
New York Supreme Court

APPELLATE DIVISION – THIRD DEPARTMENT

CRISPIN HERNANDEZ; WORKERS' CENTER OF CENTRAL NEW YORK;
WORKER JUSTICE CENTER OF NEW YORK, *Plaintiffs-Appellants*,

-against-

THE STATE OF NEW YORK and GOVERNOR ANDREW CUOMO, in his
official capacity, *Defendants-Appellants*,

NEW YORK FARM BUREAU, INC., *Intervenor-Defendant-Respondent*.

BRIEF FOR *AMICI CURIAE*

ADVOCATES FOR BASIC LEGAL EQUALITY, INC., ALIANZA NACIONAL
DE CAMPESINAS, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC.,
EL COMITÉ DE APOYO A LOS TRABAJADORES AGRÍCOLAS, JUSTICE
AT WORK, LEGAL AID SOCIETY OF MID-NEW YORK, INC., LEGAL
SERVICES OF CENTRAL NEW YORK, INC., THE NATIONAL
EMPLOYMENT LAW PROJECT, THE PENNSYLVANIA FARMWORKER
PROJECT, AND UNITED FARMWORKERS OF AMERICA
IN SUPPORT OF PLAINTIFFS-APPELLANTS

NAOMI B. CAMPBELL
N.Y. Registration Number: 5592456
Centro de los Derechos del Migrante, Inc.
10 E. North Avenue, #9
Baltimore, Maryland 21202
855-234-9699
naomi@cdmigrante.org
Counsel for Amici

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SUMMARY OF THE ARGUMENT

The continued exclusion of farmworkers from the protections of the New York State Employment Relations Act (SERA) exacerbates this population's vulnerability to exploitative and illegal working conditions. Amici seek to aid the Court by offering a perspective that is easy to overlook in the intricacies of the legal conflict at issue in this case: that of farmworkers themselves.

As the worker voices below illustrate, farmworkers are among the United States' most marginalized workers. They face significant barriers to economic mobility, precarious immigration status and physical and linguistic isolation from their communities. Their work is low-paid and more dangerous than that of any other private industry. They work long hours with few benefits, and live in substandard housing. Violations like wage theft, sexual harassment and assault, and discrimination are widespread. Indeed, conditions in agricultural work are so harsh they often amount to labor trafficking. Making this situation worse, farmworkers frequently suffer adverse actions for complaining about illegal working conditions. While many labor statutes prohibit retaliation, remedies are often inadequate. And insufficient legal services exist to help those in need.

The plaintiffs in this case seek to address these widespread problems proactively by vindicating their state constitutional right to collectively engage with employers to improve working conditions. Workers who suffer from such

frequent abuse are precisely those who should be protected when they ask for better wages, good cause for discipline or other sensible workplace protections. Under the trial court's interpretation of state law, however, employers in New York can legally retaliate against farmworkers who ask for the kinds of working conditions any other worker would reasonably expect. This Court should reject such a misreading of the State Constitution's protections.

STATEMENTS OF INTEREST

Advocates for Basic Legal Equality, Inc. (ABLE) is a 501(c)(3) non-profit law firm with offices in Toledo, Dayton, and Defiance, Ohio. ABLE attorneys and advocates represent agricultural workers in employment, employment discrimination, immigration, and civil rights abuses that take place in Ohio, and continues to represent them if they leave the state or country in those cases. ABLE's mission is to provide high-quality legal assistance in civil matters to help eligible low-income individuals and groups achieve self-reliance, and equal justice and economic opportunity. The organization thus has a strong interest in ensuring that all farmworkers, including New York farmworkers, can act collectively to address the widespread abuses in their industry.

Alianza Nacional de Campesinas (National Alliance of Women Farmworkers) is the first national farmworker women's organization in the U.S. created by current and former farmworker women, and women who hail from

farmworker families. Its mission is to unify the struggle and advance leadership among farmworker women in a national movement to create visibility and advance changes that guarantee their rights. Alianza is committed to securing social, environmental, and economic justice, violence prevention, equality, and healthier workplaces, homes and communities for farmworker women and their families. For this reason, the organization has a vested interest in ensuring that farmworkers in New York can take collective action to improve their working conditions.

Centro de los Derechos del Migrante, Inc. (CDM, Center for Migrant Rights) is a U.S. section 501(c)(3) migrant workers' rights organization with offices in Baltimore, Maryland; Mexico City; and Oaxaca, Mexico. CDM's mission is to improve the working conditions of low-wage workers throughout the U.S. and to remove the border as a barrier to access to justice. In all facets of its work, CDM seeks to advance the perspective of workers in affecting positive change. It thus has a strong interest in ensuring that New York farmworkers can act collectively to address the widespread abuses in their industry.

El Comité de Apoyo a los Trabajadores Agrícolas (CATA, or the Farmworkers Support Committee) is a membership organization formed by migrant farmworkers in Southern New Jersey in 1979. CATA is a non-profit, migrant farmworker organization that is governed by and comprised of farmworkers who are actively engaged in the struggle for better working and living

conditions. CATA primarily operates in New Jersey, Pennsylvania, and Maryland, but has had members in New York State. CATA has been actively involved in the support of successful struggles for farmworkers in New Jersey to win the right of collective bargaining and protection for concerted protected activity under the New Jersey Constitution. CATA has also been involved in successful struggles for thousands of Pennsylvania workers to win protected rights to organize and engage in concerted protected activity under the Pennsylvania Labor Relations Act.

Justice at Work (Friends of Farmworkers, Inc.) is a Pennsylvania based non-profit legal services organization that was founded in 1975. Justice at Work legal staff have been involved in protecting the rights of farmworkers in both New Jersey and Pennsylvania to engage in concerted protected activity for mutual aid and protection and in successful legal battles to win protected rights for labor organization under the New Jersey Constitution (Article I, § 19) and the Pennsylvania Labor Relations Act. Justice at Work has offices in both eastern and western Pennsylvania and encounters farmworkers who are or have been employed in New York State. The seasonal nature of many agricultural jobs means that agricultural workers in Pennsylvania may have had, or may in the future have, agricultural employment in New York.

