



# Coalition of Immokalee Workers

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**FOOD LAW  
and POLICY CLINIC**  
HARVARD LAW SCHOOL

October 24, 2022

Secretary Tom Vilsack  
United States Department of Agriculture  
Departmental Administration  
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Washington, DC 20250

CC:

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*Via electronic submission to <https://www.regulations.gov/commenton/FSA-2022-0013-0001>*

RE: United States Department of Agriculture – Farm Labor Stabilization and Protection Pilot Program – Docket ID FSA-2022-0013

Dear Secretary Vilsack:

The Harvard Law School Food Law and Policy Clinic (FLPC) and the Coalition of Immokalee Workers (CIW) respectfully submit the following comment regarding the proposed Farm Labor Stabilization and Protection Pilot Program.

The Food Law and Policy Clinic (FLPC) is an educational program at Harvard Law School that serves partner organizations and communities by providing guidance on food system issues and advocating for food systems change, while engaging law students in the practice of food law and policy. FLPC focuses on increasing access to healthy foods, supporting sustainable and equitable production, promoting community-led food system change, and reducing waste of healthy, wholesome food. As part of this work, FLPC frequently studies and evaluates program administration by the USDA. FLPC also engages in and supports advocacy to advance the rights, well-being, and representation of food system workers across levels of government, including through stronger worker support systems enacted through the farm bill and at USDA.<sup>1</sup>

CIW is a worker-based human rights organization internationally recognized for its achievements in fighting human trafficking and gender-based violence at work.<sup>2</sup> The CIW is also recognized for pioneering the design and development of the Worker-driven Social Responsibility (WSR) paradigm, a worker-centered, market-enforced approach to the protection of workers' rights in corporate supply chains, and creating the Fair Food Program (FFP).<sup>3</sup> This approach is especially critical for protecting human rights and the dignity of workers in agriculture, an industry with an extensive history of exploitative working conditions and numerous current cases of human trafficking and forced labor.

## I. INTRODUCTION

Worker-driven social responsibility programs, like the Fair Food Program (FFP), and collective bargaining agreements (CBAs) offer the only proven mechanisms to ensure protection of workers' rights in agriculture. It is well-documented that outside of the FFP, or in the absence of a CBA, farms in the United States have a pervasive problem with labor and human rights abuses.<sup>4</sup> This is true throughout the agricultural industry, but especially so on farms that participate in the H-2A temporary worker visa program, which has facilitated working conditions particularly conducive to worker exploitation. The H-2A program has a well-documented history of placing guestworkers at high risk of the most extreme forms of human rights abuses: dangerous working and living conditions, sexual violence, human trafficking, and modern-day slavery. Efforts by the federal government to reform the program have failed to protect H-2A guestworkers.

Simply put, without the Fair Food Program or a CBA in place, the H-2A program is a recipe for forced labor in American agriculture.

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<sup>1</sup> FARM BILL L. ENTER., FARMWORKERS (2022), <http://www.farmbilllaw.org/wp-content/uploads/2022/06/Farmworkers-Report.pdf>.

<sup>2</sup> John Kerry, *Remarks at the White House Forum on Combating Human Trafficking in Supply Chains*, U.S. DEP. OF ST. ARCHIVES (Jan. 29, 2015), <https://2009-2017.state.gov/secretary/remarks/2015/01/236950.htm>.

<sup>3</sup> Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017), [https://ciw-online.org/wp-content/uploads/HitovAsbedArticle\\_AuthorCopy.pdf](https://ciw-online.org/wp-content/uploads/HitovAsbedArticle_AuthorCopy.pdf); Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39 (2013), <https://scholarship.law.upenn.edu/jlasc/vol16/iss1/3>.

<sup>4</sup> DANIEL COSTA ET AL., ECON. POL'Y INST., FEDERAL LABOR STANDARDS ENFORCEMENT IN AGRICULTURE (2020), <https://www.epi.org/publication/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/>; FARM BILL L. ENTER., *supra* note 1.

As explained in detail below, the FFP is an exception to the rule that H-2A workers are more likely than not to suffer abuse. The FFP has successfully mitigated the risk to H-2A workers on FFP farms by coordinating with the Mexican federal government's Servicio Nacional de Empleo (SNE), the National Employment Service, which designs and implements national labor policies and employment programs, to serve as recruiter for H-2A workers on FFP farms. The FFP's success in protecting H-2A workers on participating farms is built on two necessary ingredients: (1) having in place both this trusted recruiting partner in the H-2A workers' origin country, and (2) having in place the gold-standard independent, worker-driven monitoring and enforcement mechanisms that WSR provides, thus enabling any issues that do arise to be discovered and corrected. With the SNE providing a trusted and transparent recruiting process in Mexico and the FFP providing independent, worker-driven monitoring in the United States, it has been possible to protect at least those H-2A workers employed by growers participating in the FFP.

