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**Harvesting Justice in the Land of the Free:
A Call for Legislative Reform for Immigrant Farmworker
Rights**

Leah Burnett

I. Introduction

In the words of Daniel Webster, an American lawyer and statesman from the early 19th century, “[l]et us not forget that the cultivation of the earth is the most important labor of man. When tillage begins, other arts follow. The farmers, therefore, are the founders of human civilization.”¹ In this quote, Webster established a profound truth that has persisted from the dawn of time until the present day. Agriculture is vital to a society’s existence, not only because it depends on the produce for subsistence, but because of the impact the farming industry has on the economy—more specifically, the impact it has on the U.S. economy.²

According to the U.S. Department of Agriculture, agriculture, food, and related industries contributed roughly \$1.420 trillion to U.S. gross domestic product (GDP) in 2022, which was a 5.5% share.³ The output of America’s farms contributed \$223.5 billion of that amount, which is about 0.9% of U.S. GDP.⁴ Moreover, in 2022, 22.1 million full- and part-time jobs were related to the agricultural and food sectors, which was 10.4% of total U.S. employment.⁵ Direct on-farm employment accounted for about 2.6

¹ *5 Farming Quotes We Love*, FARMS.COM, <https://www.farms.com/ag-industry-news/5-farming-quotes-we-love/4> (last visited Feb. 17, 2024); see *Daniel Webster*, HISTORY.COM (June 26, 2023), <https://www.history.com/topics/19th-century/daniel-webster>.

² *Ag and Food Sectors and the Economy*, U.S. DEP’T OF AGRIC., ERS, <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sectors-and-the-economy/> (last updated Feb. 12, 2024).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

million of these jobs, or 1.2% of U.S. employment.⁶ This data clearly elucidates the indisputable importance of the agricultural sector on the U.S. economy and labor market.

However, in an ironic plot twist, farmworkers are rarely treated as essential workers and more often as expendable commodities.⁷ For hundreds of years, farmworkers in the United States have been treated like second-class citizens, while carrying the proverbial “weight of the world” on their shoulders. They face injustice and inhumanity daily—often perpetrated by the same people and laws that should be protecting them— even though the U.S. economy and our society’s literal existence depend on their arduous work.⁸ I personally witnessed the plight of farmworkers when I was a teacher in Immokalee, Florida, which is a small, agricultural town located on the outskirts of Collier County.⁹ My students and their family members—mostly migrant farmworkers—work harder than most people I have encountered in my life, only to struggle to achieve economic and social equality. Adults and youth alike, slave away for endless hours in the blazing, Florida sun, risking their health to pesticide exposure and dehydration, and always at the mercy of the employers who can decide to treat them humanely or exploit them. This is the cost of living in the land of the free without the means to afford freedom.

⁶ *Id.*

⁷ This argument will be made and proven throughout the subsequent sections of the paper through the use of data, news reports, law review articles, federal regulations, and personal accounts of farmworkers.

⁸ *Id.*

⁹ To provide some context on the prevalence of agricultural work in Immokalee, the total population was 27,669 in 2021. *Immokalee, FL*, DATAUSA, <https://datausa.io/profile/geo/immokalee-fl/> (last visited Feb. 13, 2024). And an estimated 15,000 to 20,000 migrant seasonal farmworkers live in the area. See Betty Akoh et al., *Mapping the Impacts of COVID-19 on Farmworkers in Immokalee, FL*, UNIV. TEX. AT AUSTIN SCH. L. (July 2020), https://law.utexas.edu/wp-content/uploads/sites/31/2020/11/Immokalee_Agricultural-Workers_Website-1.pdf.

Inevitably, I developed a love and respect for the farmworkers of Immokalee. So, it follows that their struggle for dignity and equality matters to me; my desire to advocate for them and their fellow farmworkers inspired the topic of this paper. As I further pondered on my objectives as an attorney, I was impacted by a particular line of the Oath of Admission to the Florida Bar— “I will never reject...the cause of the defenseless or oppressed...So help me God.”¹⁰ This line resonated with me and spurred my poem, *The Defenseless*, which explains why I will advocate for this vulnerable population’s rights:

They are here to toil the land, to feed their families and
feed mine, so
I will defend the defenseless...

Their children should go to school instead of working
the fields, so
I will defend the defenseless. . .

Their voices should be heard over the roar of the
machines, so
I will defend the defenseless. . .

I do solemnly swear that I will defend the defenseless.
So help me God.¹¹

Notably, there are three main laws in the United States that purport to defend the rights of and regulate the protections for agricultural workers,¹² and one immigration program that

¹⁰ *Oath of Admission to the Florida Bar*, THE FL. BAR, <https://www.floridabar.org/prof/regulating-professionalism/oath-of-admission/> (last visited Dec. 11, 2023).

¹¹ LEAH BURNETT, *The Defenseless*.

¹² *U.S. Labor Law for Farm Workers*, NAT’L FARM WORKER MINISTRY (NFWM), <https://nfwm.org/farm-workers/farm-worker-issues/labor-laws/> (last updated Aug. 2022).

provides for the hiring of foreign agricultural workers:¹³ the Fair Labor Standards Act of 1938 (FLSA);¹⁴ the Migrant and Seasonal Agricultural Worker Protection Act (MSPA or AWP);¹⁵ the Field Sanitation Provisions of the Occupational Safety and Health Act of 1970;¹⁶ and the H-2A Temporary Agricultural Workers Program.¹⁷ However, these laws do not fully protect farmworkers because of exemptions that exclude farmworkers, deficient protective provisions, and lack of oversight to ensure employer compliance. For example, many agricultural workers are not protected by minimum wage and overtime pay standards; many are not entitled to health insurance, workers compensation, or disability insurance; and many are subjected to unsafe work conditions and unsanitary living conditions.¹⁸ Furthermore, these laws do not provide a pathway to permanent residency or citizenship for long-term H-2A workers or undocumented farmworkers.¹⁹ Thus, there is a dire need for legislative reform that will guarantee equal conditions in the workplace; ensure appropriate social, economic, and legal protection for farmworkers; and provide a pathway to legal residency and/or citizenship for long-term farmworkers.

¹³ *H-2A Temporary Agricultural Program*, U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/eta/foreign-labor/programs/h-2a> (last visited Dec. 11, 2023).

¹⁴ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LAB., <https://shorturl.at/pqrQ1> (last visited Dec. 11, 2023).

¹⁵ Pub. L. No. 97-470, 96 stat. 2586 (codified as amended in scattered sections of 29 U.S.C.).

¹⁶ *Field Sanitation Provisions of the Occupational Safety and Health Act*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/agriculture/field-sanitation> (last visited Feb. 16, 2024).

¹⁷ *H-2A Temporary Agricultural Program*, *supra* note 13.

¹⁸ *U.S. Labor Law for Farm Workers*, *supra* note 12; Dustin J. Coffman, *The Excluded Workers: The NLRA, Farm Laborers, and a Lineage of Exploitation*, 27 *DRAKE J. AGRIC. L.* 85, 86 (2022); Hunter Knapp, *Essential, Not Expendable: Protecting the Economic Citizenship of Agricultural Workers*, 93 *U. COLO. L. REV.* 459, 474 (2022).

¹⁹ *H-2A Temporary Agricultural Program*, *supra* note 13.

This paper will outline the current U.S. regulations that impact farmworkers and will propose reform to address the lack of rights and protections provided in the same. First, this paper discusses the contentious history of agricultural labor in the United States, highlighting the fact that farmworkers in this country have never enjoyed equal rights and protections, such as the right to organize into unions. Next, this paper reviews various labor laws that establish employment standards for agricultural workers and calls attention to the inequitable provisions regarding wages, overtime, child labor, as well as the lack of oversight and effort to ensure safe and healthful working conditions. Finally, this paper examines the current provisions of the H-2A visa program and elucidates the shortcomings of the program, including further human rights violations perpetrated by employers against workers.

II. The Origins of Agricultural Labor in the United States

The history of agricultural labor in the United States has been plagued by animosity, discrimination, and degradation.²⁰ During the very early stages of colonization in the United States, dating back to the early 1600s, the English settlers had a growing need for farmworkers.²¹ When indentured servants from Europe and the exploited and enslaved Native Americans could no longer fulfill that need, the first African slaves were brought over.²² Data indicates that between the early 1600s and 1866, 450,000-600,000 African slaves were brought to the United States to work on

²⁰ Kate Egner Gruber, *Slavery in Colonial America*, AM. BATTLEFIELD TR., <https://www.battlefields.org/learn/articles/slavery-colonial-america> (last visited Dec. 11, 2023).

²¹ *Id.*

²² *Id.*; *Immigration and Farm Worker Policy in the U.S.*, NFWM, <https://nfwf.org/wp-content/uploads/2018/07/ImmigrationFWTimeline-for-download-FINAL.pdf> (last visited Dec. 11, 2023).

plantations.²³ Slave labor fueled the U.S. economy until the American Civil War and the Thirteenth Amendment brought an end to legal slavery.²⁴ During the Post-war Reconstruction era, the number of Black Americans working on farms significantly decreased, and by 1886, seven out of every eight farm workers were Chinese, Japanese and Filipino.²⁵

However, a new form of involuntary servitude emerged in the form of sharecropping and tenant farming.²⁶ These oppressive avenues for Black Americans to “own” or use land for their personal gain arose after a failed attempt to provide each Black family in the United States with forty acres of tillable land.²⁷ These paternalistic arrangements bred further hostility between White landowners and Black farmworkers, creating yet another opportunity for violence

²³ Henry Louis Gates, Jr., *How Many Africans Were Really Taken to the U.S During the Slave Trade?*, Am.’s Black Holocaust Museum (Jan. 6, 2014), <https://www.abhmuseum.org/how-many-africans-were-really-taken-to-the-u-s-during-the-slave-trade/>; *Trans-Atlantic Slave Trade – Database*, SLAVEVOYAGES, <https://www.slavevoyages.org/voyage/database> (last visited Dec. 11, 2023); *Immigration and Farm Worker Policy in the U.S.*, *supra* note 27.

²⁴ Matthew Desmond, *In Order to Understand the Brutality of American Capitalism, You Have to Start on the Plantation*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/interactive/2019/08/14/magazine/slavery-capitalism.html>; U.S. CONST. amend. XIII, § 1.

²⁵ *Immigration and Farm Worker Policy in the U.S.*, *supra* note 27; *The Farm Worker Struggle: A Chronology of Events*, NFWM (1977), <https://shorturl.at/acABM>.

²⁶ Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 69 UCLA L. REV. 674, 683 (2022). The premise of sharecropping was that the sharecropper provided his or her labor in exchange for a portion of the proceeds of the crop after harvest, and sometimes for a home on the landowner’s property as well. *Id.* 684. Tenant farmers on the other hand, would pay rent to a landlord for use of a portion of his land and held title to the crops during the time stipulated in the lease. *Id.* at 685.