Legal Aid Society of Mid-New York, Inc. (LASMNY) is a Section 501(c)(3) non-profit law firm serving the civil legal needs of low-income families

and individuals, as well as underserved populations and populations with special needs, in thirteen counties in central New York for 65 years. In addition, LASMNY is a recipient of funds from the Legal Services Corporation to provide services to farmworkers throughout all of New York State. More specifically, LASMNY's farmworker project includes representing farmworkers with employment discrimination, wage and hour, employment conditions, equal pay, wrongful termination, immigration, tax, and employment benefit issues.

Legal Services of Central New York, Inc. (LSCNY) is a Section 501(c)(3) non-profit law firm serving the civil legal needs of low-income families and individuals, as well as underserved populations and populations with special needs, in thirteen counties in central New York for 52 years. Specifically, LSCNY's work includes representing people with employment discrimination, wage and hour, equal pay, wrongful termination, re-entry, and family and medical leave matters.

The National Employment Law Project (NELP) is a non-profit legal organization based in New York with over 45 years of experience advocating for the employment and labor rights of low-wage and immigrant workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor standards, including baseline protections against retaliation, regardless of the job. NELP has litigated and participated as amicus curiae in numerous cases addressing the rights of immigrant workers under the Fair Labor

Standards Act and other state and federal laws. NELP also provides legal assistance to worker centers, labor unions and community-based organizations regarding the wage and hour rights of low-wage and immigrant workers, and this collaboration informs its policies. NELP has an interest in this case because a ruling against the workers would encourage employers to retaliate against farmworkers who attempt to improve their working conditions through organizing or other concerted activity.

The Pennsylvania Farmworker Project (FPF) is a project of Philadelphia Legal Assistance, a U.S. section 501(c)(3) organization, with the mission of increasing farmworkers' access to justice throughout the state of Pennsylvania. FPF serves farmworkers that come to Pennsylvania from outside and inside the United States, including neighboring states like New York. Thus, FPF has a strong interest in supporting farmworker efforts to combat exploitation in New York and everywhere else that they seek or find work.

The United Farm Workers of America (UFW) is the nation's first enduring and largest farm workers union. The UFW continues organizing in major agricultural sectors, chiefly in California, Washington and Oregon. Recent years have witnessed dozens of UFW union contract victories protecting thousands of farm workers, among them agreements with the some of the largest berry, winery, tomato, dairy and mushroom companies in the nation. The UFW continues to

actively champion legislative and regulatory reforms for farm workers covering issues such as worker protections, pesticides and immigration reform. The UFW's mission is to ensure that there is a safe and just food supply and therefore, the UFW has a strong interest in ensuring that farm workers can collectively address their issues in New York.

ARGUMENT

I. Farmworkers live in poverty and physical and linguistic isolation, frequently with precarious immigration status.

Farmworkers face significant barriers to economic mobility, including immigration status and low levels of income and education, making them vulnerable to abuse at work. In 2014, an estimated 30 percent of farmworker families had incomes below the federal poverty level. U.S. Dep't of Labor, *Findings from the National Agricultural Workers Survey 2013-2014* 37 (2016) [hereinafter NAWS].¹ Average annual income from agricultural employment is well below \$20,000. *See id.* Some estimates put it as low as \$7,500, as the seasonal nature of the work often prevents year-round employment. Oxfam America, *Like Machines in the Fields: Workers Without Rights in American Agriculture* 2, 7 (2004) (noting that 83 percent of farmworkers are employed on a seasonal basis). In most cases, farmworkers have also had limited educational opportunities. *See*

¹ www.doleta.gov/naws/pages/research/docs/NAWS_Research_Report_12.pdf.

² www.ncfh.org/uploads/3/8/6/8/38685499/fs-facts_about_farmworkers.pdf.

National Center for Farmworker Health, *Facts About Farmworkers 1* (2012) [hereinafter NCFH].² On average, farmworkers have only an eighth-grade education; only 40 percent have completed sixth grade. *Id.* As one farmworker explains, “[f]arm worker wages are barely enough to get by. . . . [they barely] cover rent, insurance, food, electricity and garbage. . . . There are days when you eat, and others when you don't, but you always have to work.” David Bacon, Farmworker Justice, *Stories from the Field: “Pedro”* (2013).³ Another farmworker describes her frustration:

Considering all the difficulties involved with doing this type of work, I don't think we're paid a fair wage. Unfortunately the law sets a very low minimum wage. . . . I know we work here because we don't have an education, but I think we should be earning more. . . . I only received an elementary education I wanted to continue attending school, but I couldn't because my mother was very poor and couldn't afford it. I didn't have any other option.

Id., “*Ramona.*”

Immigration status is another source of vulnerability. Nationally, approximately three-fourths of the country's estimated 3 million farmworkers are foreign born. *See* NAWS, *supra* at 1; NCFH *supra* at 1.⁴ The federal government estimates that just under half lack work authorization, though this is likely a

² www.ncfh.org/uploads/3/8/6/8/38685499/fs-facts_about_farmworkers.pdf.

³ www.farmworkerjustice.org/stories/index.html.

⁴ The NAWS does not include temporary agricultural workers who enter the United States on H-2A visas, so it underestimates the total proportion of farmworkers who were born outside the United States. *See* NAWS, *supra* at i.

serious underestimate because both employers and workers are reluctant to report workers' status. See Margaret Gray with Emma Kreyche, *The Hudson Valley Farmworker Report*, Bard College Migrant Labor Project 20-21 (2007) [hereinafter *Hudson Valley Report*].⁵ Indeed, some studies estimate that as many as 70 percent of farmworkers are undocumented. See, e.g., Farmworker Justice, *Selected Statistics on Farmworkers 1* (2014).⁶ In New York, the proportion of farmworkers with tenuous legal status is likely even higher. A recent survey of Hudson Valley farmworkers found that 99 percent of them were immigrants, 71 percent undocumented and 21 percent on H-2A temporary employment visas. *Hudson Valley Report*, *supra* at 7.

