-the-fair-food-program/> [<https://perma.cc/888K-P5ZD>] (containing a list of the corporations that have partnered with the Coalition of Immokalee Workers to support workers' rights at the farms from which the corporations purchase their produce).

²⁵⁴ See Guild & Figueroa, *supra* note 6, at 174 (discussing that corporations have engaged in social responsibility in the agricultural industry by instituting mechanisms to oversee partner farms, enforcing labor standards against discrimination, and instituting labor law compliance measures).

²⁵⁵ See WICKS-LIM, *supra* note 86, at 22 (stating this increase is comparable to other low-wage industries). Accordingly, based on the estimated increase, farm owners could raise their prices by approximately 1.3% to shift the increased expenses to consumers rather than absorbing them as owners. See *id.* at 20 (suggesting that this price increase is small enough that consumers likely would not notice). By raising prices slightly to allow for overtime compensation, farm owners reasonably would not impact the price seen by consumers because this value is marginal. See *id.* at 21 (explaining that an increase in sale price to distributors would result in a few cents change in the sale price to consumers).

tive abolition of the agricultural exemption in chapter 151, section 1A of the Massachusetts General Laws would align the agricultural industry with other sectors that employ low-wage workers and help to create an environment that is more financially conducive to the maintenance of employment over time.²⁵⁶ Additionally, according to the Fairness for Farmworkers Coalition, eliminating the agricultural exemption not only would provide a financial benefit, but it would help reduce food insecurity and poverty among farmworkers as well.²⁵⁷ In sum, the social benefit of providing overtime compensation to farmworkers outweighs the cost of denying farmworkers this essential labor protection.²⁵⁸

CONCLUSION

The Massachusetts legislature designed the overtime statute as a remedial law to provide coverage to those not protected by the FLSA. Despite the historical similarities between the Massachusetts law and the FLSA, the Massachusetts law contains a narrower definition of agriculture within the context of the agricultural exemption. In 2019, in *Arias-Villano v. Chang & Sons Enters., Inc.*, the Massachusetts Supreme Judicial Court confirmed the narrow scope of the exemption by holding that the agricultural exemption excluded only those workers involved in harvesting work. Following *Chang & Sons*, the Massachusetts Department of Labor Standards issued an advisory opinion that broadened the reach of the exemption to include those who do both harvesting and post-harvesting work. This guidance undermined the original legislative intent and the contemporary judicial interpretation that afforded farmworkers greater labor protections. The Department of Labor Standards's opinion runs counter to trends across the country of states eliminating the agricultural exemption to their overtime statutes. New York, the state most like Massachusetts in the farming industry, removed this provision from their overtime statute and instituted the FLFLPA in 2019, which afforded broad labor protections to farmworkers. Massachusetts should follow the lead of New York and other states in

²⁵⁶ See *id.* at 23 (explaining that in a similar industry, restaurant work, employers have experienced a rise in minimum wage and sustained their ability to pay and employ workers).

²⁵⁷ See FAIRNESS FOR FARMWORKERS COAL., *supra* note 26, at 31 (stating that paying farmworkers overtime will help reduce the challenges faced by farmworkers on a daily basis and will help support the Massachusetts economy). Under the current wage and hour laws, the subminimum wage combined with the lack of overtime compensation places farmworkers in a difficult position finding affordable housing. See *id.* at 28 (noting that low wages, as well as language barriers and lack of housing rights knowledge, leads many migrant farmworkers to live in homes that pose health and safety risks). Furthermore, because of the poverty-inducing wage, many farmworkers struggle to consistently afford the costs of food and other living expenses. See *id.* at 25 (concluding that the subminimum wage and lack of overtime causes farmworkers to struggle to provide food for themselves and their families).

²⁵⁸ See *id.* at 22 (detailing the history of the agricultural exemption in Massachusetts and the hardships faced by migrant farmworkers).

abolishing the agricultural exemption. The Fairness for Farmworkers Act presents an opportunity for the Massachusetts legislature to eliminate this exemption and begin affording farmworkers the critical labor protections that the law has historically deprived them of—an important step during a time of precarious employment conditions.

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