²⁷ Henry Louis Gates, Jr., *The Truth Behind '40 Acres and a Mule'*, PBS, <https://www.pbs.org/wnet/african-americans-many-rivers-to-cross/history/the-truth-behind-40-acres-and-a-mule/> (last visited Dec. 11, 2023); *(1865) General William T. Sherman’s Speech Field Order No. 15*, BLACKPAST.ORG (Sept. 29, 2008), <https://www.blackpast.org/african-american-history/special-field-orders-no-15/>.

against Black Americans.²⁸ This form of agricultural labor continued well into the early 1900s and only began to decline when the cotton crop production in the South depleted and the mechanization of agricultural equipment came about.²⁹

A. The Introduction of Agricultural Guest Worker Programs and Immigration Reform

The introduction of guest worker programs in 1917 changed the trajectory of agricultural labor in the United States.³⁰ During World War I, the first guest worker programs were implemented, utilizing unskilled Mexican labor to fill the void from decreased migrant workers arriving from Europe and decreased Black farm workers.³¹ During the life span of the program, 76,862 Mexican workers were admitted to the United States; of this number only 34,922 returned to Mexico, spawning the first official occurrence of illegal immigration in the United States.³² This initial guest worker program ended in 1922, as there was national controversy over whether the program was undermining the economic welfare of citizen workers and whether employers were exploiting the immigrant workers.³³

As a need for agricultural labor arose again during World War II, growers sought assistance from the government in hopes that another contract labor program could be created.³⁴ After much debate and negotiations between the United States and Mexican governments, in 1942, the U.S. Congress created the Mexican Labor

²⁸ Farr, *supra* note 31, at 685-87.

²⁹ *History of Sharecropping*, U. TEX. AT AUSTIN, <https://texancultures.utsa.edu/cabin/history/> (last visited Dec. 11, 2023).

³⁰ Vernon M. Briggs, Jr., *History of Guestworker Programs: Lessons from the Past and Warnings for the Future*, CTR. FOR IMMIGR. STUD. (Mar. 1, 2004), <https://cis.org/Report/History-Guestworker-Programs>.

³¹ *Id.*

³² *Id.*

³³ Briggs, *supra* note 35.

³⁴ *Id.*

Program—more commonly known as the Bracero Program (“the Program”).³⁵ The program “guaranteed” workers a few basic protections, including a minimum wage, insurance, and safe, free housing.³⁶ However, farm owners frequently failed to comply with these requirements, and farmworkers routinely received housing and food that were substandard, as well as extremely low and, often unpaid, wages.³⁷ During the twenty-two-year span of the Program, 4.6 million contracts were issued, and the Program set the stage for decades of labor disputes and a litigious dynamic that still exists today.³⁸ The Program was ultimately terminated in December of 1964, in part, because the U.S. government was forced to act on the reality that growers were exploiting the Braceros.³⁹

³⁵ *Id.* Following the precedent of the Mexican Labor Program, the U.S. government established a similar nonimmigrant program to recruit workers from the British West Indies (Jamaica, the Bahamas, St. Lucia, St. Vincent, Dominica, and Barbados). The British West Indies (“BWI”) program was initiated in 1943 and was established in response to the shortage of farmworkers along the U.S. east coast. The initial BWI program was operative from 1943 to 1947 and brought about 19,000 workers a year. From 1947-1952, the BWI program was converted into a temporary-worker program. A review of the BWI program in 1951 by the President’s Commission on Migratory Labor led to condemnation of the administration of the program. The Commission attacked the lack of “vigilance for the protection of living and working standards” of the workers—a recurring theme in the previous farmworker labor programs and all the programs to come. *Id.* (citation omitted).

³⁶ *U.S. and Mexico Sign the Mexican Farm Labor Agreement*, HISTORY, <https://www.history.com/this-day-in-history/us-mexico-sign-mexican-farm-labor-agreement-bracero-program> (last updated Oct. 7, 2019).

³⁷ *Id.* Due to the broken promises, strikes were very common during the existence of the Bracero Program, and unionization spread through the agriculture industry. Even years after the program ended, many Braceros were still fighting to receive the money that had been deducted from their salaries and allegedly put into savings accounts.

³⁸ *Id.*

³⁹ Luke Perez, *Essential and Expendable: The Rise of Agricultural Labor and the United Farm Workers*, NAT’L MUSEUM OF AM. HISTORY, (Oct. 15, 2020), <https://americanhistory.si.edu/explore/stories/essential-and-expendable-rise-agricultural-labor-and-united-farm-workers>.

Amid the Bracero Program, the Immigration and Nationality Act was passed in 1952.⁴⁰ Among its many provisions, the Act created various entry categories for nonimmigrants; among these was the H-2 program for "other temporary workers."⁴¹ Initially, agricultural employers made the greatest use of the program, since it was difficult to find farmworkers in various regions of the United States and many citizen workers wouldn't take seasonal jobs.⁴² Temporary agricultural labor was necessary to do the seasonal planting and harvesting.⁴³ The height of the H-2 program was in 1969 when over 69,000 visas were issued.⁴⁴ The H-2 programs have been criticized for being forms of indentured servitude because the participating workers are totally dependent on their employer, and they are tethered to their jobs by contractual terms.⁴⁵ In 1986, the Immigration Reform and Control Act of 1986 split the H-2 visa into two separate temporary visas: the H-1A for non-agricultural workers and the H-2A for agricultural workers.⁴⁶ While the H-1A program has been replaced by a different visa program since its inception in the 1980s, the H-2A visa program persists to this day.⁴⁷

B. The Emergence of Farmworker Unions and the Fight for Equality

By the 1960s, as a result of the various foreign worker programs that had been implemented over the years, the farm labor

⁴⁰ Briggs, *supra* note 35; Immigration and Nationality Act, ch. 125, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁴¹ See Briggs, *supra* note 35.

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

⁴⁷ *Id.* (citing Edwin Reubens, *Temporary Admissions of Foreign Workers: Dimensions and Policies* 15, NAT'L COMM'N FOR MANPOWER POL'Y (1979)); please note that a complete explanation of the H-2A visa program and the Immigration Reform and Control Act will be presented in a later section of this paper.

force was mostly comprised of immigrants, primarily from Latin America.⁴⁸ Moreover, thousands of former Braceros continued to seek agricultural jobs, albeit as illegal immigrants, because of the termination of the Bracero Program.⁴⁹ Due to the sheer number of immigrant farmworkers in the United States at that time, and to the lack of oversight and regulations, there were significant labor rights violations taking place.⁵⁰

Ironically, regardless of the mistreatment the workers faced, federal laws did not grant them the right to organize into unions and engage in collective bargaining free from retaliation.⁵¹ In 1935, the National Labor Relations Act (NLRA) was created to “encourage collective bargaining by protecting workers’ full freedom of association. The NLRA protects workplace democracy by providing employees at private-sector workplaces the fundamental right to seek better working conditions and designation of representation without fear of retaliation.”⁵² However, the Act specifically excluded agricultural laborers from the definition of “employee,” so farmworkers were not awarded the protected right to collectively bargain to seek redress for violations.⁵³ In 1937, the Supreme Court

⁴⁸ *Timeline of Agricultural Labor in the U.S.*, NFWM, <https://nfwm.org/farm-workers/farm-worker-issues/slider-test/> (last visited Dec. 11, 2023); On the West Coast, there was a significant population of Filipino farmworkers as well.

⁴⁹ Briggs, *supra* note 35.

⁵⁰ See Perez, *supra* note 44.

⁵¹ See *Collective Bargaining Rights for Farmworkers*, NAT’L AGRIC. L. CTR., <https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers> (last visited Dec. 11, 2023); see also *Thirty Years of Farmworker Struggle*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/a-new-era-of-farm-worker-organizing/> (last updated June 12, 2021).

⁵² ch. 372, 49 stat. 449 (1935) (codified as amended at 29 U.S.C. § § 151-169); see NAT’L LAB. REL. BD., GUIDANCE: NATIONAL LABOR RELATIONS ACT, <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act> (last visited Feb. 17, 2024).

⁵³ 29 U.S.C. § 152(3) (2018) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home . . .”). Many scholars believe the decision was racially motivated, since the majority of farmworkers in 1935 were black

confirmed the Act and determined that an employee's right to self-organize for collective bargaining is a fundamental right. However, almost one hundred years have passed, and the law has not been amended to confer this essential right to agricultural workers.⁵⁴ Accordingly, the only recourse is that states may amend their laws to grant the right to collective bargaining to farmworkers, so that employers recognize the union or bargaining representatives.⁵⁵ Unfortunately, there are currently only fourteen states that guarantee collective bargaining rights for farmworkers.⁵⁶

California stands out for its history with farmworker unions. Reports indicate that in the mid-1960s, there were approximately 571,000 agricultural workers in California.⁵⁷ The exploitation of farmworkers was rampant, and they became restless—this led to the emergence of major agricultural unions on the West Coast, such as the Filipino Farm Labor Union, the Agricultural Workers Organizing Committee (AWOC), the Agricultural Workers Association, and the National Farm Workers Association (NFWA).⁵⁸ In 1966, these unions merged to become the United Farm Workers of America (UFW), spearheaded by César Chávez and Dolores Huerta.⁵⁹ These groups went against the grain, risking their livelihoods, and possibly their lives, because agricultural workers still did not have the federally protected right, or state right in California, to organize into unions and collectively bargain without retaliation.⁶⁰

Americans. 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 STATE L.J. 95, 118–22 (2011).

⁵⁴ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937)

⁵⁵ *Collective Bargaining Rights for Farmworkers*, *supra* note 56.

⁵⁶ *Id.*

⁵⁷ See *California's Hired Farm Workers in 1965*, RURAL MIGRATION NEWS (Aug. 27, 2020), <https://migration.ucdavis.edu/rmn/blog/post/?id=2464>.

⁵⁸ See Perez, *supra* note 44; see also *UFW Chronology*, UNITED FARM WORKERS, <https://ufw.org/research/history/ufw-chronology/> (last visited Dec. 12, 2023).

⁵⁹ See *UFW Chronology*.

⁶⁰ *Id.*

The goal of UFW was to demand improved pay, safer work conditions, more stringent regulations for child labor, and humane living conditions, such as housing with plumbing and cooking facilities for the workers.⁶¹ The UFW was also responsible for the first major farm labor strike, the Delano Grape Strike of 1965, which continued until 1970.⁶² The UFW's efforts were highly successful and resulted in the first-ever contracts between growers and an agricultural union.⁶³ In 1975, UFW achieved the passage of the California Agricultural Labor Relations Act, a landmark legislation recognizing the right of farmworkers in California to organize.⁶⁴ Overall, the UFW brought national attention to the struggles of farmworkers and laid the groundwork for other farmworker unions and organizations.⁶⁵ The UFW has continued to win important victories for farmworkers across the United States, and to this day, it persistently leads efforts to pass legislative reform.⁶⁶

C. Discriminatory Laws

Since the 1980s, the U.S. government has enacted various laws that have directly impacted farmworkers and the farm labor market.⁶⁷ Some of the laws have expanded the protections afforded

⁶¹*Id.*; As a testament to the jarringly harsh conditions that farmworkers experienced, the average life expectancy of a farmworker in the 1960s was forty-nine years, which was a flagrant contrast to the national average life expectancy of sixty-seven years.

