Farm workers, equal treatment and insurability: Griego v New Mexico Workers’ Compensation Administration

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The US courts have considered a number of cases where a person has argued that his or her exclusion from insurability (either in social security, unemployment insurance or workers compensation) was in breach of the guarantee of equal protection in federal and/or state constitutions. The Social Security Act had originally entirely excluded domestic and agricultural workers. Early cases upholding the constitutionality of the Social Security Act had, inter alia, held that the exclusion of certain classes of worker from the scope of coverage did not render the legislation unconstitutional. However, these cases had not involved claims of racial, economic or sexual discrimination. Nonetheless, subsequent federal court decisions have consistently upheld exclusion of farm workers based on rational basis review. Legislative changes to the social security and unemployment insurance laws have addressed many of the issue concerning the exclusion of farm workers. However, exclusion of such workers from state workers compensation legislation remains an issue in a number of states although some State courts have struck down such exclusions – generally applying a heightened standard of review under State law. A recent case to consider this issue is in New Mexico where the district court – in Griego v New Mexico Workers’ Compensation Administration (WCA) - ruled that the exclusion of farm and ranch laborers from workers’ compensation benefits is in violation of the Equal Protection Clause set out in Article II, § 18 of the New Mexico Constitution. The Court of Appeals of New Mexico – although not directly considering the constitutionality of the law - has now ruled that ‘[a]s a party to the declaratory judgment, the WCA is bound by the district court’s ruling’. This note discusses this decision in the light of the existing jurisprudence.

Social security challenges

In the 1970s, the exclusion of agricultural workers from social security coverage (unemployment insurance) was challenged on equal protection grounds. However, this exclusion was upheld by district and circuit courts and (albeit summarily) by the Supreme

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3 Social security coverage was extended to most farm laborers over time while Congress extended unemployment insurance coverage to most agricultural workers under the Federal Unemployment Tax Act (FUTA) in 1976. However, issues may still remain in relation to, for example, seasonal workers.


5 Griego v New Mexico Workers’ Compensation Administration, 32, 120, Nov. 25 2013 (N.M. C.A. 2013). The decision is discussed in more detail below.
In *Romero v Hodgson*, the three-judge district court upheld the exclusion, by both California and federal statutes, of agricultural labor from the definition of ‘employment’ for the purposes of unemployment compensation. Although the court accepted that circumstances had changed since the 1930s (undermining part of the rationale cited in the earlier cases), it found that the desire to subsidize agriculture remained a rational basis for the exclusion. More recently in *Zambrano v Reinert*, the Seventh Circuit court of appeals shortly dismissed an argument that the application of different eligibility requirements to seasonal workers (involved in the processing of fresh fruit or vegetables) under Wisconsin’s unemployment benefit scheme was unconstitutional. The court ruled that the exclusion need only be assessed on the basis of rational review and it satisfied that standard. The court held that seasonal workers were not a suspect categorization and that the rule had a rational basis in Wisconsin’s interest in ensuring that workers receiving unemployment benefits were firmly committed to the state labor market.

Indeed, federal decisions in this area are consistent with the general approach of the federal courts which have routinely rejected equal protection claims concerning access to social insurance, as indeed did a number of state courts.  

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7 319 F. Supp. 1203. Though see Judge Zirpoli dissenting.  

8 291 F.3D. 964 (7th Cir. 2002). Not an insurability case but one to the same effect in that many seasonal workers were denied access to benefits.  

9 In *Fisher v Secretary of Health, Education and Welfare*, 522 F.2d 493 (7th Cir. 1975) the petitioner – a black woman who worked as a domestic servant – challenged the minimum earnings requirement under which a person earning less than $50 per quarter from a single employer was excluded from social security coverage. She argued that this discriminated against a class of employees on the basis of race, gender and economic status as, she argued, domestic workers were an identifiable black racial group, an identifiable sexual group of women, and an identifiable economic group of poor wage-earners. The court accepted that racial classifications were inherently suspect. However, it pointed out that the plaintiff must show an intention to discriminate. The plaintiff produced evidence that domestic workers were in general poor, black women, and argued that intent to discriminate should be found where it can be shown that Congress knew (or should have known) that a class was composed primarily of minority members. However, following previous Supreme Court decisions, in particular *Jefferson v Hackney*, 406 U.S. 535 (1972), the court did not accept this ‘far-reaching approach’. Having rejected the higher standard of review, the court found that there was rational basis for the exclusion in the administrative difficulties in collecting tax from employers of domestic workers and in the unfairness of collecting tax from people who only worked occasionally when they would be unlikely to qualify for benefits.  