In the absence of these two necessary ingredients, the current pilot program as proposed by USDA to facilitate the growth and expansion of H-2A in the Northern Triangle countries raises serious risks of exploitation for the additional H-2A workers who will work under it. The currently available pilot program materials do not at all address the need for independent, worker-driven monitoring for H-2A workers once they arrive in the United States. It is suggested, without proof, that the non-state recruiters contemplated should be trusted to conduct ethical recruitment despite rampant corruption evident in each of the Northern Triangle countries. Expanding the H-2A program to countries where the rule of law is dangerously weak and currently ineffective in protecting workers, worker organizations, and human rights groups from violence and retaliation will place thousands of H-2A workers at an alarmingly high risk for the worst kinds of labor and human rights abuses, including human trafficking and forced labor. Without an authentic WSR program or bona fide CBA and recruiters proven in advance to be reliably ethical, this H-2A expansion pilot will endanger large numbers of workers.

The \$65 million, which FSA appears committed to spending on expansion of the H-2A program, would be better diverted to making agricultural employment a safe, accessible, and economically viable job opportunity for domestic workers. As detailed in Part II.A, below, low wages and exploitative working conditions contribute to the perceived labor shortage by failing to offer domestic workers a dignified job that pays an adequate amount to support workers and their families. The H-2A program already threatens domestic workers with further displacement and reduces their bargaining power in securing better wages and working conditions. FSA's proposal would exacerbate these challenges and harm the essential farmworkers who carried this country through the pandemic. Solutions like the FFP and CBAs, discussed in Part III, offer worker-driven solutions to the labor challenges plaguing the agricultural industry. Furthermore, the pilot program, as proposed, fails to support small farms in line with Secretary Vilsack's stated commitments to advancing the interests of small-scale producers. In FSA's Listening Session with Agricultural Employers, employer representatives raised concerns that expanding the H-2A program would help large-scale growers to the detriment of smaller farms.<sup>5</sup> Indeed, many groups representing

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<sup>5</sup> "There [are] fixed costs associated with participating in the H-2A program that...disadvantage[] smaller operators compared to larger operators"; "A lot of these family farms have older [housing]...in need of major repair...and it is getting tougher and tougher for [smaller growers] to compete and still maintain a profit margin." Farm Serv. Agency,

small and mid-sized farms have opposed prior attempts to expand the H-2A program on these grounds.<sup>6</sup> Rather than incentivizing expansion of a broken, exploitative system, USDA should invest the \$65 million in incentives for growers to join FFP or enter a CBA and offer competitive wages to attract workers.

Given FSA's indications that it plans to move forward with the program, the only way the pilot program could be altered to prevent it from spurring the most horrific forms of abuse is to use the pilot programs funds as an incentive to drive (or keep) the farms that petition for H-2A workers into the FFP or CBAs.<sup>7</sup> Pilot program funds should thus be conditioned not only using high-road recruiters in origin countries *but also* to make participating in the FFP or having a CBA in place a requirement of pilot program participation. To ensure growers remain committed to these fundamental labor and human rights protections, the funding condition should not only be used to reward growers for participating in the FFP or having a CBA at the time funds are awarded, but must also make growers responsible for returning any grant funds received if they leave the FFP or CBA during the term of the pilot.

It is not an exaggeration to say that using the pilot program funds to pay for H-2A expansion without the protections FFP or a CBA offers would be akin to spending federal tax dollars to subsidize extortionary employment practices, sexual assault, human trafficking, and forced labor.

## **II. EXPLOITATIVE WORKING CONDITIONS IN AGRICULTURE, VERIFIED FAILURES OF H-2A PROGRAM TO PROTECT WORKERS, AND HEIGHTENED RISKS OF H-2A PROGRAM EXPANSION**

### **A. Exploitative Working Conditions in Agriculture**

Outside of the FFP, agricultural workers experience some of the most dangerous and exploitative working conditions of any industry, with their legal rights routinely violated and under-enforced. Over the past two decades, federal investigations have uncovered \$65 million of wage theft violations against tens of thousands of agricultural workers,<sup>8</sup> despite a very low level of government investigation. According to a recent study by the Economic Policy Institute,

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*Farm Labor Stabilization & Protection Pilot Grant Listening Sessions: Ag Employers*, YOUTUBE (Oct 17, 2022), [https://www.youtube.com/watch?v=xVEvZ4Y1zag&list=PL00y58bSZgQHRcCsCS\\_1lVilFQ9ZOivMTs&index=3](https://www.youtube.com/watch?v=xVEvZ4Y1zag&list=PL00y58bSZgQHRcCsCS_1lVilFQ9ZOivMTs&index=3).

<sup>6</sup> See, e.g., Nat'l Sustainable Agric. Coal., Comment re: Temporary Agricultural Employment of H-2A Nonimmigrants in the United States (Sep. 23, 2019), [https://downloads.regulations.gov/ETA-2019-0007-0142/attachment\\_1.pdf](https://downloads.regulations.gov/ETA-2019-0007-0142/attachment_1.pdf) (opposing DOL's proposed expansion of the H-2A program because, among other concerns, it "will disproportionately favor the largest farming operations at the expense of small operations"); NE Organic Farming Ass'n, Comment on Proposed Changes to H-2A Program (Sep. 1, 2019), (explaining that DOL's proposed expansion of the H-2A would disproportionately favor the largest farming operations and labor contractors at the expense of family-scale farms);

<sup>7</sup> Currently, the Fair Food Program is the only fully developed WSR program in the United States in the industries relevant to the H-2A program. This comment therefore focuses on FFP as the specific target of support for WSR as it relates to the proposed pilot program. The commenters would support investment or incentives to support the growth of other WSR programs in the agricultural sector so long as those initiatives are fully equipped to effectuate the core principles of the WSR model. See *Statement of Principles*, WSR NETWORK, <https://wsr-network.org/what-is-wsr/statement-of-principles/>.