⁶² *Id.*

⁶³ *Id.*; The contracts raised wages 40% from the standard Bracero wage that was still being used and improved working conditions, which was a major feat for farmworkers.

⁶⁴ *Fact Sheet*, CAL. AGRIC. LAB. REL. BD., <https://www.alrb.ca.gov/forms-publications/faqs-and-guidance/fact-sheet-english/> (last visited Dec. 11, 2023); *Collective Bargaining Rights for Farmworkers*, *supra* note 56.

⁶⁵ *Timeline of Agricultural Labor in the U.S.*, *supra* note 53.

⁶⁶ *United Farm Workers of America*, NFWM, <https://nfwm.org/farmworkers/farmworker-partners/united-farm-workers-of-america/> (last updated June 2018).

⁶⁷ *Immigration and Farm Worker Policy in the U.S.*, *supra* note 27.

to farmworkers, while others have limited them.⁶⁸ Regardless of the efforts of the federal government to mandate better working conditions for farmworkers and regulate the agricultural labor market, there is still so much more that needs to be done to overcome the dark history of mistreatment and marginalization of farmworkers in the United States. One such action that must be taken is to update the NLRA to include agricultural workers in the definition of “employee.”⁶⁹ Farmworkers have been overworked and under-protected by the law for long enough, and it is time that they enjoy the same protections and rights that other workers have.

The poet, Jordan Chaney, also recognizes the value of the honorable farmworker in the poem *Conflict: A Poem for America's Migrant Workers*.⁷⁰ Throughout the poem, the poet pays homage to migrant workers by proposing a toast to them and recognizing their laborious, yet undervalued work.⁷¹ The last stanza of the poem is particularly poignant:

...to the Mighty Migrant Worker
may your hands and spine
always nurture the vine
may the cups of all your tomorrows
be filled with the fruits of your labor
and may the dreams you dream of find freedom
in the land of your neighbor
to you

These lines capture the ultimate prayer for farmworkers—that they may one day enjoy the literal and figurative fruits of their labor and

⁶⁸ *Id.*

⁶⁹ 29 U.S.C. § 152(3) (2018), (“The term ‘employee’... shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home....”).

⁷⁰ Jordan Chaney, *Conflict: A Poem for America's Migrant Workers*, THE SEATTLE GLOBALIST, <https://seattleglobalist.com/conflict-a-poem-for-americas-migrant-workers> (last visited Dec. 11, 2023).

⁷¹ *Id.*

find freedom and protection in the land that their hands toil to cultivate. To make this a reality, legislative reform is imperative.

III. Current Labor Laws and Occupational Health Provisions

A. Fair Labor Standards Act (FLSA)

In 1938, President Franklin D. Roosevelt enacted a landmark law, known as the Fair Labor Standards Act of 1938 (FLSA or the Act).⁷² It is one of the most important laws, if not the most important, that governs labor regulations in the United States. At the time of its inception, the FLSA most notably banned oppressive child labor and set the minimum hourly wage and the maximum number of hours per workweek.⁷³ While the Act intended to provide protection for many workers, it originally excluded farmworkers from its protections.⁷⁴ In 1966, the Act was amended to include agricultural workers, and it now applies the minimum wage, overtime pay, and recordkeeping provisions to *most* agricultural workers and employers.⁷⁵

⁷² see *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, *supra* note 13; see *History*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://shorturl.at/bfsA5> (last visited Dec. 11, 2023) (“The Wage and Hour Division was also created with the enactment of the [FLSA]. The Division is responsible for ... enforcing FLSA, Government Contracts labor standards statutes, the Migrant and Seasonal Agricultural Worker Protection Act, the Employee Polygraph Protection Act, and the Family and Medical Leave Act”); see also 29 U.S.C. § 202 (2018).

⁷³Grossman, *supra* note 14; Harry S. Kantor, *Two Decades of the Fair Labor Standards Act*, 81 MONTHLY LAB. REV. 10#, 1097-98 (1958); *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/flsa> (last visited Dec. 11, 2023) (Today, the law “establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments.”).

⁷⁴ *US Labor Law for Farmworkers*, FARMWORKER JUSTICE, https://www.farmworkerjustice.org/advocacy_program/us-labor-law-for-farmworkers/ (last visited Dec. 11, 2023).

⁷⁵ *Id.*

Since the FLSA regulates businesses that produce goods for interstate commerce, virtually all employees engaged in agriculture are covered by the Act.⁷⁶ There are, however, some caveats which exempt certain employees from the minimum wage provisions, the overtime pay provisions, or both.⁷⁷ First, if an employee performs agricultural labor as defined in the FLSA, he or she is exempt from the overtime pay provisions.⁷⁸ Second, "small" farms are exempt from the minimum wage requirements and overtime provisions.⁷⁹ In addition, there are four other categories of agricultural workers who are exempt from the minimum wage requirements and overtime provisions.⁸⁰

Because of the exemptions to the minimum wage rate and overtime pay regulations, many adult farmworkers are forced into poverty.⁸¹ A recent report from the National Agricultural Workers Survey indicated that about 20% of farmworkers have family incomes below the poverty level and around 44% of farmworkers

⁷⁶ *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture> (last updated Jan. 2020).

⁷⁷ *Id.*

⁷⁸ *Fair Labor Standards Act in Agriculture*, NC STATE EXT., https://farmlaw.ces.ncsu.edu/agribusiness-law/labor-and-employment/fair-labor-standards-act/#_ednref5 (last visited Dec. 11, 2023) (citing 29 U.S.C. § 203) (The summarized definition of agriculture, according to the FLSA, is farming activities tied directly to production from the soil.).

⁷⁹ *Fair Labor Standards Act Advisor*, U.S. DEP'T OF LAB., <https://webapps.dol.gov/elaws/whd/flsa/docs/hazag.asp> (last visited Dec. 11, 2023) ("‘Small’ farm means any farm that did not use more than 500 ‘man-days’ of agricultural labor in any calendar quarter (3-month period) during the preceding calendar year.”)

⁸⁰ See *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, *supra* note 82, (“Additional exemptions from the minimum wage and overtime provisions of the Act for agricultural employees”).

⁸¹ See *Agricultural Exceptionalism: A History of Discrimination Against Farmworkers in Labor Laws Results in Poverty for Farmworkers*, FARMWORKER JUSTICE, <https://www.farmworkerjustice.org/blog-post/agricultural-exceptionalism-a-history-of-discrimination-against-farmworkers-in-labor-laws-results-in-poverty-for-farmworkers/> (last visited Dec. 12, 2023).

with a family size of six or more have incomes below the poverty level.⁸² While farm work consistently ranks as one of the most dangerous occupations, farmworker wages are among the lowest in the country.⁸³ In effect, the current wage regulations for farmworkers perpetuate the cycle of inequality.

Moreover, child labor is permitted under the FLSA, governed by many different rules depending on the age of the child and the job to be performed.⁸⁴ For example, agricultural employers are allowed to hire sixteen-year-old children during school hours and for hazardous jobs (with a couple exemptions regarding who owns the farm).⁸⁵ Furthermore, children fourteen-years and older can work on any farm; twelve- and thirteen-year old children may be hired with parental permission; and children under twelve may be hired on “small” farms if a parent has given written permission or if a parent is working on the same farm.⁸⁶ Upon examining the regulations, one thing stands out—there is a “...clear double standard in U.S. federal law [because] children can toil in the fields at far younger ages, for far longer hours, and under far more hazardous conditions than children working any other type of

⁸² Amanda Gold et al., *Findings from the National Agricultural Workers Survey (NAWS) 2019–2020: A Demographic and Employment Profile of United States Farmworkers* 41–42 (Jan. 2022) [hereinafter *Findings from the National Agricultural Workers Survey*], https://www.dol.gov/sites/dolgov/files/ETA/publications/ETAOP2022-16_NAWS_Research_Report_16_508c.pdf.

⁸³ See *Agricultural Exceptionalism: A History of Discrimination Against Farmworkers in Labor Laws Results in Poverty for Farmworkers*, *supra* note 87.

⁸⁴ *Rules and Regulations for Youth Employment*, YOUTH.GOV, https://youth.gov/youth-topics/youth-employment/rules-and-regulations-youth-employment#_ftn3 (last visited Dec. 11, 2023); *Fair Labor Standards Act Advisor*, *supra* note 85.

⁸⁵ 29 C.F.R. § 570.2 (2023); *Fair Labor Standards Act Advisor*, *supra* note 85.

⁸⁶ 29 C.F.R. § 570.2 (2023); *Fair Labor Standards Act Advisor*, *supra* note 85; *Rules and Regulations for Youth Employment*, *supra* note 83. *Fair Labor Standards Act in Agriculture*, *supra* note 85 (listing child labor laws for both agricultural and non-agricultural jobs and highlighting existing discrepancies).

employment in the United States.”⁸⁷ The blatantly disparate child labor laws for agricultural and non-agricultural labor are questionable, and quite frankly, appalling.

From the perspective of a farmworker who is working the fields—picking tomatoes...or apples...or strawberries...for ten hours a day for such little pay, so others can enjoy the fruits of his labor—it must be frustrating and disheartening to be treated as a second-class citizen. He might ask why he is *Less Than <*, which is the title of a poem I wrote that projects the hypothetical thoughts of a migrant farmworker:

I hear that we have less protection than they do.
They get paid if they work extra hours—
 We get our regular, minimal pay no matter how
many hours we work.
They always get the minimum wage—
 We are at the mercy of the “man days.” . . .

I hear that our children have less protection than theirs.
Their 16-year-olds are prohibited from the ‘hazardous
jobs’—
 Our 16-year-olds can breathe in the pesticides.⁸⁸

These lines reflect the disjointed rights of agricultural workers because the FLSA strips them of the same federal labor protections that are awarded to nonagricultural workers.

B. Migrant and Seasonal Agricultural Worker Protection Act

⁸⁷ *Child Farmworkers in the United States: A “Worst Form of Child Labor”*, HUMAN RIGHTS WATCH (Nov. 17, 2011, 1:31 PM), <https://www.hrw.org/news/2011/11/17/child-farmworkers-united-states-worst-form-child-labor>.

⁸⁸ LEAH BURNETT, *Less Than <*.

Another significant agricultural labor statute that purports to protect the rights of temporary and seasonal agricultural workers is the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which works in conjunction with the U.S. Department of Labor (DOL).⁸⁹ The MSPA was enacted in 1983, and serves to enforce employment standards related to wages, housing, working condition requirements, transportation for workers, disclosures, and the registration of farm labor contractors.⁹⁰ These standards are extremely important to ensure fair and safe working conditions for migrant and seasonal agricultural workers; however, they are violated frequently.