A different type of ‘domestic’ employment was at issue in *Tyson v Heckler*, 727 F.2d 1029 (11th Cir. 1984), cert. denied, 469 U.S. 853 (1984), where a married, self-supporting man (who lived away from the parental home) was employed by his father. However, the social security code excluded services performed by a child under the age of 21 in the employ of his or her parent. The court of appeals applied the normal rational-basis standard applicable to social security legislation and found that the legislative history, which indicated that the prevention of collusion was the objective of the rule, provided such a basis. This was not affected by the fact that the age of majority in many states was then 18 rather than 21 as the different age limits involved different concerns. Similarly in *Cornelius v Sullivan*, 936, F.2d 1143 (11th Cir. 1991) the court upheld the exclusion of non-business employment by a relative on the basis that it was rationally related to Congress’ aim to prevent fraud (although the administrative law judge had found the employment to be bona fide). The court of appeals upheld this exclusion even though, as a result of various amendments to the original blanket exclusion, the
State challenges to workers compensation exclusions

However, similar exclusions from state workers’ compensation laws have been challenged in a number of jurisdictions. Where rational basis review has been applied, the state courts – like the federal courts – have upheld the exclusion of farm workers as being rationally related to some legitimate state objective. For example, in *Otto v Hahn*, the Supreme Court of Nebraska upheld a farm laborer exemption against an equal protection challenge. The Nebraska law had declared that farm labor was not a hazardous occupation and, therefore, it was not covered by the workers compensation statute. The appellant argued that the classification of farming as a non-hazardous occupation was unreasonable and arbitrary and therefore a violation of the equal protection clause of the Fourteenth Amendment. However, the court, having reviewed the legislative history, concluded that

... farm laborers were excluded from the act not because farming is nonhazardous but because the Legislature chose not to extend the coverage of the act to that class for a possibly political or social reason. The question we must decide is not whether the legislative classification of farm labor as ‘nonhazardous’ is unreasonable, but

exemption now discriminated on the basis of marital status in that employment of a parent was allowed if the son or daughter was a widow(er), a divorced person, or a person with a disabled spouse with a child. The court held that the distinction did not involve marital status but rather was based on the fact that a parent, who was the sole provider and caregiver because of divorce, death or disablement, was likely to have a legitimate need for domestic services provided by his or her parent. Although expressing its concerns about adapting the provision to ‘contemporary social realities’ which might necessitate the full-time employment of both husband and wife, the court could not (or would not) say that the concerns expressed by Congress were unfounded nor the means adopted ‘irrational’.

In Clift v Sullivan, 927 F.2d 367 (8th Circuit 1991) the circuit court of appeals shortly upheld provisions which excluded work performed in the employment of a spouse from insurability. The court recalled that as long as a classification had ‘some rational basis’ it was not unconstitutional and, as in *Tyson* and *Cornelius*, the prevention of collusion provided such a rationale. The fact that one might assume that such a provision has a greater impact on wives than it does on husbands is not even adverted to in the judgment.

See also a number of recent decisions in which the courts have upheld the 20/40 rule – whereby in order to qualify for social security disability benefits a person must have worked for 20 out of the previous 40 quarters – against equal protection challenges from persons who argued that this was discriminatory against persons unable to work due to disability or responsibilities as ‘homemaker': Collier v Astrue 473 F.3d 444 (2007) cert. denied 128 S.Ct. 353 (2007); Winger v Barnhardt 320 F.Supp.2d 741 (Ill. DC. 2004).