<sup>8</sup> *Low Wage, High Violation Industries*, WAGE & HOUR DIV., U.S. DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/data/charts/low-wage-high-violation-industries#>.

investigations into agricultural operations by the United States Department of Labor’s Wage and Hour Division (WHD) uncovered violations 70% of the time, including wage theft and inadequate housing, but investigated only 1% of farms.<sup>9</sup> The study’s authors observed that in 2018, WHD had just one investigator for every 175,000 workers—a 154% increase since 1978—with a \$229 million budget to investigate 10.2 million establishments.<sup>10</sup> Compounded by the rurality and isolation of agricultural work and the unique retaliation threats many farmworkers face (including deportation and blacklisting), these deficient resources mean that the violations that are detected likely represent the tip of the iceberg.<sup>11</sup>

Even when workers are lawfully paid, the circumstances surrounding their employment are unquestionably substandard. Farmworkers in the United States earn an average of \$17,500 to \$19,000 individually each year, with total family incomes between \$20,000 and \$24,999 and 21% of farmworker families (documented and undocumented) living below the poverty line.<sup>12</sup> Yet for such little pay, agricultural jobs are among the most dangerous for work-related injuries and fatalities.<sup>13</sup> Farmworkers work long hours, engaging in repetitive motions and overexertion that can lead to musculoskeletal injuries,<sup>14</sup> and face an increasing number of health threats posed by climate change, such as heat stress, wildfire smoke, and forced displacement.<sup>15</sup> Pesticide exposure also poses significant health risks to farmworkers, including dangerous acute illness and an increased risk of severe long-term health issues, including cancer, neurological disorders, hormone disruption, and fertility issues.<sup>16</sup> Farmworkers across the country have dealt with a lack of safe and sanitary employer-provided housing for decades,<sup>17</sup> with issues including overcrowding, structural

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<sup>9</sup> COSTA ET AL. *supra* note 4.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> Marianne Levin, *Behind the minimum wage fight, a sweeping failure to enforce the law*, POLITICO (Feb. 18, 2018), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.

<sup>12</sup> JBS INT’L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2017–2018: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 1 (2021), <https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS%20Research%20Report%202014.pdf>. As Farmworker Justice points out, the actual number of families in poverty may be greater because the survey used did not account for dependents living outside of the United States. FARMWORKER JUSTICE, SELECTED STATISTICS ON FARMWORKERS (2015-2016 DATA) (2019), <https://www.farmworkerjustice.org/wp-content/uploads/2019/05/NAWS-Data-FactSheet-05-13-2019-final.pdf>.

<sup>13</sup> See *Agricultural Safety*, NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, <https://www.cdc.gov/niosh/topics/aginjury/default.html>. Government estimates may even miss up to 77.6% of actual injuries and illnesses. J. Paul Leigh, Juan Du, & Stephen A. McCurdy, *An Estimate of the U.S. Government’s Undercount of Nonfatal Occupational Injuries and Illnesses in Agriculture*, 24 ANNALS OF EPIDEMIOLOGY 254 (2014), <https://doi.org/10.1016/j.annepidem.2014.01.006>.

<sup>14</sup> CTR. FOR A LIVABLE FUTURE, JOHNS HOPKINS, ESSENTIAL AND IN CRISIS: A REVIEW OF THE PUBLIC HEALTH THREATS FACING FARMWORKERS IN THE US 26–28, 41–43 (2021), <https://clf.jhsph.edu/sites/default/files/2021-05/essential-and-in-crisis-a-review-of-the-public-health-threats-facing-farmworkers-in-the-us.pdf>.

<sup>15</sup> Michelle Tigchelaar et al., *Work Adaptations Insufficient to Address Growing Heat Risk for U.S. Agricultural Workers*, 15 ENV’T RSCH. LETTERS (2020), <https://iopscience.iop.org/article/10.1088/1748-9326/ab86f4>; *Water, Drought, and Wildfires*, NAT’L FARM WORKER MINISTRY, <http://nfwm.org/farm-workers/farm-worker-issues/farm-workers-the-environment/>.

<sup>16</sup> Cynthia L. Curl et al., *Synthetic Pesticides and Health in Vulnerable Populations Agricultural Workers*, 7 CURRENT ENV’T HEALTH REP. 13 (2021).

<sup>17</sup> Teresa Wiltz, *States Struggle to Provide Housing for Migrant Farmworkers*, PEW (May 2, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/02/struggle-to-provide-housing-for-migrant-farmworkers>.

damage, and lack of basic plumbing.<sup>18</sup>

Farmworkers are also at heightened risk of more extreme violations of their rights, such as forced labor and sexual assault, and 2021 saw the forced labor crisis in agriculture rise to shocking levels<sup>19</sup> with multiple new forced labor and human trafficking cases announced.<sup>20</sup> In June 2021, anti-trafficking expert Polaris published data demonstrating that the COVID-19 crisis has heightened the prevalence of labor trafficking of agricultural workers.<sup>21</sup> As detailed in the section that follows, this increase is directly tied to H-2A program expansion and the opportunity it creates for such trafficking to occur.