One of the major provisions of the MSPA stipulates that farm labor contractors are required to obtain a Certificate of Registration issued by the DOL and comply with all other applicable provisions of the Act when they recruit, solicit, hire, employ, furnish or transport or, in the case of migrant agricultural workers, provide housing.⁹¹ However, multiple incidents over the years have shed light on the dark truth that labor contractors often exploit the

⁸⁹ 29 U.S.C. § 1853(a)(1) (2018); *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/agriculture/mspa> (last visited Feb. 16, 2024).

⁹⁰ For example, the FLSA determines what the wage standards are, and the MSPA establishes that employers must pay workers their wages when due, and give workers itemized, written statements of earnings for each pay period, including any amount deducted and the reasons for the deduction, *Fact Sheet #49: The Migrant and Seasonal Agricultural Worker Protection Act*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/fact-sheets/49-mspa> (last updated July 2008); *Labor – An Overview*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/overview/labor/> (last visited Feb. 16, 2024) (noting MSPA defines “farm labor contractors” as “any person other than agricultural employers, their employees, or agricultural associations that recruit, solicit, hire, employ, furnish, or transport any migrant or seasonal agricultural worker for money or other valuable consideration.”).

⁹¹ 29 C.F.R. pt. 500.1(c) (2023) (*Migrant and Seasonal Agricultural Worker Protection*).

workers, instead of protecting them.⁹² According to various criminal indictments and allegations in civil lawsuits, labor contractors have driven workers into debt with illegal recruitment fees and other expenses; some have confiscated workers' passports; charged them if they wanted to quit their jobs; threatened them with deportation; asked employees to work in hazardous conditions; or provided unlivable housing conditions.⁹³ Consequently, to eradicate these exploitative labor violations, there is an urgent need for stricter enforcement of the regulations that oversee labor contractors.

C. Occupational Safety and Health Standards for Agriculture (OSHA)

The Field Sanitation Provisions of the Occupational Safety and Health Act (OSHA) regulate the standards for agricultural employers and attempt to ensure safe and healthful working

⁹² See Marc D. Stanley, *Rodents for Roommates: Liability Under the Migrant and Seasonal Agricultural Worker Protection Act's Housing Provision*, 15 DRAKE J. AGRIC. L. 341, ## (2010) (noting the violations committed against migrant farmworkers by the labor contractors in *Castillo v. Case Farms of Ohio, Inc.*, 96 F. Supp. 2d 578 (W.D. Tex. 1999)); see also *News Release: Department of Labor Recovers \$540K for 268 Guest Workers After Father, Son Farm Labor Contractors Denied Them Full Wages, Provide Unsafe Housing*, U.S. DEP'T OF LAB. (Aug. 28, 2023), <https://shorturl.at/nt568> (discussing the federal investigation of two men who acted as labor contractors to obtain seasonal farmworkers and perpetrated numerous violations of the FLSA, DOL, and MSPA).

⁹³ See Maria Perez, *What Led to a Migrant Worker's Death from Heatstroke?*, USATODAY (Jan. 19, 2022, 8:23AM), <https://shorturl.at/dlHJV>; see also Tina Vásquez, *Human Trafficking or a Guest Worker Program? H-2A's Systemic Issues Result in Catastrophic Violations*, PRISM (Apr. 14, 2023), <https://shorturl.at/fuX69>; see also Sky Chadde & Jonathan Hettinger, *Spotty Regulations Leave Migrant Farmworkers Living in Poor Conditions Across the Midwest*, USATODAY (Jan. 16, 2023, 2:41PM), <https://shorturl.at/byABJ>; see also Thomas Arcury et al., *Migrant Farmworker Housing Regulation Violations in North Carolina*, 55 Am. J. of Indus. Med. (2012) <https://doi.org/10.1002/ajim.22011>. The housing standards and violations that occur will also be addressed more thoroughly in the following section.

conditions for workers.⁹⁴ These standards were established in 1987 to regulate work conditions in covered agricultural settings, and the Wage and Hour Division (WHD) of the DOL enforces the standards.⁹⁵ The provisions apply to any agricultural establishment where eleven or more employees are engaged on any given day in hand-labor operations in the field.⁹⁶ The standards indicate that employers must provide workers with reasonable access to toilets, potable drinking water, and hand-washing facilities and must advise workers about the importance of good hygiene practices.⁹⁷ Moreover, the OSHA acknowledges that farmworkers are exposed to numerous safety, health, environmental, biological, and respiratory hazards, and it provides controls and solutions related to these hazards.⁹⁸

Despite the protective provisions of the OSHA, farm labor ranks as one of the top three most dangerous occupations in the United States.⁹⁹ This is not surprising, as farmworkers are regularly exposed to harmful pesticides and other chemicals; hazardous equipment, machinery, and farm vehicles; extremely high

⁹⁴ See *Field Sanitation Provisions of the Occupational Safety and Health Act*, *supra* note 16; see also *Fact Sheet #51: Field Sanitation Standards Under the Occupational Safety and Health Act*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/fact-sheets/51-osh-act-field-sanitation> (last updated July 2008).

⁹⁵ *Id.*

⁹⁶ *Fact Sheet #51: Field Sanitation Standards Under the Occupational Safety and Health Act*, *supra* note 100 (“‘Hand labor’ includes hand-cultivation, hand-weeding, hand-planting, and hand-harvesting of vegetables, nuts, fruits, seedlings, or other crops, including mushrooms, and the hand-packing of produce in the field into containers, whether performed on the ground, on moving machinery, or in a shed. ‘Hand labor’ does not include the care and feeding of livestock, or hand labor operations in permanent structures (e.g. canning facilities or packing houses).”).

⁹⁷ *Id.*

⁹⁸ See U.S. DEP'T OF LAB., OSHA, AGRICULTURAL OPERATIONS: HAZARDS AND CONTROLS, <https://www.osha.gov/agricultural-operations/hazards> (last visited Feb. 16, 2024).

⁹⁹ See NC FARMWORKER HEALTH PROGRAM, NC FARMWORKER HEALTH FACTS (2008), <https://ncfhp.ncdhhs.gov/farmworker-health-facts/>.

temperatures; infectious diseases from animals; and physical exertion that can lead to musculoskeletal disorders.¹⁰⁰ As established in the provisions, employers are required to comply with the sanitation standards and educate the workers on the existing hazards to help alleviate some of the health risks farmworkers face,¹⁰¹ but there are widespread violations, leading to detrimental effects on the workers.¹⁰²

According to a 2015 report of the Bureau of Labor Statistics, there were 570 fatal occupational injuries within the agricultural industry, and the industry had the highest overall rate of fatal occupational injuries for full-time workers.¹⁰³ Another report on farmworkers' health reported that they endure the highest rate of toxic chemical injuries and skin disorders of any workers in the country.¹⁰⁴ To wit, on tobacco farms, green tobacco sickness, or nicotine poisoning through the skin, is experienced at least once in a growing season by 24% of workers.¹⁰⁵ One study in North Carolina surveyed three hundred workers and concluded that 28% had worked in areas adjacent to fields where pesticides were being applied and about 25% were asked to enter fields before it was safe to do so.¹⁰⁶ On a national scale, farmworkers face six times the risk of other groups of contracting tuberculosis.¹⁰⁷ Even more,

¹⁰⁰ *See Id.*

¹⁰¹ *See* Jessica Looman & Doug Parker, *Honoring and Protecting Farmworkers, Always Essential*, U.S. DEP'T OF LAB. BLOG (March 29, 2022), <https://blog.dol.gov/2022/03/29/honoring-and-protecting-farmworkers-always-essential/>.

¹⁰² Anita Alves Pena & Edward R. Teather-Posadas, *Field Sanitation in U.S. Agriculture: Evidence from NAWS and Future Data Needs*, 23 J. Agromedicine 123, (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7050297/>.

¹⁰³ *Occupational Health & Safety Factsheet: Agricultural Worker Occupational Health & Safety*, NAT'L CTR. FOR FARMWORKER HEALTH, INC. (2018), https://www.ncfh.org/uploads/3/8/6/8/38685499/fs-occ_health_2018.pdf.

¹⁰⁴ NC FARMWORKER HEALTH PROGRAM, *supra* note 105.

¹⁰⁵ *Id.* (noting that in just one day, workers can absorb the amount of nicotine found in 36 cigarettes).

¹⁰⁶ *Occupational Health & Safety Factsheet: Agricultural Worker Occupational Health & Safety*, *supra* note 109.

¹⁰⁷ *Id.*

environmental heat was responsible for claiming the lives of 423 workers between 1992-2006.¹⁰⁸ This data reveals the devastating reality for farmworkers because of their daily exposure to hazardous working conditions and the lack of precautions set in place by employers. The even more devastating reality is that less than half of farmworkers have health insurance,¹⁰⁹ and even if they do, they typically cannot afford to take time off from work or to risk losing their jobs to seek medical care.¹¹⁰ Farmworkers constantly find themselves trapped in a vicious cycle because of the discriminatory system that promotes their exploitation and advances their socioeconomic deprivation.¹¹¹

D. Proposed Revisions to Agricultural Labor Laws

Congress should update the labor laws to put an end to the contemptuous statutory exemptions that exclude agricultural workers from receiving equal wages and overtime compensation. To promote this change, Congress reintroduced the Fairness and Farm Workers Act in July 2023.¹¹² The bill proposed various modifications to the agricultural labor regulations of the FLSA: the gradual implementation of overtime pay for farmworkers over the

¹⁰⁸ NC FARMWORKER HEALTH PROGRAM, *supra* note 105 (illustrating heat fatalities among farmworkers between 1992-2006).

¹⁰⁹ *Findings from the National Agricultural Workers Survey*, *supra* note 88, at 45.

¹¹⁰ *There Are Over 2 Million Farmworkers in the United States*, MHP SALUD, <https://mhpsalud.org/who-we-serve/farmworkers-in-the-united-states/> (last visited Feb. 16, 2024).

¹¹¹ See *Agricultural Exceptionalism: A History of Discrimination Against Farmworkers in Labor Laws Results in Poverty for Farmworkers*, *supra* note 87; see also Farmworker Justice; *Fair Labor Standards Act in Agriculture*, *supra* note 84; see also "The Cycle of Poverty": Mexican-American Migrant Farmworkers Testify before Congress, HISTORY MATTERS, <https://historymatters.gmu.edu/d/7024/> (last visited Dec. 12, 2023).