The exclusion of employees of religious and charitable organizations has also been upheld following *Carmichael*: Von Stauffenberg v. Dist. Unemployment Compensation Bd., 459 F.2d 1128 (D.C. Cir. 1972) (‘denial of benefits to employees of exempt organizations is amply justified by considerations of administrative convenience and expense in the payment and measurement of benefits’). See also Thomas v. Unemp. Comp. Bd. of Review, 577 A. 2d 940; 133 Pa.Commw. 623 (Pa Commw Ct 1990).

10 For example, Sheppard v. State, Dept. of Employment, 650 P. 2d 643; 103 Idaho 501 (Idaho 1982) (‘legislature may reasonably have determined that agricultural employment is inherently more unstable than non-agricultural employment and hence directed its efforts concerning unemployment compensation] toward the non-agricultural market as being more likely to succeed while opting to deal with the agricultural labor market at a later time’).

whether the Legislature can exempt farm laborers as a class from the act without contravening the equal protection clause of the fourteenth amendment.\(^{12}\)

The court concluded that the appellant had not met the burden of proving that there was no rational basis for the classification of farm labor employers, and had not, therefore, overcome the presumption of constitutionality. However, the court did not even specify what the rational basis for the law was and clearly went out of its way to uphold the legislation.\(^{13}\)

In *Collins v Day*, the Supreme Court of Indiana applied the state standard to the exclusion of farm workers from the statute.\(^{14}\) This required:

First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates [the state Privileges and Immunities Clause], courts must exercise substantial deference to legislative discretion.\(^{15}\)

Applying this standard, the court found that there were inherent distinctions between the classifications of agricultural and other workers that were reasonably related to the exemption.\(^{16}\) In a number of other cases, the state courts upheld specific exclusions of farm laborers\(^{17}\) or upheld general exclusions without giving any detailed consideration to the issues.\(^{18}\)

\(^{12}\) 306 N.W.2d 590.

\(^{13}\) To a similar effect, see State ex rel. Hammond v. Hager, 160 Mont. 391, 503 P.2d 52 (Mont. 1972) (‘Our legislature might have concluded to exclude farming operations because they were hazardous enough that the cost of coverage to the farmer would be an unnecessary and unreasonable burden, particularly since the legislature may not have believed that conditions of farm employment generally were similar to those of the industries the Act did cover. Speculating further, one could as well conclude that the legislature excluded coverage of farmers on the basis, for example, that a great majority of Montana farmers employ too few people to justify the cost and administrative expense required to comply with the Act; that most farm employees are too seasonal or casual to require coverage; or, that Montana’s farmers should not be put at a competitive disadvantage since most other states also exclude agriculture.’)


\(^{15}\) 644 N.E.2d 80.

\(^{16}\) Including the prevalence of sole proprietorships and small employment units, including numerous family operations; the distinctive nature of farm work, its attendant risks, and the typical level of worker training and experience; the traditional informality of the agricultural employment relationship and the frequent absence of formal ancillary employee benefit programs; and the peculiar difficulties agricultural employers experience in passing along the additional cost of worker’s compensation insurance coverage to the ultimate consumer.

\(^{17}\) For cases upholding legislation which excluded certain classes of farm workers see Ross v. Ross, 308 N.W.2d 50 (Iowa 1981) (relatives of farm employer exclude) and Eastway v. Eisenga, 420 Mich. 410, 362 N.W.2d 684 (Mich 1984) (employers employing below a minimum number of workers for a minimum period excluded). Wyoming legislation applied only to ‘extrahazardous’ occupations from which ‘ranching and agriculture’ were excluded. The Supreme Court of Wyoming rejected a challenge to this exclusion in Baskin v. State ex rel. Workers’ Compensation Div., 722 P.2d 151 (Wyo. 1986) (‘We conclude that our legislature decided to except the economically unique agricultural employers in Wyoming from required participation in the worker’s
However, some state courts have struck down such exclusions either applying a higher standard or (if rarely) on a rational basis review. In Benson v North Dakota Workmen’s Compensation Bureau, the exclusion of agricultural workers from the state workers compensation scheme was challenged as being in breach of the equal protection guarantee in the state constitution. The state Supreme Court applied an intermediate standard of review as the case involved an important substantive right (following state cases under which classifications which prevented a class of injured persons from suing to recover for their injuries). This standard required that there be ‘close correspondence between the statutory exclusion and the legislative goals to be accomplished by that exclusion’. The majority of the court identified the goal of the law as being to provide ‘sure and certain relief for workers injured in hazardous employment’ and held that the exclusion of agricultural employees was unreasonable and contrary to the purpose of the act. However, an insufficient number of judges agreed in the decision to have the effect of nullifying the legislation.