H-2A agricultural visa workers, who receive temporary work authorization, frequently arrive on the job in even deeper poverty than those who have lived in the U.S. for longer. See U. of Miami S. of Law Human Rights Clinic, Coalition of Immokalee Workers, *Farmworker Poverty and Human Rights, Submission to the U.N. Special Rapporteur 4* (2017).⁷ Worse still, many pay illegal recruitment fees for their jobs. See, e.g., Centro de los Derechos del Migrante, *Recruitment Revealed: Fundamental Flaws in the H2 Temporary Worker Program and*

⁵ www.adelphi.edu/pdfs/farmworker.report.pdf.

⁶ www.farmworkerjustice.org/sites/default/files/NAWS%20data%20factsht%201-13-15FINAL.pdf.

⁷ www.ohchr.org/Documents/Issues/Poverty/VisitsContributions/USA/2.TheCoalitionofImmokoleeWorkers.pdf.

Recommendations for Change 4 (2013) [hereinafter CDM] (about half of surveyed workers paid recruiters for the right to work).⁸ To pay fees, workers frequently take on crippling debt, using homes, land, or possessions as collateral. Jennifer Gordon, *Regulating the Human Supply Chain*, 102 Iowa L. Rev. 445, 463 (2017).

Tenuous immigration and economic status limit workers' access to institutional safety nets. Given the costs involved, most do not have health insurance. Southern Poverty Law Center, *Injustice on our Plates: Immigrant Women in the U.S. Food Industry* 21 (2010) [hereinafter SPLC].⁹ Undocumented and H-2A farmworkers are ineligible for benefits like food stamps, housing assistance, disability, unemployment, Medicaid, and social security. *Id.* at 8. Federal statistics from 2005-2009 reflected that less than half of farmworkers were covered by workers' compensation insurance. Bon Appétit Management Co. Found. & United Farm Workers, *Inventory of Farmworker Issues and Protections in the United States* iv (2011) [hereinafter UFW].¹⁰ A farmworker describes:

Medical insurance is so expensive here. A simple prescription will run you \$100. Because the money isn't enough people have to ask others for loans. We live a stressful life because all of this work is temporary. When the work runs out, many of us don't have unemployment benefits. So when the work ends the stress begins. It's

⁸ www.cdmigrante.org/wp-content/uploads/2018/02/Recruitment_Revealed.pdf.

⁹ www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf.

¹⁰ www.oxfamamerica.org/static/media/files/inventory-of-farmworker-issues-and-protections-in-the-usa.pdf.

frustrating . . . the kids are sick, you have to pay the rent and the bills are piling up.

Bacon, *supra*, “*Ramona*.”

Farmworkers also must contend with multiple forms of isolation, preventing them from seeking help when they suffer workplace abuses. Language is one form: 70 percent speak English only somewhat, a little, or not at all. NCFH, *supra* at 1. As one New York dairy worker explains, “[n]ot knowing English is a big barrier for me to defend myself from my boss.” Carly Fox, et al., Workers’ Center of Central New York & Worker Justice Center of New York, *Milked: Immigrant Dairy Farmers in New York State* 62 (2017).¹¹ Another worker reports, “I’ve had communication problems with my employer because I don’t know English. I was owed two weeks’ pay when I left.” *Id.* It took three full years for him to learn enough English to “go back to the farm and tell the employer to pay [him].” *Id.*

Physical isolation from communities and services is likewise common. In the rural areas where farmworkers live and work, public transit is “virtually nonexistent.” *Hudson Valley Report, supra*, at 7. A study of Hudson Valley dairy workers found that 78 percent of farmworkers do not have a car of their own and 22 percent report that their employers explicitly forbid them from having cars. Fox, *supra* at 57. This forces many farmworkers to depend on “*raiteros*,” workers who offer rides for a fee, to buy groceries, see a doctor, or even get to the hospital in an

¹¹ https://milkedny.files.wordpress.com/2017/05/milked_053017.pdf.

emergency. *See id.* at 58-59. As Omar, a Hudson Valley farmworker, explains, “I don’t have a license. I use *raiteros* to go and buy food . . . They charge me about \$40. . . . we all have to take turns to go out once a week.” *Id.* at 58.

Employers frequently exacerbate this physical isolation by forbidding visitors, including outreach workers who attempt to access labor camps to offer legal assistance, healthcare, education, and other services. *Id.* at 56 (twenty percent of surveyed Hudson Valley dairy workers reported their employer prohibited them from having visitors in their homes). Employers tell outreach workers to leave the property, or pressure them into revealing which workers have sought assistance. *See* Lauren E. Bartlett, et al., *Isolated by Force: Migrant Farmworkers Fight for Access to Justice and Health Care in the United States, Submission to the United Nations 2* (2015). Owners of migrant labor camps regularly harass and even threaten service providers with arrest or violence. *See id.* While it is illegal in New York to bar visits from outreach workers, *see Mid-Hudson Legal Servs., Inc. v. G&U, Inc.*, 437 F. Supp. 60, 62 (S.D.N.Y. 1977), *rev’d on other grounds*, 578 F.2d 34 (2d Cir. 1978), employer actions create an atmosphere of fear and intimidation, making such outreach often practically difficult. *See* Bartlett, *supra* at Att. 1.

This isolation has a profound impact on workers’ ability to seek help when they experience workplace violations. One Guatemalan worker in the Southeast described being trapped at his employer’s farm and how angry the employer

became when a few workers fled. See Southern Poverty Law Center, *Close to Slavery: Guestworker Programs in the United States* 36 (2013) [hereinafter *Close to Slavery*].¹² The employer threatened to call the police when the workers had visitors and locked the gates surrounding their housing at night. *Id.* The worker described:

I felt trapped . . . I didn't have my documents or any money. And we were so far away from the town I didn't know where to go for help or how to get away. And the crew leader kept a close watch over us at all times. He often warned us that if we left, he would tell the employer and have us reported to Immigration right away.

Id. at 36-37. The poverty, uncertain legal status, and isolation farmworkers face combine to make it nearly impossible to change abusive workplace conditions.

II. Isolation, poverty, and non-citizen status expose farmworkers to exploitative, dangerous, and often illegal labor practices.