¹¹² Alex Padilla, *Fairness for Farm Workers Act*, https://www.padilla.senate.gov/wp-content/uploads/Fairness-for-Farm-Workers-2023_Final_One-Pager.pdf (last visited Dec. 12, 2023); *The Fairness for Farmworkers Act: It's Time to End Discrimination Against Farmworkers*, FARMWORKER JUSTICE (July 2023), <https://www.farmworkerjustice.org/wp-content/uploads/2023/07/Fairness-for-Farm-Workers-Act-2023-Fact-Sheet.pdf>.

course of four years and the elimination of most of the minimum wage exemptions.¹¹³ Some argue that expanding overtime protections and raising the minimum wage for farmworkers would drive up costs for consumers and farm owners.¹¹⁴ However, a study done by the Fiscal Policy Institute in New York clarified that “even accepting the most aggressive assumptions about the cost to farmers, if all of the increase came out of the bottom line of farm owners it would represent 9% of total farm income.”¹¹⁵ The study showed that even if all the added costs were passed on to consumers, it would only be a 2% increase in prices.¹¹⁶ Thus, there would be minimal impact on farm owners and consumers, while having a profound impact on the quality of life of millions of farmworkers in the U.S.¹¹⁷

Further, Congress needs to take regulatory action and revise the child labor provisions of the FLSA to protect the rights of child farmworkers. The current child labor regulations for the agricultural industry are a holdover from the original FLSA of 1938, when a larger percentage of Americans lived on farms, and child labor was “needed” to perform agricultural labor. The last time Congress modified these provisions was in 1970, so they are still antiquated and do not reflect the current societal norms regarding child labor.¹¹⁸

¹¹³ *Id.*

¹¹⁴ David Dyssegaard Kallick et al., *Brief Look: Farm Workers’ Overtime Pay Is Affordable and Long Overdue*, FISCAL POL’Y INST. (May 2019), <https://fiscalpolicy.org/wp-content/uploads/2019/05/Support-the-Farm-Worker-Fair-Labor-Practices-Act.pdf>.

¹¹⁵ *Id.* at 1.

¹¹⁶ *Id.* at 1–2.

¹¹⁷ Teresa Romero, *End the Farmworker Exclusion from Overtime Protections*, NAT’L EMP’T L. PROJECT (June 26, 2023), <https://www.nelp.org/blog/end-the-farmworker-exclusion-from-overtime-protections/>.

¹¹⁸ Amy Volz, *It Is Time for the U.S. to Overhaul Its Agricultural Child Labor Laws*, IMMIGR. & HUM. RIGHTS L. REV. (Oct. 25, 2022), <https://lawblogs.uc.edu/ihr/2022/10/25/it-is-time-for-the-u-s-to-overhaul-its-agricultural-child-labor-laws/> (citing Letter from Rep. Lucille Roybal-Allard et al. to Martin J. Walsh, Sec’y, U.S. Dep’t of Lab. 1, n.5 (July 19, 2022) [hereinafter *Walsh Letter*], <https://perma.cc/UU2A-PXW3>, which, in turn, cites 76 Fed. Reg. 54836, 54839 (Sept. 2, 2022) (“The Department published a final rule in the

The present-day laws still permit children who perform agricultural labor to work in hazardous conditions, work longer hours for little pay, sacrifice school and work at a younger age, and suffer exposure to pesticides and other toxins.¹¹⁹ A letter to Congress on July 19, 2022, proposed that the legislation should be amended to “... declare certain agricultural occupations particularly hazardous and prohibited for hired child workers under the age of 16. The current Hazardous Occupations Orders (HOs)...are far too narrow and do not sufficiently protect younger children from workplace hazards such as handling tobacco, operating heavy machinery, or working at dangerous heights.”¹²⁰

Furthermore, Congress should mandate more effective oversight of employers and labor contractors to abolish their discriminatory practices and protect migrant and seasonal workers from being victimized. These amendments were presented by President Biden in the U.S. Citizenship Act of 2021.¹²¹ The bill contained multiple provisions that would radically modify the immigration system, one of which addressed the protection of immigrant and migrant workers who suffer serious labor violations, and another that would increase penalties for employers who violate labor laws.¹²²

Finally, to address the major health violations that permeate the agricultural industry, Congress must amend OSHA to create more stringent regulations to protect farmworkers from hazardous conditions, including exposure to pesticides and other toxic

Federal Register on January 7, 1970 (35 FR 221), which became effective on February 6, 1970. The Ag H.O.s established by that final rule have never been revised and are identical to the current Ag H.O.s now contained in 29 CFR 570.71.”) (emphasis omitted)).

¹¹⁹ *Child Farmworkers in the United States: A “Worst Form of Child Labor”*, *supra* note 93; Rick Paulas, *American Agriculture's Child Labor Problem*, PBS SOCAL (Oct. 6, 2014), <https://shorturl.at/hjrJ5>.

¹²⁰ *Walsh Letter*, *supra* note 124, at 1 (footnotes omitted).

¹²¹ *Fact Sheet: President Biden Sends Immigration Bill to Congress as Part of His Commitment to Modernize Our Immigration System*, THE WHITE HOUSE (Jan. 20, 2021), <https://shorturl.at/ailrP>.

¹²² U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021).

chemicals. In an effort to do so, the Environmental Protection Agency (EPA) proposed a rule in February of 2023, that would require pesticide handlers to suspend applications if any worker enters an Application Exclusion Zone.¹²³ Although this is a step in the right direction, provisions like this, and even more preventative provisions, should already be embedded in the regulations to promote the safety and well-being of the essential agricultural workforce.

IV. H-2A Visa Program for Temporary Agricultural Workers

A. History, Purpose, and Functionality of the H-2A Visa Program

As previously mentioned, the H-2A visa program developed from the H-2 nonimmigrant visa program that was established by the Immigration and Nationality Act of 1952.¹²⁴ The H-2 nonimmigrant visa program allowed temporary foreign workers to be admitted to the United States to perform temporary and seasonal employment.¹²⁵ Under the Reagan Administration, the Immigration Reform and Control Act of 1986 was created, which amended the

¹²³ U.S. EPA, WORKER PROTECTION STANDARD APPLICATION EXCLUSION ZONE (Feb. 5, 2024), <https://www.epa.gov/pesticide-worker-safety/worker-protection-standard-application-exclusion-zone>; U.S. EPA, PRE-PUBLICATION NOTICE, <https://www.epa.gov/system/files/documents/2023-02/Pre-Pub-Copy-WPS-AEZ.pdf> (last visited Dec. 12, 2023) (explaining that the Application Exclusion Zone is an area surrounding the pesticide application equipment that, during a pesticide application, must generally be free of all persons other than appropriately trained and equipped handlers.).

¹²⁴ *Immigration and Nationality Act*, USCIS (July 10, 2019), <https://www.uscis.gov/laws-and-policy/legislation/immigration-and-nationality-act> (stating “[t]he Immigration and Nationality Act (INA) was enacted in 1952. The INA collected many provisions and reorganized the structure of immigration law. The INA has been amended many times over the years and contains many of the most important provisions of immigration law”); see 8 U.S.C. § 1151 (2018).

¹²⁵ Sadikshya Nepal, *Primer: Evolution of the H-2A Visa Program*, BIPARTISAN POL’Y CTR. (Sept. 15, 2021), <https://bipartisanpolicy.org/explainer/primer-h2a-visa/>.

Immigration and Nationality Act.¹²⁶ One amendment separated the pre-existing H-2 visa program into the H-2A for agricultural workers and the H-2B for seasonal non-agricultural employment.¹²⁷

The H-2A visa program permits agricultural employers who anticipate a shortage of domestic workers to bring nonimmigrant foreign workers to the United States to perform agricultural labor or services of a temporary or seasonal nature.¹²⁸ The program is administered by three agencies: 1) The Department of Labor (DOL), which determines whether employers need H-2A workers and enforces labor regulations; 2) The Department of Homeland Security (DHS), which determines whether the employer petitions for H-2A visas are accurate and then admits workers who have approved H-2A visas; and 3) The Department of State (DOS), which issues the H-2A visas to foreign workers abroad.¹²⁹ Before employers (petitioners) can file H-2A applications with DOL, they

¹²⁶ *Statutes and Regulations: Form I-9 Statutes and Regulations*, USCIS, <https://www.uscis.gov/i-9-central/form-i-9-resources/statutes-and-regulations> (last visited Dec 12, 2023) (stating that “[t]he Immigration Reform and Control Act of 1986 (IRCA) ... [p]rohibits employers from knowingly hiring unauthorized aliens and hiring individuals without completing the employment eligibility verification process. This act led to creation of Form I-9, Employment Eligibility Verification. ... employers must use Form I-9 for all employees hired on or after Nov. 6, 1986, who are working in the U.S.”); INA *supra* note 130.

¹²⁷ Nepal, *supra* note 131.

¹²⁸ *H-2A Temporary Agricultural Program*, *supra* note 13 (stating “employment of a seasonal nature is tied to a certain time of year by an event or pattern, such as a short annual growing cycle, and requires labor levels above what is necessary for ongoing operations. Employment is of a temporary nature when the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.”); *H-2A Temporary Agricultural Workers*, USCIS, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> (last visited Dec. 12, 2023), (noting that an extension for a new temporary labor certification can be requested, but the maximum period of stay in H-2A classification is 3 years).

¹²⁹ *The H-2A Program in 2022*, RURAL MIGRATION NEWS (May 16, 2022), <https://migration.ucdavis.edu/rmn/blog/post/?id=2720#:~:text=There%20is%20no%20cap%20on%20the%20number%20of,seasonal%20farm%20jobs%20with%20H-2A%20workers%20in%20FY21>; *H-2A Temporary Agricultural Workers*, *supra* note 134.

must try to recruit U.S. workers for the jobs they need filled.¹³⁰ Then, they may file the applications, including reports on the results of their recruitment attempts and reports on the housing and transportation they will provide for the workers.¹³¹

In order for labor certifications to be approved by the DOL, the Secretary of Labor must certify that there are not sufficient U.S. workers able, willing, qualified and available to accept the job opportunity in the area of intended employment and that employment of the foreign worker will not adversely affect the wages and working conditions of similarly employed U.S. workers.¹³² Once the DOL verifies this information and approves the temporary labor certifications for H-2A employment, petitioners must file a form with U.S. Citizenship and Custom Services (USCIS) for each worker.¹³³ When USCIS approves the form for each prospective H-2A worker, the worker, who is still outside the United States at this point, must apply for an H-2A visa with the DOS at a U.S. Embassy or Consulate abroad and then seek admission to the United States at a U.S. port of entry.¹³⁴ The application process, from start to finish, usually takes around two months.¹³⁵

B. Concerns with the H-2A Visa Program

The H-2A Visa Program is not streamlined, as evidenced by the description of the H-2A application process. This may explain

¹³⁰ *Id.* *H-2A Temporary Agricultural Workers*

¹³¹ *Id.*

¹³² *Permanent Labor Certification*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/eta/foreign-labor/programs/permanent> (last visited Dec.12, 2023).

¹³³ *H-2A Temporary Agricultural Workers*, *supra* note 134.; *Citizenship and Immigration Services*, U.S. DEP'T OF HOMELAND SEC., <https://www.dhs.gov/topics/citizenship-and-immigration-services> (last visited Dec. 12, 2023).

¹³⁴ *H-2A Temporary Agricultural Workers*, *supra* note 134.