The issue was, however, reconsidered in Haney v North Dakota Workmen’s Compensation Bureau. In this case, the majority of the Supreme Court overruled Benson and upheld the legislation. Firstly, the Haney court disagreed as to the classification of the interest at issue holding that rational basis review should apply. The court noted that agricultural employment was excluded from mandatory coverage of the workers compensation law because it was not classified as hazardous. However, agreeing with Benson, the Haney court accepted that agricultural work was indeed hazardous and that the real reason for its exclusion was ‘a possibly political or social reason’. The court took the view that the legislative purpose of workers compensation was two part: first to provide sure and certain relief for workers injured in hazardous employments (what the court described as the ‘articulated’ part of the purpose) and to do so without adversely affecting the financial health of the agricultural sector which made up the most important part of the state compensation program because they were not in as good a position to pass on as readily the costs to an ultimate consumer, and frequently did not employ ranch hands on the same basis as employees in other commercial enterprises. We recognize a legitimate state objective with respect to (1) not imposing an additional expense upon Wyoming agricultural operations and (2) some practical difficulty in always identifying the work force. Michigan has recognized that the ‘economic uniqueness’ of agricultural employers justifies exclusion of agricultural workers from the worker’s compensation scheme.’). This approach was recently upheld in a non-farm case: Araguz v. State, ex rel., Wyo. Workers’ Safety and Comp. Div., 2011 WY 148 (Wyo. 2011).

19 283 N.W.2d. 96 (N.D. 1979).
20 Under the North Dakota Constitution, four Supreme Court judges must concur to declare a statute unconstitutional and in Benson the majority consisted of three.
22 As the reasons for this are a matter of state law, it is not discussed further here.
23 Citing Otto v Hahn, 306 N.W.2d. at 590.
economy (the ‘unarticulated’ part). The court identified a number of conceivable purposes which the legislature might have intended to benefit agricultural employees such as ‘by retarding the mechanization of the industry’. On this basis the court held that there was a rational relationship between the exclusion and the legitimate government interest and therefore upheld the legislation.

To the contrary, in *Gallegos v Glaser Crandell Co.*, the Michigan Supreme Court held that the special treatment accorded to agricultural employers by their exclusion from mandatory coverage under the state law, a treatment not accorded any other private or public employer, was impermissible as being discriminatory and without rational basis. In *Gallegos*, the majority concluded that:

> There is no basis for distinguishing the work of a laborer who drives a truck at a factory from a laborer who drives one on the farm or for any one of numerous other labor activities 'on the farm' as distinguished from the same activity in industry, wholesaling, retailing, or building. 25

The court went on

If the argument is that this creates special benefits for a class of agricultural workers ... then it is clearly discriminatory as to all other employees .... If the argument is that the benefits are illusory since the class created is next to non-existent, then the exclusions ... are all the more to be condemned.

Finally, the argument that Section 115(e) is especially tailored to meet the problems of the small farmer and his occasional employees fails to account for the need for similar treatment as to the small businessman--grocer, clothier, butcher--or as to the small contractor--plumber, carpenter, roofer--or as to numerous other categories of small employers and their employees who are not accorded this treatment. 26

The court found that the special benefit to agricultural employers was impermissible, clearly discriminatory, and unsupported by any rational basis. 27 None of the justices concluded that there was an ‘inherently suspect’ class even though the plaintiffs were Hispanic and none considered that a ‘fundamental’ right was violated.