Farmworkers' vulnerability exposes them to uniquely exploitative and dangerous working conditions. Several of these abusive practices are described below.

Hazardous Working Conditions and Inadequate Training

Farmworkers face extremely dangerous working conditions, leading to staggering rates of workplace injury and death. According to U.S. Department of Labor statistics, agriculture is one of the nation's most dangerous private industries. See, e.g., Bureau of Labor Statistics, *Number and Rate of Fatal Work*

¹² www.splcenter.org/20130218/close-slavery-guestworker-programs-united-states.

Injuries, by Occupation (2016).¹³ Farmworkers are five times more likely to die on the job than workers in other industries. See Don Villarejo, Kresge Found., *Health-Related Inequities Among Hired Farm Workers and the Resurgence of Labor-intensive Agriculture* 5 (2012).¹⁴ They are significantly more likely to be killed at work than even construction and mining workers. *Id.* at 5-6. Between 1990 and 2017, New York farmworkers were killed on the job at a rate three times higher than that of workers employed in construction, the next most-fatal job, and 15 times greater than the state's average occupational death rate. Robert Downen, *Eighty Years After Jim Crow, NY Farm Workers Still Fighting for Rights*, Times Union, May 27, 2017.¹⁵

Primary among the job hazards farmworkers face is heat. Between 1992 and 2006, the Centers for Disease Control (CDC) reported a heat-related death rate for field workers nearly 20 times higher than the average for other workers. CDC, *Morbidity and Mortality Weekly Report, Heat-Related Deaths Among Crop Workers - United States, 1992-2006* (2008).¹⁶ Even these numbers underestimate the risk, as heat stress is grossly underreported. See UFW, *supra* at 39.

Pesticide exposure is another serious threat to farmworker health. See Oxfam

¹³ www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-occupation.htm.

¹⁴ <https://kresge.org/sites/default/files/Health-farm-worker-white-paper.pdf>.

¹⁵ www.timesunion.com/tuplus-business/article/Eighty-years-after-Jim-Crow-NY-farm-workers-11178770.php.

¹⁶ www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm.

America, *supra* at 2-3. Regardless of whether a farmworker applies pesticides herself, all farmworkers are at risk of indirect exposure to pesticide residue, including through drift from aerial application. UFW, *supra* at 44. As a fruit picker describes his experience, “I saw a truck that was spraying. All that white stuff came over to where we were. After, my head hurt. I felt like it got inside. I felt dry . . . like when you have a cold or flu or congested.” SPLC, *supra* at 31. Long-term exposure is linked to a range of chronic health problems, including cancer, infertility, birth defects, Parkinson’s disease, and neurological damage. *See id.* at 32; Joan D. Flocks, *The Environmental & Social Injustice of Farmworker Pesticide Exposure*, 19 *Geo. J. on Poverty L. & Pol’y* 255, 271-72 (2012). Farmworkers have higher rates of certain cancers than other professions. UFW, *supra* at 45. They are at least ten times more likely than other workers to suffer acute pesticide poisoning. Villarejo, *supra* at 11. Juana, who worked for years harvesting lettuce, reports how little she knew about the danger of pesticides before she and her son were diagnosed with lymphoma:

Our house was (and still is) right along the edges of the lettuce fields. When we started living there I still didn’t know about how dangerous pesticides could be. I would hang the clothes outside to dry in the fresh air, and my son would play in the water that collected in the irrigation ditches. We didn’t know the risks. . . . [P]esticides don’t have boundaries. They can freely cross wherever they want and we all need to know this.

Farmworker Justice, *Exposed and Ignored: How Pesticides Are Endangering Our*

Nation's Farmworkers 17 (2013).¹⁷

Other job hazards include death or injury from farm equipment and chronic injuries resulting from repetitive physical labor. Farmworkers, especially young or insufficiently trained workers, often die by falling into machinery or being crushed by heavy farm equipment. See Human Rights Watch, *Fields of Peril: Child Labor in US Agriculture* (2010).¹⁸ Tractor overturns are the leading cause of death for farmworkers who die from work-related injuries. *Id.* Repetitive stress issues are even more common. See Freedom Network USA, *Human Trafficking and Farmworkers* 3 (2013).¹⁹ Isabel, a farmworker in Upstate New York, spent her entire workday hunched over. SPLC, *supra* at 28. She used scissors and cutters to trim branches, reporting that at the end of the day, “I don’t feel my hands. I feel like an animal bit me. I have a pulsing in my arms, and I feel the pain when I sleep. . . . It’s intolerable the pain, from using the scissors so much.” *Id.* Work-related injuries and repetitive actions, as one expert explains, “frequently evolve into more complicated, chronic conditions that plague farmworkers for the rest of their lives.” Rick Mines, et al., California Institute for Rural Studies, *The Binational Farmworker Health Survey* VI-2 (2001).

¹⁷ www.farmworkerjustice.org/sites/default/files/aExposed%20and%20Ignored%20by%20Farmworker%20Justice%20singles%20compressed.pdf.

¹⁸ www.hrw.org/report/2010/05/05/fields-peril/child-labor-us-agriculture#ac91b9.

¹⁹ <https://freedomnetworkusa.org/app/uploads/2016/12/Farmworkers.pdf>.

Despite dangerous working conditions, farmworker job-safety training and protective equipment are often nonexistent. *See id.* at V-3. As a New York dairy worker explains, “I barely had training, like one minute. I figured it out after some time. One just simply has to learn as they go.” Fox, *supra* at 49. One New York dairy worker was not trained on safety procedures and suffered three injuries on the job, including exposure to chemicals that temporarily blinded him. Keller, et. al, *Milking Workers, Breaking Bodies: Health Inequality in the Dairy Industry*, 26 New Labor Forum 36, 39 (2016). Another worker recounts how his skin began falling off in pieces because his supervisor failed to train him adequately:

Yesterday . . . I washed with the red acid. “No, Edgar,” [a supervisor told me]. “That red liquid is dangerous.” “Why didn’t you tell me?” And it’s like that, things just slip by. I washed myself but I was hurting here and little pieces [of skin] were falling off me. When someone doesn’t know something, they don’t train them.