¹³⁵ *H-2A Final Rule FAQs*, U.S. DEP'T OF LAB. (Dec. 30, 2022), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Publish-H-2A-FAQs_H-2A-App-Filing-and-Processing-Round_508-v2-5.31.2023.pdf.

why the number of H-2A applications, and subsequent approved labor certifications, are extremely low compared to the number of farmworkers in the United States.¹³⁶ To provide context, direct on-farm employment in 2022 accounted for about 2.6 million jobs in the agricultural sector,¹³⁷ and in FY 2022, the DOL certified only 372,000 jobs to be filled with H-2A workers.¹³⁸ While the number of H-2A workers has increased over the years, there is still clearly a massive discrepancy between the total number of farmworkers in the United States and those who are H-2A workers.¹³⁹ This raises the question of why there is a comparatively low number of H-2A workers when there is such a need for agricultural labor. Numerous resources suggest that the primary reasons why the H-2A program has not been utilized more are: 1) the complexity of the application process and the demanding requirements with which employers must comply; 2) the abuses, discrimination, and exploitation many H-2A workers endure at the hands of their employers; 3) the restrictions it places on the workers' ability to move freely between jobs with different employers; and 4) the short-term nature of the visa.¹⁴⁰

¹³⁶ *Ag and Food Sectors and the Economy*, *supra* note 2; *H-2A Program Expands in 2023*, RURAL MIGRATION NEWS (July 11, 2023), <https://migration.ucdavis.edu/rmn/blog/post/?id=2860#:~:text=DOL%20certified%2013%2C500%20applications%20to%20fill%20212%2C000%20jobs,peak%20mid-1950s%20Bracero%20admissions%20of%20455%2C000%20before%202025>.

¹³⁷ *Ag and Food Sectors and the Economy*, *supra* note 2.

¹³⁸ *H-2A Program Expands in 2023*, *supra* note 142 (noting that in 2021-2022, over half of H-2A jobs were in five states: California, Florida, Georgia, North Carolina, and Washington.”); *Florida, California, and Georgia Accounted for One-third of H-2A Jobs in FY 2022*, U.S. DEP’T OF LAB., ERS, <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=106604> (last updated May 30, 2023).

¹³⁹ *The H-2A Program in 2022*, *supra* note 135.

¹⁴⁰ Daniel Costa, *New survey and Report Reveals Mistreatment of H-2A Farmworkers is Common: The Coronavirus Puts Them Further at Risk*, ECON. POL’Y INST. (Apr. 15, 2020, 2:30 PM), <https://www.epi.org/blog/new-survey-and-report-reveals-mistreatment-of-h-2a-farmworkers-is-common-the->

One of the many complaints of employers has been the wage requirements set by DOL:¹⁴¹ employers must pay H-2A workers the federal or state minimum wage rate, the prevailing wage rate, the Adverse Effect Wage Rate (AEWR), or the collective bargaining wage, whichever is highest in their specific geographic location.¹⁴² On average, H-2A minimum wages are 57% higher than every state's minimum wage.¹⁴³ Employers are discouraged and perturbed by this, particularly since the pandemic, because they also have to provide housing, transportation, and living costs for the workers.¹⁴⁴ However, the DOL did not give in to employers' complaints, and in November 22 issued a final rule regarding the Temporary Agricultural Employment of H-2A Nonimmigrants. There, the DOL

coronavirus-puts-them-further-at-risk/; Vásquez, *supra* note 91; *Fact Sheet: Farm Workforce Modernization Act of 2021*, AM. IMMIGR. COUNCIL (Aug. 27, 2021), <https://www.americanimmigrationcouncil.org/research/farm-workforce-modernization-act-2021>; *Bill Summary: Farm Workforce Modernization Act*, NAT'L IMMIGR. F. (Nov. 19, 2019), <https://immigrationforum.org/article/bill-summary-farm-workforce-modernization-act/>; *Guide to Housing, Wage, Transportation, and Food Requirements for H-2A Visas*, LAB. SOLS., <https://awlabor.com/guide-to-housing-wage-transportation-and-food-requirements-for-h-2a-visas/#:~:text=Employers%20must%20pay%20H-2A%20workers%20the%20highest%20of,wage.%20Federal%2FState%20minimum%20wage.%20Agreed%20upon%20bargaining%20rate> (last visited Dec. 12, 2023).

¹⁴¹ Vásquez, *supra* note 91; David J. Bier, *DOL Plans to Make the H-2A Program Too Expensive for Many Farms to Use*, CATO INST. (Feb. 28, 2022, 11:57 AM), <https://www.cato.org/blog/dol-plans-make-h-2a-program-too-expensive-many-farms-use>.

¹⁴² Nepal, *supra* note 131 ("AEWR is a DOL authorized wage for H-2A workers which provides employees with a minimum wage guarantee under which wages for H-2A foreign workers cannot fall.").

¹⁴³ *See Id.*

¹⁴⁴ *DOL Plans to Make the H-2A Program Too Expensive for Many Farms to Use*, *supra* note 142; David J. Bier, *H-2A Visas for Agriculture: The Complex Process for Farmers to Hire Agricultural Guest Workers*, CATO INST. (Mar. 10, 2020), <https://www.cato.org/publications/immigration-research-policy-brief/h-2a-visas-agriculture-complex-process-farmers-hire>; Franco Ordoñez, *White House Seeks To Lower Farmworker Pay To Help Agriculture Industry*, NPR (Apr. 10, 2020), <https://www.npr.org/2020/04/10/832076074/white-house-seeks-to-lower-farmworker-pay-to-help-agriculture-industry>; Nepal, *supra* note 131.

established that several job types on farms will have separate and higher AEWRs.¹⁴⁵ While this benefits the H-2A workers, it burdens the employers, dissuading them from utilizing the program. Furthermore, employers have complained that the application process and regulations of the program are “bureaucratically complex.”¹⁴⁶ Because this has been a deterrence for many agricultural employers,¹⁴⁷ the DOL attempted to address the issue in the November 2022 final rule.¹⁴⁸ The final rule modernized the process by which the DOL receives and processes employers' job orders and applications for temporary agricultural labor certifications, including the recruitment of U.S. workers.¹⁴⁹

C. Exploitation and Abuse of H-2A Workers

Despite the complaints of employers, one of the main reasons they continue to hire H-2A workers is because H-2A workers are more exploitable.¹⁵⁰ Wage theft has been a major issue for H-2A workers because of gaps in enforcement by the DOL.¹⁵¹

¹⁴⁵ *DOL Plans to Make the H-2A Program Too Expensive for Many Farms to Use*, *supra* note 142; *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. 61660, 61678 (defining “prevailing wage,” as codified in 20 C.F.R. § 655.103(b) (2023)); noting that All H-2A farmers have to separately track every activity of every employee on their farms to avoid violating the new wage rules. Moreover, DOL suggests classifying H-2A workers into higher wage occupations if they perform any job duties that could fit under that job category.

¹⁴⁶ Vásquez, *supra* note 99.

¹⁴⁷ *Id.*

¹⁴⁸ *News Release: US Department of Labor Announces Final Rule to Improve H-2A Visa Program*, U.S. DEP'T OF LAB. (Oct. 6, 2022), <https://www.dol.gov/newsroom/releases/whd/whd20221006>.

¹⁴⁹ *News Release: US Department of Labor Announces Final Rule to Improve H-2A Visa Program*, *supra* note 154.

¹⁵⁰ Vásquez, *supra* note 99.

¹⁵¹ Andrea Hsu & Ximena Bustillo, *America's Farms Are Desperate for Labor. Foreign Workers Bring Relief and Controversy*, NPR (July 27, 2023, 5:19 AM), <https://www.npr.org/2023/07/27/1187682674/farm-workers-guest-workers-h-2a-visa-agricultural-harvest-farm-labor>; Vásquez, *supra* note 99 (According to

Under the Biden Administration, DOL has discovered more than 1,000 cases of wage theft, resulting in back wages of \$12 million owed to more than 17,000 H-2A workers.¹⁵² These cases may only be the tip of the iceberg, with minimal violations resulting in enforcement or public scrutiny, due, in part, to the paternalistic dynamic between employers and H-2A workers and the geographic isolation of many agricultural worksites.¹⁵³

Another grave abuse that H-2A workers face is inadequate housing conditions.¹⁵⁴ Even though the Wage and Hour Division (WHD) of the DOL, in conjunction with OSHA, establishes stringent stipulations regarding the provision and condition of

reports by the Economic Policy Institute, “farm employers have a 1.1% chance of being investigated by the WHD in any given year. When WHD does investigate a farm, they find employment law violations in 70% of cases, according to 15 years of data” that EPI has collected. Due to the pandemic, “oversight and enforcement of the H-2A program fell by the wayside.” In 2020, “WHD largely stopped doing in-person investigations,” and by the end of 2021, “WHD conducted just 562 agricultural investigations impacting H-2A workers.”); Daniel Costa et al., *Federal Labor Standards Enforcement in Agriculture: Data Reveal the Biggest Violators and Raise New Questions About How to Improve and Target Efforts to Protect Farmworkers*, ECON. POL’Y INST. (Dec. 15, 2020), <https://shorturl.at/rvJRS>.

¹⁵² Hsu & Bustillo, *supra* note 157; Vásquez, *supra* note 99 (According to attorneys and immigration experts, wage theft in the H-2A program presents itself in complex and expansive ways: through illegal fees, unpaid hours, or employers failing to reimburse workers or purposefully misclassifying them for lower-paying jobs.).

¹⁵³ Nepal, *supra* note 131.; Vásquez, *supra* note 99 (Andrea Rojas, the director of strategic initiatives at Polaris, organization dedicated to ending the practice of human trafficking, believes that wage theft is the most common method of control in agriculture because “the structure of the H-2A program creates a ‘perfect storm’ for abuse because workers are completely disconnected from their support networks in their home countries and forced to rely on their employer for food, housing, and transportation. Speaking out means risking it all.”); Grace Dean, *An Idaho Potato Farm Threatened to Fire Foreign Workers and Deport Them to Mexico If They Didn’t Accept Wages Below the Legal Limit, the DOL Says*, BUS. INSIDER (Feb. 23, 2022, 6:03 AM), <https://shorturl.at/afsET> (highlighting one of the multitude of cases in which an employer exploited and victimized vulnerable H-2A workers).

¹⁵⁴ Arcury et al., *supra* note 99

housing for the workers,¹⁵⁵ there is a lack of supervision provided by the DOL which lead to ubiquitous violations.¹⁵⁶ The housing obligation regulations clarify that H-2A employers must provide housing at no cost to H-2A workers. The H-2A employers may house workers in temporary labor camps that they own or control, or they may use rental or public accommodations, such as hotels or motels.¹⁵⁷ Furthermore, the OSHA Housing Safety and Health Checklist provides specific guidance on the housing standards that apply to temporary labor camps under the H-2A program—there are close to one hundred standards in total.¹⁵⁸ Despite these minimum living standards for H-2A workers, there have been reports of unsanitary, unsafe, and crowded housing.¹⁵⁹ In an attempt to curtail

¹⁵⁵ *Fact Sheet #26G: H-2A Housing Standards for Rental and Public Accommodations*, U.S. DEP'T OF LAB., WAGE & HOUR DIV. (Nov. 22), <https://www.dol.gov/agencies/whd/fact-sheets/26g-housing-standards-for-rental-and-public-accommodations-H-2A>.