The Washington Supreme Court considered a somewhat similar issue in *Macias v Dept. of Labor and Industries*. That case involved the exclusion of seasonal agricultural workers,


25 388 Mich. 667


27 See also Higgs v. Western Landscaping & Sprinkler Systems, Inc., 804 P.2d 161 (Colo. 1991) in which the Colorado Supreme Court held that state laws distinguishing between agricultural and other workers in how wages were calculated was in breach of the equal protection guarantees of the United States and state constitutions because it provided less workers' compensation benefits to farm and ranch labor employees than other workers by calculating ‘wages,’ which determine benefits, differently.

28 668 P.2d 1278; 100 Wn.2d. 263 (Wash. 1983). It was argued that the rule was in breach of the Fourteenth Amendment of the US constitution. For the impact of the ruling see P. Demers and L. Rosenstock, The Effects of Removing a Statutory Barrier to Workers’ Compensation for Farm Workers, (1991) Am J Public Health, 81, 1659-60.
earning less than $150 from the farmer for whom he or she was working, from workers compensation cover. The appellants were migrant workers who were injured before having earned the requisite amount in the specific employment. They argued that the rule should be subject to strict scrutiny (or at least intermediate scrutiny) as it had a disparate impact on Mexican-Americans and Mexican nationals and adversely affected the right to travel. Although the respondents produced evidence of the disproportionate impact which the rule had on Hispanics, the court ruled that disparate impact alone did not trigger strict scrutiny and also that, other than in unusual circumstances (which did not apply here), disparate impact will not indicate ‘a clear pattern, unexplainable on grounds other than race’ such as to allow intent to be deduced. However, the court held that strict scrutiny was required because of the impact which the rule had on the right to travel by denying the basic necessities of life and, on that basis, found that the administrative burden and costs which would be imposed on employers did not survive strict scrutiny (and doubted if it would even survive rational review).

Maestas is, of course, a pre-Saenz case and whether it is correctly decided in the light of the US Supreme Court’s interpretation of the right to travel (or indeed whether it was correct at the time) may be open to question. In a series of cases, the Supreme Court has, of course, struck down durational residence requirements on the basis of the right to travel. Such requirements clearly discriminate directly against non-residents. However, the provision at issue in this case applied equally to residents and non-residents. It may well have had a disproportionate impact on non-residents but so do a host of other requirements which impact of the ability of non-residents to work or obtain benefits in a state. However, there does not seem to be any significant jurisprudence supporting the view that such indirect barriers to the right to travel are in breach of the Constitution.

Griego v North Dakota Workers Compensation Administration

Griego is the most recent decision in this area. Under the New Mexico Workers’ Compensation Act, employers must provide workers compensation if they have three or more employees. The objective of the Act is to ensure that the industry carries the burden of compensating workers’ injuries and to prevent injured workers from becoming public charges. However, the Act specifically excludes ‘employers of private domestic servants and farm and ranch laborers’. This was challenged by three individual plaintiffs and two organization plaintiffs (Sin Froteras Organizing Project and Help-New Mexico).

29 The evidence was that 73% of those affected were Hispanics.
30 Applying Arlington Heights v Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977). The court did suggest (without deciding) that the evidence might warrant the application of an intermediate standard of review but this would not appear to be correct in the light of the subsequent development of the case-law.
32 For cases before Saenz, see Shapiro v. Thompson, 394 U.S. 618 (1969) and Memorial Hospital v. Maricopa County, 415 US 250 (1974).
The district court in *Griego* was able to draw on a range of stipulated facts including:

- New Mexico’s farm and ranch laborers are very low income;
- They are largely without health insurance or access to health care, and have very low education levels;
- The vast majority were not citizens (many being monolingual Spanish speakers);
- They had been historically subjected to abusive treatment by employers and have been subjected to retaliation for asserting their rights or speaking out against the employment, health, and safety practices of their employers;
- The vast majority continue to be unable to vote because they are non-citizens and it is extremely difficult for them to have meaningful input with elected officials.\(^{36}\)

In contrast, the agricultural industry in New Mexico has historically had a strong lobbying force; and is currently one of the strongest lobbies in the State.