Even as government enforcement resources are deployed to prosecute forced labor cases in agriculture, the abuses uncovered by the government represent only a sliver of the workplace rights violations happening on farms in the United States very day. When considering whether government investigators can, in fact, eliminate these violations, former WHD Administrator David Weil concluded that there “will never be sufficient resources to staff agencies to the level required to assure complete compliance with workplace laws.”<sup>22</sup> This unfortunate reality—one of extremely prevalent labor law violations, only a fraction of which are ever brought to justice by an under-resourced government—highlights the need for a proactive approach to protecting workers’ rights and creating dignified working conditions, that does not solely depend on government agency investigations for its success. Resources should be devoted to strategies that achieve these objectives rather than expanding a deeply flawed program.

## B. Heightened Risk of Worker Exploitation in H-2A Program

The H-2A program has placed participating workers at even higher risk of abuse of their legal rights, economic exploitation, discrimination and sexual violence, exposure to dangerous working and living conditions, and human trafficking and modern-day slavery. Despite efforts to reform the program, guest workers under the H-2A program continue to suffer abuses by recruiters and

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<sup>18</sup> Thomas A. Arcury et al., *Migrant Farmworker Housing Regulation Violations in North Carolina*, 55 AM. J. IND. MED. 191 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3708262/>.

<sup>19</sup> *Growing wave of brutal modern-day slavery operations in agriculture prompts renewed calls for expansion of Fair Food Program*, COAL. OF IMMOKALEE WORKERS (Jan. 11, 2022), <https://ciw-online.org/blog/2022/01/growing-wave-of-brutal-modern-day-slavery-operations-in-agriculture-prompts-renewed-calls-for-expansion-of-fair-food-program/>.

<sup>20</sup> Associated Press, *Feds: 3 charged in Mexican migrant worker conspiracy*, ABC NEWS (Sep. 22, 2021), <https://abcnews.go.com/US/wireStory/feds-charged-mexican-migrant-worker-conspiracy-80180555>; Lautaro Grinspan, *‘This has been happening for a long time’: Modern-day slavery uncovered in South Georgia*, ATL. JOURNAL-CONSTITUTION (Dec. 3, 2021), <https://www.ajc.com/news/this-has-been-happening-for-a-long-time-modern-day-slavery-uncovered-in-ga/SHBHTDDTTBG3BCPSVCB3GQ66BQ/>; Richard Marosi, *U.S. blocking tomato shipments from Mexican farms accused of abusing workers*, LA TIMES (Dec. 31, 2021), <https://www.latimes.com/california/story/2021-12-31/u-s-blocks-tomato-shipments-from-mexican-farms-accused-of-abusing-workers>.

<sup>21</sup> POLARIS PROJECT, LABOR EXPLOITATION AND TRAFFICKING OF AGRICULTURAL WORKERS DURING THE PANDEMIC (2021), [https://polarisproject.org/wp-content/uploads/2021/06/Polaris\\_Labor\\_Exploitation\\_and\\_Trafficking\\_of\\_Agricultural\\_Workers\\_During\\_the\\_Pandemic.pdf](https://polarisproject.org/wp-content/uploads/2021/06/Polaris_Labor_Exploitation_and_Trafficking_of_Agricultural_Workers_During_the_Pandemic.pdf).

<sup>22</sup> David Weil, *Creating a strategic enforcement approach to address wage theft: One academic’s journey in organizational change*, 60 J. OF INDUS. RELS. 437 (2018), [https://www.fissuredworkplace.net/assets/D.Weil.Creating\\_a\\_Strategic\\_Enforcement\\_Approach.JIR\\_2018.pdf](https://www.fissuredworkplace.net/assets/D.Weil.Creating_a_Strategic_Enforcement_Approach.JIR_2018.pdf).

farm owners. Pursuing any expansion of hiring through the H-2A program will, in the absence of the FFP or a CBA, inevitably continue to perpetuate these harms to workers. Therefore, it is necessary to develop alternative recruitment channels and stronger control mechanisms through investment in those uniquely-powerful and enforceable solutions to abuse.

Workers hired through the H-2A program routinely experience serious legal violations of their rights relating to wages or working conditions. A 2020 report from Centro de los Derechos del Migrante (CDM) found through interviews with workers that **every single H-2A worker had experienced some form of serious legal violation, and 94% of workers had experienced three or more violations.**<sup>23</sup> H-2A workers are especially vulnerable to such violations due to the difficulties that they face in asserting their legal rights. Continuing to expand the H-2A program despite widespread violations of worker rights will place workers in harm's way and endanger the wellbeing of all farmworkers, unless the solutions outlined in this comment are adopted.