¹⁵⁶ Vásquez, *supra* note 91.

¹⁵⁷ *Fact Sheet #26G: H-2A Housing Standards for Rental and Public Accommodations*, *supra* note 165.

¹⁵⁸ *OSHA Housing Safety and Health Checklist*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/osha-housing-checklist> (last visited Feb. 16, 2024) (These housing standards apply to structures for which construction started on or after April 3, 1980. For example, there must be: “100 sq. ft. or more per person in a room where workers cook, live, and sleep; an adequate and convenient water supply, approved by the appropriate health authority, in each camp for drinking, cooking, bathing, and laundry purposes; an adequate number of toilets, and a toilet room within 200 ft. of the door of each sleeping room; and kitchen and dining hall areas free from vermin, rodents, flies, etc.).

¹⁵⁹ *H-2A Guest Worker Fact Sheet*, NAT'L CTR. FOR FARMWORKER HEALTH, INC., <https://www.ncfh.org/h-2a-guest-workers-fact-sheet.html> (last updated Oct. 2020); Arcury et al., *supra* note 99 (In 2012, the National Library of Medicine conducted an investigation on 183 farmworker camps in eastern North Carolina. Using the DOL standards in NC, the investigation assessed the housing regulation violations for the domains of camp, sleeping room, bathroom, kitchen, laundry room, and general housing. The results yielded 4 to 22 violations per camp, encompassing all six domains.); Hsu & Bustillo, *supra* note 157 (Another source states that a 2021 federal investigation found H-2A workers in Georgia were forced to dig onions with their bare hands while being severely underpaid and

these violations, the November 2022 final rule also provided amendments to the regulations for rental and/or public accommodations provided to workers.¹⁶⁰ Employers are now required to submit written documentation with the application for the labor certification, that affirms that the housing meets applicable standards and contains enough bed(s) and room(s) to accommodate all workers requested.¹⁶¹ While steps are being taken to ensure the compliance of the requisite housing standards for H-2A workers, the reality is that unless the DOL provides adequate supervision, violations will continue to occur.

Another fundamental problem with the program is that the contractual obligations of the H-2A visa create a lack of freedom for the workers and a power imbalance between the employers and workers.¹⁶² Because the workers are tied to their petitioning

threatened with violence and deportation. The workers were housed in an unsanitary work camp, encircled by an electric fence, with little food and no safe water. Two died, according to court records.); *Press Release: Human Smuggling, Forced Labor Among Allegations in South Georgia Federal Indictment*, U.S. DEP'T OF JUST., U.S. ATTY'S OFF. S.D. GA. (Nov. 23, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>; Ximena Bustillo, *A Human-trafficking Case Exposed Farmworker Abuses. The Government Is Promising Change*, NPR (May 27, 2022, 2:01 PM), <https://www.npr.org/2022/05/27/1101741366/human-trafficking-farmworker-abuse-georgia>; *Findings from the National Agricultural Workers Survey*, *supra* note 88, at 20 (30% of farmworkers lived in crowded dwellings); Brittany Anthony et al., *The Typology of Modern Slavery: Defining Sex and Labor Trafficking in the United States* 33-35, POLARIS (Mar. 2017), <chrome-extension://efaidnbmnnnibpcajpglclefndmkaj/https://polarisproject.org/wp-content/uploads/2019/09/Polaris-Typology-of-Modern-Slavery-1.pdf>.

¹⁶⁰ *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg. at 61663.

¹⁶¹ *Id.* at 61711.

¹⁶² Mary Bauer et al., *Ripe for Reform: Abuses of Agricultural Workers in the H-2A Visa Program*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., <https://shorturl.at/wyzX2> (last visited Feb. 16, 2024) (Center for Migrants' Rights, or "CDM," traveled across Mexico to interview 100 individuals who had worked as H-2A workers in the United States within the four previous years. The in-depth interviews revealed atrocious information about the H-2A program.).

employer, the H-2A program promotes unjust labor relations and leaves workers unable to quickly move to another job to escape abuse or seek better wages or working conditions.¹⁶³ Because they are afraid of losing their jobs and legal status, H-2A workers oftentimes continue working for their their exploitative employers, forced to stay and endure the poor conditions and unsustainable productivity demands.¹⁶⁴ This type of exploitation is a form of human trafficking, known as labor trafficking, which entails the use of “force or physical threats; psychological coercion; abuse of the legal process; a scheme, plan, or pattern intended to hold a person in fear of serious harm; or other coercive means to compel someone to work.”¹⁶⁵ Labor trafficking has also been described as “modern-day slavery” and imprisonment and has been openly denounced by the Department of Justice.¹⁶⁶

¹⁶³ Letter from Ron Estrada, CEO, Farmworker Justice, to Alejandro Mayorkas, Sec’y, U.S. Dep’t of Homeland Sec., and Julie Su, Acting Sec’y, U.S. Dep’t of Lab. (Mar. 23, 2023) [hereinafter *Estrada Letter*], <https://shorturl.at/xET37>; Mary Bauer et al., *supra* note 168, at 23 (Of the 100 interviewees, 32% of workers described themselves as feeling “not free to quit.” Many worried about the ramifications of quitting and many believed that they would not be allowed to return to work in the United States at all if they did not complete a contract, regardless of the reason.).

¹⁶⁴ *Estrada Letter*, *supra* note 169, at 3; *The IRÉ Project: How Mexican Workers Define Ideal Recruitment and Recruitment Priorities 2*, EQUITABLE FOOD INITIATIVE (Apr. 2021), <https://shorturl.at/euFS2> (a project to generate insight on how farmworkers who are recruited for jobs on fresh produce farms in the United States, Canada and Mexico would redesign the recruitment experience and the project provides an opportunity to learn about worker experiences on the farms).

¹⁶⁵ *What is human trafficking?*, OFF. OF THE ASS’T SEC’Y FOR POL’Y, <https://www.dol.gov/agencies/oasp/resources/trafficking/what-is-human-trafficking>

¹⁶⁶ *Anti-Slavery Program*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/slavery/> (last visited Feb. 16, 2024); *Latest Slavery Indictments Expose Exploitive Nature of H-2A “guestworker” program...*, COAL. OF IMMOKALEE WORKERS (Oct. 5, 2021), <https://ciw-online.org/blog/2021/10/latest-slavery-indictments-expose-exploitive-nature-of-h-2a-guestworker-program/>; Hsu & Bustillo, *supra* note 157; *Press Release: Human Smuggling, Forced Labor Among Allegations in South Georgia Federal Indictment*, *supra* note 165.

Workers have expressed discontent with the H-2A visa program because the work visas are temporary (usually increments of one year with a maximum period of stay of three years when extensions are filed).¹⁶⁷ The workers must leave the U.S. as soon as the H-2A visa status expires and must remain outside the U.S. for an uninterrupted period of three months before seeking readmission as an H-2A nonimmigrant.¹⁶⁸ The temporary nature of the visas, along with the fact that workers have to depart from the U.S. and reapply to come back and work, discourages potential workers from utilizing the program and encourages those already here to remain unlawfully.¹⁶⁹

D. Proposed Legislative Reform to the H-2A Visa Program

For all these reasons and more, many H-2A workers remain in the U.S. unlawfully after their visas have expired.¹⁷⁰ While this creates another set of issues, it alleviates some of the complications that come along with the H-2A visa program. In the alternative, many immigrant farmworkers prefer to come to the U.S. unlawfully and work without documentation.¹⁷¹ In 2021, only 11% of the Full-Time Equivalent (FTE) jobs in U.S. crop agriculture were employed by H-2A workers, while in 2022, 44% of all farmworkers in the U.S. were undocumented¹⁷²—a notable discrepancy. This is

¹⁶⁷ *Bill Summary: Farm Workforce Modernization Act*, *supra* note 146; *Estrada Letter*, *supra* note 169; USCIS, *supra* note 130.

¹⁶⁸ *H-2A Temporary Agricultural Workers*, *supra* note 129.

¹⁶⁹ *Bill Summary: Farm Workforce Modernization Act*, *supra* note 146; *Estrada Letter*, *supra* note 169.

¹⁷⁰ *See Id.*

¹⁷¹ *Farm Labor*, U.S. DEP'T OF AGRIC., ERS, <https://www.ers.usda.gov/topics/farm-economy/farm-labor#h2a> (last updated Aug. 7, 2023) (Roughly Half of Hired Crop Farmworkers Lack Legal Immigration Status, report from 2018-2020).

¹⁷² Philip Martin, *A Look at H-2A Growth and Reform in 2021 and 2022*, WILSON CTR. (Jan. 3, 2022), <https://shorturl.at/EJTZ9>; *Findings from the National Agricultural Workers Survey*, *supra* note 88, at 54; *Farm Labor*, *supra* note 188.

unmistakable evidence that the current temporary farmworker programs and supervisory regulations are not working well.

In an effort to address some of the issues with the program, there have been slight modifications made by the DOL, such as in the November 2022 final rule for the Temporary Agricultural Employment of H-2A Nonimmigrants.¹⁷³ However, not enough has been done, and farmworkers advocates have been actively lobbying for change.¹⁷⁴ The DOL cannot ignore the dire need for reform, so further efforts are currently being made to amend the H-2A program. For example, on September 15, 2023, the WHD published a notice of proposed rulemaking, titled “Improving Protections for Workers in Temporary Agricultural Employment in the United States.”¹⁷⁵ The revisions focus on strengthening protections for temporary agricultural workers and enhancing the Department's capabilities to monitor program compliance and take necessary enforcement actions against program violators.¹⁷⁶ Since the government permits the workers to come to the U.S. under the program, it is the government's duty to ensure that their basic human rights are not being violated, such as exploitation by employers, inadequate housing, and unsafe working conditions.

Another impetus to the DOL's proactivity may be the introduction of the Farm Workforce Modernization Act of 2021,

¹⁷³ See *Temporary Agricultural Employment of H-2A Nonimmigrants in the United States*, 87 Fed. Reg.; *News Release: US Department of Labor Announces Final Rule to Improve H-2A Visa Program*, *supra* note 154;

¹⁷⁴ *Estrada Letter*, *supra* note 169; *Agriculture Labor Reform*, AM. FARM BUREAU FED'N, <https://www.fb.org/issue/labor/agriculture-labor-reform> (last visited Feb. 16, 2024); Ximena Bustillo, *Sweeping Immigration Bills Seek to Reform Dire Farm Working Conditions*, POLITICO (Feb. 19, 2021, 3:43 PM), <https://www.politico.com/news/2021/02/19/immigration-bills-farm-working-conditions-470265>; Mary Bauer et al., *supra* note 162.