The State of New Mexico argued that the more workers included in workers’ compensation coverage, the better, because coverage ‘is generally positive’.\(^{37}\) Also according to the State, there were negative impacts on society at large by not having all workers covered by workers’ compensation. The evidence was that including the farm laborers would add about 10,000 people (1.4% more). Close to one-third of New Mexico farm employers voluntarily provided coverage for their workers.

It was argued that the exclusion of farm laborers was in breach of the state equal protection clause. Article II, § 18 of the New Mexico Constitution provides that

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

It was agreed that farm laborers were similarly situated to persons covered by the Act.\(^{38}\) Therefore, the court had to decide the appropriate level of scrutiny. Under New Mexico law, there are three levels of equal protection review: rational basis, intermediate scrutiny and strict scrutiny.\(^{39}\) Strict scrutiny did not apply. Intermediate scrutiny review is applied either where the law (i) restricts the ability to exercise an important right or (ii) treats the person or persons challenging the constitutionality of the legislation differently because they belong to a sensitive class.\(^{40}\) In this case, Judge Huling resisted the temptation to categorize farm laborers as a ‘sensitive class’ (despite the evidence of their disadvantaged status). She concluded that

> The discrimination and difficulties faced in terms of political power are not based on characteristics ‘relatively beyond the individuals’ control such that the discrimination

\(^{36}\) At pp. 3-5.
\(^{37}\) At pp. 2-3.
\(^{38}\) At p. 11.
\(^{39}\) Breen v. Carlsbad Municipal Sch., 2005-NMSC-028, ¶ 7, 138 N.M. 331, 120 P.3d 413.
\(^{40}\) Breen, ¶ 17.
warrants a degree of protection from the majoritarian political process,\textsuperscript{41} unlike gender and mental disability.

The court pointed out that ‘farm and ranch laborers have not been denied access to the political process based on their classification as such workers.’\textsuperscript{42} Although most laborers were of Mexican origin or descent, the statutory exclusion was ‘not based on race or ancestry’ and the US Supreme Court had ruled that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact.\textsuperscript{43} In addition the New Mexico Court of Appeals had applied the rational basis standard to farm and ranch laborers.\textsuperscript{44} However, New Mexico rational basis review is rather more stringent than the federal version.\textsuperscript{45} This ‘rational’ review applies a higher standard of review, such as that occasionally used by the US Supreme Court - as in \textit{City of Cleburne v. Cleburne Living Ctr} or, more recently \textit{United States v. Windsor}.\textsuperscript{46}

The Workers Compensation Administration argued that the farm laborer exclusion served two legitimate governmental purposes.

First, they assert that the exclusion simplifies the administration of the workers compensation system. Second, they contend that the exclusion protects one of the most economically important industries in New Mexico from the additional overhead costs that would result from mandating coverage for these workers.\textsuperscript{47}

Judge Hurling rejected both. Given that the inclusion of farm laborers would add about 1\% to the workers compensation case load and that many farms already provided benefits, the argument that inclusion would be administratively difficult was not supported by the record. As to the costs to employers, Judge Hurling pointed out that the estimated cost to the agricultural industry of providing workers compensation represented less than one percent of the industry’s annual profit.\textsuperscript{48} However, perhaps recognizing that judgments as to relative costs are best left to the legislature, the court also ruled that the classification was arbitrary.