A lack of regulation in recruiting and inadequate oversight to ensure that workers are not exploited throughout the hiring process, as well as ongoing violations by employers has caused the majority of H-2A workers to face some form of economic exploitation. Nearly three-quarters of workers interviewed were not fully reimbursed for their travel expenses, as required under Federal law, and 62% reported taking out loans in order to obtain funds to work in the United States.<sup>24</sup> The lack of oversight of recruiters also poses a serious issue, as workers are charged illegal recruitment fees that workers are instructed to lie about or else risk losing their job.<sup>25</sup>

Once workers arrive at their job site, they, like their domestic counterparts, face wage theft, poor working conditions, deplorable housing, and underenforcement of their rights.<sup>26</sup> Surveys of H-2A workers also show that 43% of workers received lower wages than advertised in the hiring process once they began working.<sup>27</sup> Additionally, despite the dangerous nature of the work, more than one third of workers reported not receiving adequate safety equipment, many of whom were required by their employers to buy their own equipment, and more than one fourth of workers received inadequate training.<sup>28</sup> Surveys of H-2A workers also show that 43% of workers received lower wages than advertised in the hiring process once they began working.<sup>29</sup> Additionally, despite the dangerous nature of the work, more than one third of workers reported not receiving adequate safety equipment, many of whom were required by their employers to buy their own equipment, and more than one fourth of workers received inadequate training.<sup>30</sup> When they leave the fields, H-2A workers stay in employer-provided housing where they are often not free to leave and where

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<sup>23</sup> “Serious legal violations included: workers paying recruitment fees; workers not receiving full travel reimbursements to or from the United States; significant wage violations; not receiving a contract or not receiving a contract in the worker’s native language; sexual harassment; verbal threats based on race, gender, or national origin or related to the use of force or deportation; the seizure of identity documents; overcrowded or seriously substandard housing; and the failure to provide essential safety equipment.” CENTRO DE LOS DERECHOS DEL MIGRANTE, RIPE FOR REFORM: ABUSE OF AGRICULTURAL WORKERS IN THE H-2A VISA PROGRAM 18 (2020), <https://cdmigrante.org/ripe-for-reform/>.

<sup>24</sup> *Id* at 19.

<sup>25</sup> *Id* at 20.

<sup>26</sup> COSTA ET AL. *supra* note 4.

<sup>27</sup> CENTRO DE LOS DERECHOS DEL MIGRANTE, *supra* note 23, at 21.

<sup>28</sup> *Id* at 29.

<sup>29</sup> *Id.* at 21.

<sup>30</sup> *Id* at 29.

conditions often fall well short of federal standards.<sup>31</sup> States seldom impose additional requirements on farmworker housing and few have an agency dedicated to farmworker housing inspection; investigations have revealed “black mold, raw sewage and pest infestations, as well as broken doors and windows, and defective plumbing and electrical wiring.”<sup>32</sup> As workers continue to incur substantial costs simply to work in the United States in difficult and dangerous conditions, expanding the H-2A program in Central America with the existing recruitment process and employment practices will continue to harm workers.

Significant discrimination in hiring of women, widespread verbal abuse by employers, and high rates of sexual harassment and abuse leaves women under the H-2A program working for lower pay in dangerous conditions. It also facilitates employment discrimination by moving the locus of “hiring” outside of the United States, where it is difficult to require equal opportunity employment standards. Growers using the H-2A program know that the labor force recruited abroad will be largely “male, young, and able-bodied.”<sup>33</sup> Eighty-six percent of H-2A respondents to a CDM survey reported discrimination against women and 67% said that women were prohibited from being hired in the first place.<sup>34</sup> 31% of respondents also reported serious verbal abuse by employers, including threats against workers and racially charged comments.<sup>35</sup> CDM found that 12% of workers reported sexual harassment on the job but noted that their “experience working with survivors of sexual violence suggests that this number grossly underreports the pervasiveness of this problem.”<sup>36</sup> Such discriminatory hiring practices and abusive working conditions fall disproportionately on women under the H-2A program, and the program requires enforceable protections, only available via WSR or a CBA, to hiring and working conditions to adequately protect these vulnerable workers.

Due to their vulnerability, H-2A workers are further at risk of human trafficking and modern-day slavery. Operation Blooming Onion uncovered the widespread abuses by farmers using the H-2A program, laying bare the dark reality for many workers under the program.<sup>37</sup> The scheme went so far as to trade and sell workers among participants in the scheme.<sup>38</sup> The H-2A program’s existing setup creates the conditions for such abuses due to the lack of resources in the Department of Labor, discussed above, to adequately investigate, uncover, and prosecute the many violations by employers.<sup>39</sup> The risk of trafficking and forced labor looms over the H-2A program in its current form, and more substantial safeguards must be put into place to ensure that migrant workers are not in danger from expansion of the program.

While forced labor issues in particular have long been recognized as prevalent in international

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<sup>31</sup> *Id.* at 27.

<sup>32</sup> *Id.* at 27–28.

<sup>33</sup> *Id.* at 13.

<sup>34</sup> *Id.* at 25.

<sup>35</sup> *Id.* at 25–6.

<sup>36</sup> *Id.* at 26.

<sup>37</sup> Emma Ockerman, *Workers Held at Gunpoint in Modern-Day Slavery Operation in Georgia, Feds Allege*, VICE NEWS (Nov. 24, 2021), <https://www.vice.com/en/article/dypvn7/georgia-modern-day-slavery-federalinvestigation>.