Fox, *supra* at 50. In addition, workers may receive no protective equipment at all, or are illegally required to pay for it themselves. *See id.*

Wage Theft

Systemic underpayment of wages is widespread in low-wage industries across New York. *See* Lauren K. Dasse, *Wage Theft in New York: The Wage Theft Prevention Act as a Counter to an Endemic Problem*, 16 CUNY L. Rev. 97, 100 (2012). Surveys of farmworkers in New York and nationally reflect such abuses as endemic. *See, e.g.*, Fox, *supra* at 11 (28 percent of surveyed workers in New

York's dairy industry knowingly experienced wage theft, others suspect more); SPLC, *supra* at 24 (the vast majority of farmworker women interviewed experienced wage theft). While common, these abuses—ranging from off-the-clock hours to kickbacks, insufficient meal breaks, illegal deductions, and subminimum piece rate wages—can be difficult to uncover because agricultural employers often keep incomplete or incorrect records. *See* UFW, *supra* at 15. One orange picker describes, “when you get the pay stub, it says eight hours. But they didn’t pay us for eight hours. I’m better off keeping quiet, even if they pay me \$20 or \$30. What can I do?” SPLC, *supra* at 28. Another worker’s wife describes supporting a family of five on a piece rate wage: “on a good day picking lemons [my husband] makes \$30 a day. He works eight to ten hours a day. What am I supposed to do with \$30? I try to make miracles!” Bacon, *supra*, “*Elisa.*”

Unsafe Housing Conditions

At least one-fifth of farmworkers live in housing owned and provided by their employers. Bartlett, *supra* at 1. Given the seasonal nature of farm work in states like New York, an influx of workers may overwhelm existing housing infrastructure and force them to sleep outside, in vehicles, tents or other structures not intended for housing. *See* UFW, *supra* at 23. Even when farmworkers live in formal housing, overcrowding, disrepair, infestations, and other unsanitary conditions are widespread. *See* N.Y. State Dep’t of Health, *Migrant and Seasonal*

Farmworkers: Health Care Access and HIV/AIDS in this Population 6; 17 (2007); Q.M.Vallejos, et al., *Migrant Farmworkers' Housing Conditions across an Agricultural Season in North Carolina*, 54 Am. J. of Industrial Med. 533, 533 (2010). Preoccupancy inspections of labor camps—the most common form of government inspection—are insufficient because some of the worst violations, like overcrowding, gas leaks, and nonfunctional bathrooms and kitchens are not apparent until workers occupy the camps. UFW, *supra* at 24. Housing standards violations are rampant. See Villarejo, *supra* at 13. Workers may share a bed, alternating night and day sleep shifts, or even sleep in a bathtub when there is no other space available. Fox, *supra* at 55. A pine straw worker describes “sle[eping] in a room with about 16 other workers . . . There was no air conditioning in the house, and it go really hot and buggy in the summer months. The tap water smelled so foul that we couldn't drink it.” *Close to Slavery, supra* at 36. On a dairy farm in Vermont, workers found sewage leaking into their drinking water; in New York, one farm linked worker housing to a milking barn, meaning that chemicals and manure could easily spread into workers' living spaces. Keller, *supra* at 3.

Sex Discrimination, Harassment and Violence

The workplace abuses described above are particularly acute for women. Female farmworkers frequently earn less than their male counterparts for similar work. See Centro de los Derechos del Migrante, Inc., *Engendering Exploitation:*

Gender Inequality in U.S. Labor Migration Programs 5 (2018).²⁰ They are often given less desirable jobs, with fewer opportunities for advancement or with lower wages, solely because of their gender. *Id.* Mary, from Mexico, was harassed because of her gender during training, explaining, “[t]he only training I got lasted five minutes. The men would laugh behind my back and they wouldn’t tell me how to be careful and about the dangers of the farm.” Fox, *supra* at 49.

Women farmworkers also regularly face sexual harassment and assault on the job. See SPLC, *supra* at 44; Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment* 21 (2012) [hereinafter HRW].²¹ A farmworker in California told investigators that she and her fellow workers referred to the fields as the *field de calzón*, or “field of panties,” because so many workers had been raped by supervisors there. SPLC, *supra* at 46. Impunity for such violations is common. As one worker explains, “[w]e thought it was normal in the United States that in order to keep your job, you had to have sex.” Jose R. Padilla and David Bacon, *Protect Female Farmworkers*, N.Y. Times, Jan. 19, 2016, at A27. A woman in New York described a supervisor who touched all of his female employees; if they resisted, he would threaten to fire them or call immigration. HRW, *supra* at 4.

Other Forms of Discrimination

²⁰ <http://cdmigrante.org/wp-content/uploads/2018/01/Engendered-Exploitation.pdf>.

²¹ www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf.

Farmworkers also contend with discrimination on account of their national origin, ethnicity, or immigration status. *See, e.g.*, HRW, *supra* at 4-5; Margaret Gray, *Labor and the Locavore: The Making of a Comprehensive Food Ethic* 63 (2014). Workers describe the atmosphere on their farms as “tolerant” of abuse, especially towards recent immigrants and indigenous workers. HRW, *supra* at 4-5. Because their immigration status can be used as a threat, undocumented workers earn less than other workers. *See* Gray, *supra* at 63. They experience wage theft at more than double the rate of other workers, and lose more money per hour to wage theft when it occurs. Saru Jayaraman, Food Chain Workers Alliance, *The Hands That Feed Us: Challenges and Opportunities for Workers Along the Food Chain* 34 (2012).²² Indigenous workers face discrimination both from supervisors and from other workers. HRW, *supra* at 37. One worker describes the treatment of workers who speak an indigenous language: “They are treated like they have no value . . . like they are not normal people.” *Id.* at 38. Another recounts his experience as an indigenous farmworker: “one foreman divided the Oaxaqueños [from other] Mexicans. He put the Oaxaqueños in the bad fields and the Mexicans in the fields with no weeds. . . . I always thought there was a law out there against discrimination, but it seems it is just not enforced.” Bacon, *supra*, “Javier.”