¹⁷⁵ *Proposed Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States*, U.S. DEP'T OF LAB., WAGE & HOUR DIV. (Sept. 15, 2023), https://www.regulations.gov/document/WHD_FRDOC_0001-0124.

¹⁷⁶ *Id.* (The submission deadline for comments was November 14, 2023.).

which was passed in the House in March of 2021.¹⁷⁷ Title I of the Act establishes a program for agricultural workers in the United States, along with their spouses and minor children, to earn legal status through continued agricultural employment and contribution to the U.S. agricultural economy.¹⁷⁸ This proposal is of colossal importance, as there is currently no pathway to citizen for undocumented farmworkers or long-term H-2A workers. Additionally, Title II of the Act proposes significant revisions to the H-2A temporary agricultural worker program, providing more flexibility for employers and ensuring critical protections for workers.¹⁷⁹ Title III would establish a mandatory, nationwide E-Verify system for all agricultural employment.¹⁸⁰ Unfortunately, the act has not passed the Senate to date.¹⁸¹ There is still hope, however, because on June 30, 2023, two State Representatives reintroduced the Farm Workforce Modernization Act of 2023, which reiterates the proposed revisions of the 2021 act.¹⁸²

In summary, farm owners need foreign farm labor and would like to utilize the program, as is evident by the increase in H-2A labor certifications over the years.¹⁸³ Additionally, the fact that about 70% of farmworkers are foreign-born demonstrates that there are foreign workers willing to do the job.¹⁸⁴ Considering these facts

¹⁷⁷ *Bipartisan Farm Workforce Modernization Act*, U.S. H. REPS., <https://shorturl.at/fjtwx> (last visited Feb. 26, 2024); *The Farm Workforce Modernization Act: A Bipartisan Bill that Would Provide a Path to Immigration Status for Agricultural Workers and Revise the H-2A Program*, FARMWORKER JUSTICE (July 2023) [hereinafter *BFWMA Article*], <https://shorturl.at/dhvHX>.

¹⁷⁸ *Id.* <https://www.farmworkerjustice.org/wp-content/uploads/2023/07/FWMA-2023-Fact-Sheet-FINAL.pdf>

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Farm Workforce Modernization Act of 2021, H.R. 1603, 117th Cong. (2021).

¹⁸² *BFWMA Article*, *supra* note 183.

¹⁸³ Marcelo Castillo, *H-2A Temporary Agricultural Job Certifications Continued to Soar in 2022*, U.S. DEP'T OF AGRIC., ERS (Mar. 13, 2023), <https://shorturl.at/jCOZ4> (Even with the restrictions of the H-2A visa program, it has grown rapidly in recent years as U.S. domestic workers find jobs outside agriculture and fewer newly arrived immigrants seek agriculture jobs.).

¹⁸⁴ *Findings from the National Agricultural Workers Survey*, *supra* note 88, at 76.

and the high percentage of undocumented farmworkers, it is indisputable that the workers are desperately needed, but the current H-2A visa program is not sufficiently effective to address all parties' needs. Accordingly, the government must decide if farmworkers are essential or expendable, and then take appropriate action. The protagonist of the poem I wrote, titled *Essential or Expendable?*, faces the same quandary:

He labored and labored—day in and day out.
He didn't ask for much.
He just wanted equal pay and protection.
After all, he thought he was essential.

He dreamt of a day when he could get his *papers*.
He hoped for security in the promised land.
He heard there was talk of reform, and he had hope.
Will they think he is essential?

Over two years have passed. . .
He has been waiting patiently.
He has been praying fervently.
Now he is beginning to wonder if he is essential—or
expendable.¹⁸⁵

Although there has not been substantial reform to the H-2A visa program in decades, hopefully persistence will pay off and Congress will finally join in the efforts to battle the discriminatory treatment that H-2A workers face.¹⁸⁶ Hopefully Congress will create pathways to permanent residency for them and other undocumented farmworkers—because they are essential.¹⁸⁷

¹⁸⁵ LEAH BURNETT, *Essential or Expendable?*, (noting that this is an excerpt from the poem.).

¹⁸⁶ *Sweeping Immigration Bills Seek to Reform Dire Farm Working Conditions*, *supra* note 180.

¹⁸⁷ Nepal, *supra* note 131.

V. Conclusion

César Chávez, a national icon and one of the leaders of the farmworkers' movement, understood that the fight for farmworkers' rights is a war, not a battle—it requires patience, planning, persistence, and resilience.¹⁸⁸ He spent his entire life dedicated to the fight, and while he and his compatriots enjoyed many successes during their lifetime, they never enjoyed absolute victory.¹⁸⁹ In a speech Chávez gave on Martin Luther King Jr. Day in 1990, he venerated Dr. King and elucidated similarities between the plight of farmworkers and the Civil Rights movement.¹⁹⁰ Quoting part of a letter that Dr. King had written him, he expressed that “[o]ur separate struggles are really one. A struggle for freedom, for dignity, and for humanity.”¹⁹¹ He also reminded the audience that “there is an unfinished agenda, that we have miles to go before we reach the promised land.”¹⁹² He was well aware that the journey to seek equality and justice for farmworkers is long and arduous, but he believed that change could be achieved through solidarity, dedication, and “the love and the faith to act.”¹⁹³

It may seem as though Chávez was an idealist, but the goals he and his colleagues dreamt of accomplishing are attainable through social change and legislative reform. Hence, the execution of strikes and boycotts has been the primary strategy of farmworkers' unions. The first step is to make the public aware of the unjust and deplorable conditions that many farmworkers endure, and then collective action follows suit. José Montoya, a poet and

¹⁸⁸ See Inga Kim, *Lessons of Dr. Martin Luther King, Jr. by Cesar Chavez*, UNITED FARM WORKERS (Mar. 7, 2017), <https://ufw.org/lessons-dr-martin-luther-king-jr-cesar-chavez/>

¹⁸⁹ Tim Ott, *Martin Luther King Jr. Praised Cesar Chavez for His 'Indefatigable Work'*, BIOGRAPHY (Oct. 15, 2020), <https://www.biography.com/activists/cesar-chavez-martin-luther-king-jr-telegram>.

¹⁹⁰ *Lessons of Dr. Martin Luther King, Jr. by Cesar Chavez*, *supra* note 194.

¹⁹¹ *Id.*; *Martin Luther King Jr. Praised Cesar Chavez for His 'Indefatigable Work,'* *supra* note 195.

¹⁹² *Id.*

¹⁹³ *Id.*

activist for immigrants and farmworkers, wrote about the inspirational gathering of thousands of farmworkers in his poem called *Faces at the First Farmworkers' Constitutional Convention*.¹⁹⁴ Throughout the poem, Montoya, who was the son of farm laborers and worked in the field as a child,¹⁹⁵ described the assembly firsthand.¹⁹⁶ Amidst the descriptions of colloquial conversations, reminiscent stories, and motivational anthems, Montoya praised the solidarity and determination of the workers to achieve their goals: the right to collective bargaining, the end of exploitative wages, and safe working conditions.¹⁹⁷ He emphasized the “Faces de farmworkers—Organized! Confident! Unafraid! Resoluteness without impudence... Faces de campesinos, Faces of the very poor, Confident, Unafraid—”¹⁹⁸ Montoya reminds us that social and legislative change is achieved through unity, courage, and action, which is what is needed today to amend the discriminatory agricultural labor laws and ineffective immigration policies that pervade the United States.¹⁹⁹

¹⁹⁴ José Montoya, *Faces at the First Farmworkers' Constitutional Convention*, POETRY FOUND. (1992), <https://www.poetryfoundation.org/poems/154381/faces-at-the-first-farmworkers-constitutional-convention>; José Montoya, POETRY FOUND., <https://www.poetryfoundation.org/poets/jose-montoya> (last visited Feb. 16., 2024).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Convention Call to the First Constitutional Convention*, UNITED FARM WORKERS NAT'L UNION, AFL-CIO, <https://shorturl.at/hABW1> (last visited Feb. 16, 2024) (the First Farmworkers' Constitutional Convention took place in 1973 in Fresno California. It was led by César Chávez and other leaders of the farmworkers' movement. The objective of the convention was to rally together to fight for their rights to organize and receive fair wages. During the convention, the farmworkers also renewed their commitment to strike, boycott, and engage in political campaigns in order to seek change.).

¹⁹⁸ Montoya, *supra* note 200.

¹⁹⁹ Matt Garcia, *Cesar Chavez and the United Farm Workers Movement*, OXFORD RES. ENCYC. OF AM. HISTORY (May 9, 2016), <https://shorturl.at/bilGX> (As a result of the Farmworkers' Constitutional Convention in 1973, the United Farm Workers won the right to bargain collectively through the California Agricultural Labor Relations Act in 1975.)

In conclusion, farmworkers are essential to the U.S. economy, and they need to be treated as such. Thus, at a minimum, farmworkers are entitled to basic legal rights, such as equal pay, safe work and living conditions, and the freedom to organize to advocate for themselves without fear of retaliation. As the great Harlem Renaissance writer, Langston Hughes, wrote in *Let America Be America Again*, this is supposed to be the “homeland of the free.”²⁰⁰ Nevertheless, many farmworkers feel rejected by this land—they feel like it is *Not My Land*, which is a poem I wrote to express the betrayal farmworkers must feel because of the inequalities they face in the United States. The following excerpts from the two poems create a dialogue between Langston Hughes and the farmworkers of today that capture the essence of their plights for freedom and justice, and remind us why we must continue fighting the good fight, without growing weary:

Let America be America again.²⁰¹
Let it be the dream it used to be.
Let it be the pioneer on the plain
Seeking a home where he himself is free...

None of us should be forced to do this work for such
little pay,²⁰²
Or under such brutal conditions [My back is killing
me].
This isn't what I signed up for—not the land of the
free.

O, let my land be a land where Liberty
Is crowned with no false patriotic wreath,
But opportunity is real, and life is free,
Equality is in the air we breathe...

²⁰⁰ Langston Hughes, *Let America Be America Again*, POETRY FOUND. (1995), <https://www.poetryfoundation.org/poems/147907/let-america-be-america-again>.

²⁰¹ *Id.*, (noting that the excerpts in black are from *Let America Be America Again*.).

²⁰² LEAH BURNETT, *Not My Land*, (noting that the excerpts in green are from *Not My Land*.).

Many of us live in inhuman conditions, but
You don't care because you don't know [Because I
am invisible to you.]

For I'm the one who left dark Ireland's shore,
And Poland's plain, and England's grassy lea,
And torn from Black Africa's strand I came
To build a "homeland of the free..."

Lots of us are afraid that "la migra" will pick us up
And lock us up... and send us back—
Not because we have committed a crime, but
Due to your laws that keep me "undocumented"
[This land is definitely not my land.]