<sup>38</sup> *Id.*

<sup>39</sup> David Weil, *supra* note 22.

agriculture,<sup>40</sup> it is also true that CIW’s decades-long history of working with U.S. law enforcement to investigate and prosecute forced labor in the Southeast United States<sup>41</sup> confirms that these risks have long been present domestically as well. But recent federal prosecutions have revealed that forced labor is even more pervasive in the United States than has been previously recognized. In November 2021, federal prosecutors—led by the U.S. Department of Justice, with support from the U.S. Department of Labor—announced a 24-defendant forced labor indictment in the aforementioned “Blooming Onion” case, involving more than 70,000 petitioned-for workers under the H-2A agricultural guestworker visa program.<sup>42</sup>

Allegations in the DOJ indictment were especially jarring. As described by Vice Magazine:<sup>43</sup>

The alleged conditions it uncovered were brutal; at least two workers died, and another was allegedly repeatedly kidnapped and raped.

While migrants toiled in Georgia’s fields as contract laborers, some of them dug onions with their bare hands for pennies per bucket, and people threatened them with a gun. Members of the accused... labor trafficking operation held onto their passports and documents to keep them from escaping, the indictment alleges.

Migrant workers were also allegedly charged unlawful fees they could not afford; some were illegally forced to do lawn care, construction, and restaurant work; and others were threatened with violence or deportation, according to the indictment. All the while, many of the workers lived in cramped, dirty conditions, sometimes with little to no food or safe water.

Workers were even unlawfully sold and traded to other conspirators within the crime ring, a so-called “transnational criminal organization”—described as “Patricio TCO” in the indictment—that made more than \$200 million as part of the scheme.

For the CIW, whose grassroots anti-slavery investigations have resulted in the prosecution of numerous cases of forced labor in U.S. agriculture,<sup>44</sup> this connection between H-2A and forced labor is being encountered firsthand on the ground with increasing regularity. In another recent example, the Department of Justice announced on September 27, 2022—less than one month ago—yet another RICO and forced labor conspiracy involving H-2A workers, which was referred to law enforcement by CIW.<sup>45</sup> As explained in more detail below, it is precisely because the CIW

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<sup>40</sup> Richard Marosi, *Desperate workers on a Mexican mega-farm: ‘They treated us like slaves,’* LA TIMES (Dec. 10, 2014), <https://graphics.latimes.com/product-of-mexico-labor/>.

<sup>41</sup> *Anti-Slavery Program*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/slavery/>.

<sup>42</sup> Ockerman, *supra* note 37.

<sup>43</sup> *Id.*

<sup>44</sup> *Anti-Slavery Program*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/slavery/>.

<sup>45</sup> *Owner of Farm Labor Contracting Company Pleads Guilty in Racketeering Conspiracy Involving the Forced*

understands forced labor cases so well that it has been able to design and implement measures in the FFP that are uniquely able to prevent the scourge otherwise rampant in the H-2A program.

### C. Pilot Program for Expansion of H-2A Program to New Countries with Weakened Rule of Law

Outside the FFP, the H-2A program already creates conditions for the rampant exploitation of workers from a number of countries. The pilot program, in its current form, will only expand the number of workers likely to be exploited from additional origin countries. Without proven, enforceable guarantees of worker protections embedded in the pilot program and the H-2A program itself, the pilot program will only exacerbate the dangerous working conditions of the existing H-2A program. Targeting this expansion in Guatemala, Honduras, and El Salvador—countries with weak rule of law protections and where violence is a highly likely response to efforts to safeguard labor and human rights—could lead to even more appalling abuses of H-2A workers coming to work on farms in the United States.

Executing safe and secure labor recruitment requires confidence that a country’s legal system can deter and address violations or suspect practices. However, in the Northern Triangle, rule of law is weakened by under-resourced prosecutors’ offices and police forces, a lack of protection for judges and court magistrates, and the corrupt influence of criminal groups.<sup>46</sup> In Guatemala, 50% of respondents in a study conducted by the World Justice Project believed that most or all local government officers are involved with corrupt practices, while 54% of respondents believed that most or all national government officers are involved with corrupt practices.<sup>47</sup> One quarter of respondents had paid a bribe in the last three years to request a government document or permit.<sup>48</sup> Of those who had experienced a crime in the last year, only 48% reported the incident to the authorities.<sup>49</sup> The most commonly cited reason for not reporting was that the respondents did not believe that reporting would help.<sup>50</sup> Guatemalans living in rural areas reported crimes at below average rates.<sup>51</sup>

In a World Justice Project study done in El Salvador, 32% of respondents believed that most or all local government officers are corrupt, while 29% believed that most or all national government officers are corrupt.<sup>52</sup> Only 29% of respondents stated that they had some or a lot of trust in judges

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*Labor of Mexican Workers*, U.S. DEP’T OF JUSTICE (Sep. 27, 2022), <https://www.justice.gov/opa/pr/owner-farm-labor-contracting-company-pleads-guilty-racketeering-conspiracy-involving-forced>.

<sup>46</sup> MARÍA FERNANDA BOXMOSKI ET AL., ADRIENNE ARSHT LATIN AMERICAN CENTER, ATLANTIC CENTER & DT INSTITUTE, *COMBATING CORRUPTION IN THE NORTHERN TRIANGLE: PRIORITIZING A WHOLE-OF-SOCIETY APPROACH* 2–3 (2021), [https://www.atlanticcouncil.org/wp-content/uploads/2021/05/AC\\_CentAmerBrief051925.pdf](https://www.atlanticcouncil.org/wp-content/uploads/2021/05/AC_CentAmerBrief051925.pdf).