Labor Trafficking

²² <https://foodchainworkers.org/wp-content/uploads/2012/06/Hands-That-Feed-Us-Report.pdf>.

The exploitation that farmworkers face can even amount to labor trafficking, “a contemporary manifestation of slavery” 22 U.S.C. § 7101(a). Labor trafficking occurs when “the employer uses force, fraud, or coercion to maintain control over the worker and to cause the worker to believe that he or she has no other choice but to continue with the work.” *Agriculture*, National Human Trafficking Hotline (Aug. 13, 2018).²³ Traffickers manipulate migrants who arrive on the job in debt because of large recruitment fees, taking advantage of their “lack of familiarity with surroundings, laws and rights, language fluency, and cultural understanding.” Polaris, *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas* 1 (2015).²⁴ These “circumstances . . . lead individuals to become more susceptible to victimization.” *Id.* An 18-year-old from Mexico describes being trafficked in the grape harvesting industry, saying:

The people told me that, since I didn’t have documents – not my visa [they had promised me] or anything – that I was working illegally in this country. They told me that if I made a move, if I tried to escape, they could kill me. Or they could take it out on my family in my country.

SPLC, *supra* at 15. She was told that she was not going to receive a paycheck because she was working to pay off the money spent to bring her to the U.S., and that if she contacted the police, they would lock her up. *Id.* Traffickers in situations

²³ humantraffickinghotline.org/labor-trafficking-venuesindustries/agriculture.

²⁴ polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf.

such as these take advantage of the isolation and vulnerability of workers, and the workers' lack of legal protections. *See* Freedom Network USA, *supra* at 2.

III. Widespread retaliation against farmworkers perpetuates workplace abuses.

When farmworkers act to address the abusive working conditions described above, they often face retaliation and inadequate tools to protect them from it. The decision below compounds this problem, by continuing to exclude farmworkers from the critical protections that other workers enjoy when they ask their employers for improved working conditions.

a. Despite laws prohibiting retaliation, the legal tools available to farmworkers are insufficient to address it.

Agricultural workers all too commonly experience retaliation when they complain about working conditions or otherwise attempt to exercise their legal rights. *See* Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 Hofstra J. Lab. & Emp. L. 575, 596 (2001). As one worker explains succinctly, “[i]f you behave, there’s work.” Gray, *supra* at 8. Another describes his reaction when an employer refused to pay his workers what they were owed:

I was so upset. I told my family to report it to the Labor Department. To them it's inevitable, though. They think we should just put up with it and be grateful that we have a job. It's also fear of losing their job if they make a complaint. . . . Other people would make fun of my dad because he would fight for his rights. They'd mock me and say, "That is why your dad never gets jobs."

Bacon, *supra*, “Javier.”

Although retaliation is a realistic threat to any worker who stands up to employer mistreatment, undocumented and temporary visa workers—the majority of farmworkers—are particularly vulnerable because of their immigration status. Being fired can have a devastating impact on any worker’s livelihood, but “undocumented workers confront the harsher reality that, in addition to possible discharge, their employer will likely report them to [immigration authorities] and they will be subjected to deportation proceedings or criminal prosecution.” *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1064 (9th Cir. 2004). Indeed, “the growing anecdotal and empirical evidence suggests that many employers report workers [to ICE] in retaliation for . . . attempting to assert their labor and employment rights.” Stephen Lee, *Private Immigration Screening in the Workplace*, 61 *Stan. L. Rev.* 1103, 1107 (2009). Unsurprisingly, the case law is replete with examples of employers and their agents that use threats of deportation or actual reports to immigration authorities to chill undocumented workers’ attempts to improve their working conditions. *See, e.g., Sure-Tan v. N.L.R.B.*, 467 U.S. 883, 886-87 (1984) (employer reported workers to INS after they voted to form a union); *Arias v. Raimondo*, 860 F.3d 1185, 1187 (9th Cir. 2017) (employer’s attorney contacted ICE to detain and deport dairy worker suing for unpaid wages).

H-2A workers similarly face the significant risk that their employer will fire them for engaging in protected conduct, thus obligating them to return to their home country or face the possibility of removal from the U.S. *See, e.g., Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 131-32 (W.D.N.Y. 2003) (employer reported H-2A workers to INS and falsely accused them of terrorist activity after they sued for unpaid wages); 8 C.F.R. § 214.2(h)(5)(i) (H-2A workers' legal status is tied to their job with the sponsoring employer). As one worker reports, "when the supervisor would see that a person was ready to leave the job because the pay was so bad, he would take our papers from us. He would rip up our visa and say, 'you don't want to work? Get out of here then. [] Right now I will call immigration to take your papers and deport you.'" *Close to Slavery, supra* at 14. In another case, over 300 sugarcane cutters from the Caribbean stopped work on a Florida plantation, complaining that they were being paid less than promised. *Id.* at 4-5. The company called the police, "who used guns and dogs to force workers onto buses." *Id.* The workers were taken off the plantation and deported. *Id.*

H-2A workers also risk being blacklisted by their employers or foreign labor recruiters, who in many cases exert total control over workers' access to jobs and visas. *See CDM, supra* at 22; Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* 223 (2000). *See, e.g., Reyes-Fuentes v. Shannon Produce Farm, Inc.,*

671 F. Supp. 2d 1365, 1367 (S.D. Ga. 2009) (H-2A workers alleged they were retaliatorily denied reemployment after suing employer).

While the retaliatory tactics employers use to prevent their workers from vindicating their rights are generally illegal (with important exceptions described below), the lack of meaningful remedies often prevents farmworkers from seeking redress. Undocumented workers are precluded from seeking reinstatement or back pay when they are unlawfully fired. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 137 (2002). Although H-2A workers can in theory seek reinstatement and back pay when they suffer retaliatory adverse actions, practical issues frequently make these remedies illusory. H-2A workers can only work during the duration of their visa, which by definition is fewer than 12 months. *See* 8 C.F.R. §§ 214.2(h)(5)(iv)(A), (vii)(B). Thus, it is unlikely that the visa will remain valid by the time a court orders relief, making going back to work impossible. Workers who have been forced to return to their home country also lack adequate access to legal services, preventing them from accessing justice. *See* American U. Washington College of Law Int'l H. R. Law Clinic & Centro de los Derechos del Migrante, *Picked Apart: The Hidden Struggles of Migrant Worker Women in the Maryland Crab Industry* 7 (2010).²⁵

²⁵ <http://cdmigrante.org/wp-content/uploads/2018/02/PickedApart.pdf>.