While the State has a legitimate interest in lowering employer costs, particularly for smaller farms, it must do so in a manner that is not arbitrary.\textsuperscript{49}

She concluded that the distinction made between agricultural workers in the field and those in the shed was ‘artificial and irrelevant, unrelated to the goal of lowering employer costs’.\textsuperscript{50}

\textsuperscript{41} Breen, 2005-NMSC-028, ¶ 21.
\textsuperscript{42} At p. 14.
\textsuperscript{43} Although not cited the reference is to \textit{Washington v. Davis}, 426 U.S. 229 (1976). \textsuperscript{44} See Cueto v. Stahmann Farms, Inc., 94 N.M. 223, 608 P.2d 535 (Ct. App. 1980) albeit without any detailed consideration of the issues. \textsuperscript{45} Trujillo v. City of Albuquerque, 1998-NMSC-031, ¶ 14, 125 N.M. 721, 965 P.2d 305. The district court did not consider itself bound by \textit{Cueto} since this decision had been given prior to the adoption of the ‘modern’ rational basis test. \textsuperscript{46} 473 U.S. 432; 570 U.S. 12. Unfortunately the federal Supreme Court has yet to specify when and why it is applying such a higher standard. \textsuperscript{47} At p. 16. \textsuperscript{48} At 17. \textsuperscript{49} Citing Schirmer v. Homestake Mining Co., 118 N.M. 420, 423, 882 P.2d 11, 14 (1994).
She further concluded that although the legislative intent of the exclusion, protection of the agricultural industry, was a legitimate goal, it involved an arbitrary classification plainly at odds with the articulated purposes of the Act and was, therefore, unconstitutional.

**Griego on appeal**

The Workers’ Compensation Administration’s (WCA) (partial) appeal from this ruling has now been dismissed by the New Mexico Court of Appeal. For reasons which are unclear, the WCA only appealed against the court’s ruling in relation to the three individual plaintiffs (arguing that the court lacked jurisdiction over their claims and authority to order the WCA to reconsider the claims) and did not make a similar argument in relation to the organizational plaintiffs. Nor did the WCA explicitly attack the court’s determination of unconstitutionality. However, the three individual plaintiffs had settled their cases and so the Court of Appeal held that the issues were moot and dismissed the appeal. In response to the WCA’s claim that the district court’s ruling invited ‘chaos’ and was inconsistent with an earlier Court of Appeal decision (Cueto, discussed above), the Court explicitly disagreed. It noted that the district court has distinguished Cueto and held that ‘[a]s a party to the declaratory judgment, the WCA is bound by the district court’s ruling’.

**Conclusion**

Farming is clearly a hazardous occupation and the exclusions of farm laborers from workers compensation are obviously related (as the Supreme Court of Nebraska delphically put it) to ‘possibly political or social reason[s]’. The minority status of many farm laborers (a fact noted in many of the cases cited above) is perhaps not unrelated to these exclusions. However, the extent to which such exclusions exist have narrowed sharply over time. In the 1970s, only seventeen states had mandatory workmen’s compensation coverage for agricultural workers. However, by 2000, only 12 states excluded agricultural workers from workers compensation. The rationale for continuing to exclude agricultural workers is now

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50 At 18. Such an argument clearly would not have succeeded under normal rational basis review where under and overinclusiveness is normally irrelevant.

51 Griego v New Mexico Workers’ Compensation Administration, 32, 120, Nov. 25 2013 (N.M. C.A. 2013).

52 Memorandum opinion, p. 4-5.

53 Ibid., p. 6.


55 Although the ‘disparate impact’ jurisprudence of the US Supreme Court allows states to discriminate on these grounds as long as they are not stupid enough to say they are doing so: Washington v. Davis, 426 U.S. 229 (1976).

56 Commission for Labor Cooperation, Protection of Migrant Agricultural Workers in Canada, Mexico and the United States, 2002. These states were Alabama, Arkansas, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee. Different sources give somewhat different figures. See for example, Farmworker Justice states that ‘16 states do not require employers to provide any workers compensation insurance for migrant or seasonal farmworkers. These states are: Alabama, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Carolina, Tennessee and Texas. In an additional eight states, coverage is limited to full-
legally rather dubious. While it is probably still possible for states to satisfy rational basis review,\textsuperscript{57} it seems very likely that any heightened standard of review will strike down the law as Judge Huling did in \textit{Griego}. 

\textsuperscript{57} Though even here several of the decisions upholding the exclusion are very weak with the courts being forced to ignore the stated rationale for the exclusion (that agricultural work is not hazardous) in order to find an ‘unarticulated’ rationale to uphold the law.