<sup>47</sup> ALEJANDRO PONCE ET AL., WORLD JUSTICE PROJECT, *THE RULE OF LAW IN GUATEMALA: KEY FINDINGS FROM THE GENERAL POPULATION POLL 2021* 7 (2022), <https://worldjusticeproject.org/sites/default/files/documents/Guatemala.pdf>.

<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.* at 8.

<sup>52</sup> ALEJANDRO PONCE ET AL., WORLD JUSTICE PROJECT, *THE RULE OF LAW IN EL SALVADOR: KEY FINDINGS FROM*

and magistrates.<sup>53</sup> Of respondents who experienced a crime in the last year, only 32% chose to report the crime to the authorities.<sup>54</sup> 68% did not report the crime, and the most frequently cited reason for not reporting was fear of retaliation or concern for their safety.<sup>55</sup>

In an analogous World Justice Project study in Honduras, respondents demonstrated a similar lack of distrust in the government and the judicial process. Only 28% of respondents trusted local government officers, while only 18% of respondents trusted national government officers.<sup>56</sup> Only 35% of respondents who had experienced a crime in the last year reported the crime to officials, with a belief that reporting would not help as the most common reason for not reporting.<sup>57</sup>

These statistics raise real doubt that rights violations occurring in an H-2A program expansion would be reported by workers. Furthermore, even if reported, Guatemala, Honduras, and El Salvador all have systematic issues within the criminal justice system that may prevent workers from accessing legal recourse.

The Washington Office on Latin America (WOLA) describes Guatemala's justice system as "hijacked by a network of corrupt actors seeking to advance their own interests and maintain political, economic, and social power."<sup>58</sup> Selection of judges raises serious issues,<sup>59</sup> as does false prosecutions of honest judges and prosecutors.<sup>60</sup> In 2019, the International Commission against Impunity in Guatemala (CICIG) closed and corrupt actors were placed in the judicial system after CICIG's disappearance.<sup>61</sup> Guatemala's system has also been criticized for having too few judges and too large of a case backlog.<sup>62</sup> El Salvador's judicial system has been similarly criticized as lacking judicial independence,<sup>63</sup> and for the "extremely low budgets of institutions such as the Attorney General's Office."<sup>64</sup> Likewise, Honduras has been criticized for a "complete lack of

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THE GENERAL POPULATION POLL 2021 7 (2022),

<https://worldjusticeproject.org/sites/default/files/documents/El%20Salvador.pdf>.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> ALEJANDRO PONCE ET AL., WORLD JUSTICE PROJECT, THE RULE OF LAW IN HONDURAS: KEY FINDINGS FROM THE GENERAL POPULATION POLL 2021 7 (2022),

<https://worldjusticeproject.org/sites/default/files/documents/Honduras.pdf>.

<sup>57</sup> *Id.* at 8.

<sup>58</sup> DANIELLE BURGI-PALOMINO ET AL., WOLA, WHEN THE DOMINOES FALL: CO-OPTION OF THE JUSTICE SYSTEM IN GUATEMALA 1 (2022), <https://www.wola.org/wp-content/uploads/2022/10/When-Dominoes-Fall-F.pdf>. 1.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.* at 10.

<sup>61</sup> LISA HAUGAARD ET AL., WOLA, GUATEMALA'S DOWNWARD SPIRAL 1–2 (2022), <https://www.wola.org/wp-content/uploads/2022/10/Guatemalas-Downward-Spiral-F-3.pdf>.

<sup>62</sup> WOLA & FUNDACIÓN MYRNA MACK, GUATEMALA'S JUSTICE SYSTEM: EVALUATING CAPACITY BUILDING AND JUDICIAL INDEPENDENCE 13 (2019), [https://www.wola.org/wp-content/uploads/2019/07/Informe\\_cam\\_english\\_final7.1.pdf](https://www.wola.org/wp-content/uploads/2019/07/Informe_cam_english_final7.1.pdf).

<sup>63</sup> *El Salvador: Events of 2021*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2022/country-chapters/el-salvador>.

<sup>64</sup> Felipe Puerta Cuartas, Julia Aikman Cifuentes, & Maureen Meyer, *Central America Monitor Reveals Challenges and Opportunities for Rule of Law, Citizen Security, and Protection of Human Rights in the Northern Triangle*, WOLA (Nov. 18, 2021), <https://www.wola.org/analysis/central-america-monitor-challenges-rule-law-citizen-security/>.

records and infrastructure [for resolving crimes].”<sup>65</sup> The issues within the Guatemalan, Honduran, and El Salvadoran judicial systems make it impossible to guarantee that Northern Triangle workers in the H-2A program will have access to a judicial system that will reliably enforce their rights.

Even if reported, Guatemala, Honduras, and El Salvador all have systematic issues within their justice systems that may prevent workers from accessing legal recourse. The World Justice Project’s 2021 Rule of Law Index ranks Guatemala, El Salvador, and Honduras, out of 128 countries, at 109, 95, and 126 respectively.<sup>66</sup> The Biden Administration has also recognized issues of corruption and impunity in Central America but has seen its efforts to address this issues hindered as leaders in each of these countries have used totalitarian tactics to maintain power.<sup>67</sup> The Administration has even pointed to these challenges as driving migration to the United States. The H-2A program does not, however, offer migrants asylum or provide a pathway to permanent residency in the United States. Instead, H-2A workers go back and forth between the United States and their home country, creating multiple opportunities for extortion or other predatory practices without the recourse of a legal or political system that workers can trust to protect their interests.