The limited availability of legal services for farmworkers compounds substandard conditions and the frequency of retaliation. Organizations that receive Legal Services Corporation (LSC) funding are prohibited from assisting “ineligible alien[s],” a category that includes undocumented workers, who make up the majority of farmworkers. 45 C.F.R. § 1626.3, 1626.5; *supra* part I. Yet even when farmworkers are legally eligible for services, organizations frequently lack the funding to represent them. LSC reports that almost a million clients, or one out of every two seeking legal assistance, are rejected each year because of inadequate resources. Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 1, 9 (2009).

b. Legalized retaliation against farmworkers who act collectively exacerbates abuse.

Retaliation is especially common for immigrant workers who seek to form a union or take part in other concerted action to improve working conditions. *See, e.g., Hoffman Plastic*, 535 U.S. at 140 (workers fired after participating in a union-organizing campaign); *Montero v. INS*, 124 F.3d 381, 383 (2d Cir. 1997) (undocumented New York garment worker who helped organize colleagues into a union ordered deported after employer’s attorney contacted INS). But the situation is even worse for farmworkers, because they are explicitly excluded from the protections of the National Labor Relations Act, 29 U.S.C. § 152(3), and most states lack any rules prohibiting retaliation for union organizing or other concerted

activity. *See, e.g., Villegas v. Princeton Farms, Inc.*, 893 F.2d 919, 920 (7th Cir. 1990) (affirming dismissal of farmworker’s claim under Illinois law that he was fired for union activity).

Farmworkers’ experiences demonstrate the impact of their exclusion from labor law’s protections. Lucrecia, a former California farmworker, explains how legal retaliation prevents workers from speaking up or from joining a union:

When I worked in a plastics factory, a coworker had a doctor's note saying she needed to work in a sitting position. The foreman fired her and then fired me for speaking up and defending her. I think a union would help, but it's been difficult for one to get organized in the area. When I began to wear my [farmworkers’ advocacy organization] shirt, I was told there wasn't work [on the farm] for me anymore. I've been working here for many years and all of a sudden there wasn't work for me. I've been looking for work ever since.

Bacon, *supra*, “*Lucrecia*.” Dolores, a worker who has spent a decade picking apples in upstate New York explains,

The fear is that we will bring our problems [to our employer] and we will be fired because there is no law that covers us . . . a lot of times employers threaten us. [T]hey take advantage, and if [someone tries to organize], they want to call immigration or simply fire the person. They are very common threats, and it has happened a lot, [in response to attempts to organize] or asking for unpaid wages. [With the right to organize,] workers would feel safer because something would be protecting us. . . . [W]e do not have the rights that we should have.

Telephone Interview with Dolores Bustamente, New York farmworker (June 29, 2018). In short, despite being uniquely vulnerable to workplace abuses—and thus constituting the group of workers who intuitively should be most

empowered to act together to improve working conditions—farmworkers face a legal void. This legal regime gives employers license to retaliate.

IV. The right to organize and to engage in concerted activity allows farmworkers to address substandard conditions without fear of adverse consequences.

As described above, agricultural employers often violate their workers' rights with impunity. In this context, forming a union and otherwise act in concert are essential tools for improving working and living conditions.

a. The right to form a union empowers farmworkers who lack individual bargaining power to improve working conditions.

The right to collective bargaining has a significant positive impact on workers' lives. Farmworkers have little power to seek improvements in working conditions when they act individually. *See* Michael H. LeRoy and Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the N.L.R.A.?*, 48 Emory L.J. 489, 536-7 (1999). Yet recent studies have demonstrated that union expansion results in increases in low-skilled workers' wages "with significant impacts on inequality." *See generally*, Henry S. Farber, et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, Nat'l Bureau of Econ. Research 34 (2018).²⁶ Union membership has allowed H-2A workers to negotiate better wages and working conditions, protect themselves from retaliation and reduce the pervasive illegal practices associated with foreign labor

²⁶ www.nber.org/papers/w24587.

recruitment like pre-employment fees. See Farmworker Justice, *No Way to Treat a Guest: Why the H-2A Agricultural Visa Program Fails U.S. and Foreign Workers* 31 (2011) [hereinafter *No Way to Treat a Guest*]. Unions also compensate for the lack of legal representation for farmworkers by bringing financial resources to cases and connecting their members with legal services they might not otherwise seek out. See, e.g., Josh Bivens, et al., *How Today's Unions Help Working People*, Economic Policy Institute 21 (2017).²⁷

Recent examples abound of the positive changes that farmworker unions have brought to ingrained, exploitative employment practices. The experience of Familias Unidas por la Justicia (FUJ, or Families United for Justice), a new farmworker union in Washington State, is illustrative. In 2013, a group of berry pickers complained to management at Sakuma Brothers Farms about unfair piece rate wages and deplorable housing conditions. David Bacon, *A New Farm Worker Union is Born*, American Prospect, June 26, 2017 [hereinafter *A New Farm Worker Union*].²⁸ When the farm fired one worker in retaliation, the remaining employees stopped working in protest. *Id.* At the conclusion of the season, the farm notified all of its local workers involved in the work stoppage that they were being terminated for missing work and would be replaced by H-2A workers. *Id.* Through

²⁷ www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/.

²⁸ <http://prospect.org/article/new-farm-worker-union-born>.

a long series of negotiations between the workers (represented by FUJ) and the farm, the workers got their jobs back and secured a contract including an average wage of \$15 per hour and a requirement for just cause for any discipline. *Id.* The benefit to the workers was tremendous. As Ramon Torres, one of the worker-leaders who helped organize the Sakuma employees, explained: “[t]hat's the priority—to raise our living standards. We know the contract will change our lives. Now, if we make a little more, our children will have other possibilities. . . . [W]e want them to have opportunities other children have.” *Id.*

Unionized farmworkers in North Carolina have had similar experiences. Diego, an H-2A worker, observed dramatic improvements in his working conditions after the North Carolina Growers Association signed a collective bargaining agreement with the Farm Labor Organizing Committee (FLOC). *No Way to Treat a Guest, supra* at 30. The contract meant that workers had increased wages, no longer had to pay recruiters for jobs, were reimbursed for travel costs, could take water breaks, and got bereavement leave. *Id.* And the employer finally was responsive to problems with housing conditions. *Id.* Diego explained, “I’ve been able to provide for [my kids], give them clothes . . . I’m very happy now that they can be in school and college . . . I encourage all workers to join a union.” *Id.*

California workers have likewise testified to the improvements to their lives that came with union support. A California farmworker describes how her union

helped get her medical insurance: “[Health care] became free when the [union] came in. . . . When my 13-year-old son died, we already had this insurance and it covered approximately 80-90% of the costs . . . thanks to that insurance we were able to move forward.” Bacon, *supra*, “*Consuelo*.” Another recounts:

Thank God the union came in and because of the union they paid better. Most companies were paying \$5 or \$5.75 an hour, but after the union came, we got paid \$7.45 for pruning and tying. . . . There were bathrooms close by and people worked at a more relaxed pace. We were given more rest breaks. The union is very important for poor people. We didn't know where go to ask for help and I barely spoke Spanish [and only spoke an indigenous language].

Id., *supra*, “*Pedro*.”

New York farmworkers similarly recognize the potential benefits of union membership. As a group of Hudson Valley farmworkers said, “[w]ith a union, the law succeeds;” “[a] union fights for certain things for you . . . [i]t’s someone to talk to;” and “[a] union listens to the worker.” *Hudson Valley Report*, *supra* at 66-67. Others commented on the advantages of unions, including “protection against abusive contractors and employers, higher pay, more benefits, . . . the ability to negotiate contracts . . . [and] greater security.” *Id.* at 68. Bety, who has worked in New York for eight years, explains her desire for the right to organize:

It is very hard and very, very poorly paid work. I work more than 8 hours a day, 6 days a week . . . in very cold conditions [in] orchards, and sometimes the snow comes up above our knees . . . or in above 90-degree heat . . . I would like to have the same rights as other people [like] the right to organize. We are human beings that are here for a better future for ourselves and for this country.

Interview with “Bety,” Statement advocating for New York Farmworker Bill (June 23, 2018) (pseudonym used to protect her identity).

b. The right to concerted activity protects farmworkers who seek to improve substandard conditions.

Even when workers do not form a union, the protected right to engage in concerted activity ensures that they can act together to improve employer practices without the fear of retaliation. Current New York law, as interpreted by the court below, allows employers to fire employees when they do something as simple as talking amongst themselves about safety procedures and equipment on the farm. *See* Complaint ¶¶ 6, 94-98. This legal void gives farmworkers a significant disincentive to speak up when faced with conditions that the vast majority of workers—who are legally protected—would never tolerate. It also provides employers a direct financial incentive to retaliate against such “troublemakers.”

The experience of California, which protects concerted farmworker activity, demonstrates the significance of this right. In case after case, California’s Agricultural Labor Relations Board has ordered relief for workers who sought simple improvements to working conditions like fair pay for back-breaking work, and suffered adverse employment actions because of it. In one case, the Board ordered a farm to reinstate and pay back wages to workers who were disciplined for walking off the job in dangerously cold conditions that left their bodies numb.

Cal. Artichoke and Veg. Corp., 41 A.L.R.B. No. 2, 4-6, 29-30 (2015). In another, the Board held that employees' protest of their employer's refusal to pay anything more than the minimum wage was legally protected. *P & M Vanderpoel Dairy*, 40 A.L.R.B. No. 8, 21, 24 (2014). And the Board ordered reinstatement of workers who were fired after protesting assignments that were more difficult and less safe than those of their colleagues. *Sabor Farms*, 42 A.L.R.B. No. 2, 1-2 (2016).

Given the vulnerable status of farmworkers and the often-coercive circumstances under which they work, this type of legal protection is essential to improving their lives.

c. The New York Farm Bureau's doomsday concerns are not borne out by the experience of other states.

The success of the agricultural industry in states where workers have the legally protected right to collectively bargain and engage in concerted activity shows that Farm Bureau's concern that the right collective bargaining would "create a disproportionate hardship for farmers," *see Hernandez v. New York*, Decision and Order, No. 2143-16, 3 (N.Y. Sup. Ct. Jan. 3, 2018), is misplaced. In California, for example, agricultural industry revenues have risen markedly over recent years despite repeated periods of drought. *See Heather Cooley, et al., Impacts of California's Ongoing Drought: Agriculture* 8 (2015).²⁹ In North Carolina, where FLOC has negotiated a collective bargaining agreement with the

²⁹ pacinst.org/wp-content/uploads/2015/08/ImpactsOnCaliforniaDrought-Ag.pdf.

North Carolina Growers' Association, the largest single employer of H-2A workers in the country, the state remains a top-five destination of H-2A workers. *See* Office of Foreign Labor Certification, U.S. Dep't of Labor, *H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2018 YTD* (2018).³⁰ The same is true in Washington State, where FUJ has successfully organized farmworkers, as described above. *See A New Farm Worker Union, supra.*

In short, the ongoing success of the New York agricultural industry does not depend on denying farmworkers the basic rights that almost all of the State's other workers enjoy.

CONCLUSION

Farmworkers' continued exclusion from the constitutionally protected right to organize and engage in concerted action exacerbates exploitative, dangerous, and frequently illegal working conditions. This Court should reverse the order below and hold that the New York Constitution guarantees farmworkers these fundamental protections—just as it does for the state's nonagricultural workers.

Respectfully submitted,

Dated: August 21, 2018



Naomi Campbell, NY Registration No. 5592456
Centro de los Derechos del Migrante, Inc.
Counsel for Amici

³⁰ www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q3.pdf.