#### *Canada’s Temporary Foreign Worker Program: Important Lessons*

Canada’s temporary foreign worker program demonstrates that even with efforts to administer a program ethically through the use of non-government organizations, human, labor, and employment rights violations can still occur if not paired with the critical safeguards outlined in Part IV and reflected in the FFP. Canada has multiple temporary worker pathways under the Temporary Foreign Worker Program (TFWP).<sup>68</sup> Within the Canadian agriculture sector, Guatemalan workers are the second-largest group of temporary foreign workers at 14% to 18% of workers between 2016 and 2020, behind only Mexican workers (45% to 50%).<sup>69</sup> Guatemalan workers remain the second largest group of temporary foreign workers in 2022, with 7,044 workers in Canada from January to March and 5,443 workers from April to June compared to 16,120 Mexican workers and 8,954 Mexican workers, respectively.<sup>70</sup> The proportion of Guatemalan workers is much higher in Quebec, where Guatemalan workers are the largest group of temporary foreign workers.<sup>71</sup>

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<sup>65</sup> *Id.*

<sup>66</sup> *WJP Rule of Law Index*, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/rule-of-law-index/global>.

<sup>67</sup> Anatoly Kurmanaev & Jody García, *The U.S. Vowed to Defend Central American Democracy. Autocrats Had Other Plans.*, NY TIMES (Sep. 17, 2022), <https://www.nytimes.com/2022/09/17/world/americas/central-america-democracy-biden.html>.

<sup>68</sup> CRISTOBAL RAMÓN ET AL., MIGRATION POL’Y INST., TEMPORARY WORKER PROGRAMS IN CANADA, MEXICO, AND COSTA RICA 3 (2022), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-temp-work-pathways-ca-mx-cr\\_eng-final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-temp-work-pathways-ca-mx-cr_eng-final.pdf).

<sup>69</sup> *Id.* at 4.

<sup>70</sup> *Temporary Foreign Worker Program 2021Q1-2022Q2 - Table 10-Top Countries of Residency According to the Number of Temporary Foreign Worker (TFW) Positions on Positive Labour Market Impact Assessments (LMIA) by Province/Territory for 2022Q2*, GOV. OF CANADA, <https://open.canada.ca/data/en/dataset/e8745429-21e7-4a73-b3f5-90a779b78d1e/resource/8097d1a-986b-4851-99f1-965f1083f498>.

<sup>71</sup> *Temporary Foreign Worker Program 2021Q1-2022Q2 - Table 10-Top Countries of Residency According to the Number of Temporary Foreign Worker (TFW) Positions on Positive Labour Market Impact Assessments (LMIA) by Province/Territory for 2022Q2*, Government of Canada, <https://open.canada.ca/data/en/dataset/e8745429-21e7->

In Quebec, most employers in the agriculture sector use a liaison agency to hire temporary foreign employees.<sup>72</sup> The liaison agency will partner with a recruitment intermediary abroad to hire workers.<sup>73</sup> Between 2010 and 2016, one of the dominant partnerships recruiting Guatemalan workers for work in Quebec was the Canadian Fondation des Entreprises en Recrutement de Main-d'œuvre Agricole Étrangère (the Foundation for Foreign Agricultural Worker Recruitment, or FERME) and the Guatemalan Amigo Laboral,<sup>74</sup> though FERME switched to a partnership with ComuGuate in 2017.<sup>75</sup> TFWP requires that employers submit a recruitment plan and must undergo a Labour Market Impact Assessment (LMIA), which considers whether Canadians are available for the position, whether the employer has made a sufficient attempt to recruit a Canadian, whether the employer is offering adequate compensation and labor conditions, and whether the employer is engaged in a labor dispute.<sup>76</sup> Upon approval of the LMIA, workers can be recruited by organizations such as Amigo Laboral.<sup>77</sup>

The Guatemalan and Honduran governments also send workers to Canada, Guatemala by working with private firms and Honduras by working with FERME and the Foreign Agricultural Resources Management Service.<sup>78</sup> The Guatemalan government also opened a Consulate General in Montreal in 2005 as a resource for temporary workers.<sup>79</sup>

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[4a73-b3f5-90a779b78d1e/resource/8097dc1a-986b-4851-99f1-965f1083f498](https://www.sqdi.org/wp-content/uploads/A-Story-Of-Debt-And-Broken-Promises-The-Recruitment-Of-Guatemalan-Migrant-Workers-In-Quebec.pdf). From January 2022 to March 2022, there were 5,695 Guatemalan workers in Quebec and 4,439 Mexican workers. From April 2022 to June 2022, there were 4,642 Guatemalan workers in Quebec and 3,273 Guatemalan workers in Quebec.

<sup>72</sup> Dalia Gesualdi-Fecteau et al., *A Story of Debt and Broken Promises? The Recruitment of Guatemalan Migrant Workers in Quebec*, 30.2 REVUE QUÉBÉCOISE DE DROIT INT'L 95, 99 (2017), <https://www.sqdi.org/wp-content/uploads/A-Story-Of-Debt-And-Broken-Promises-The-Recruitment-Of-Guatemalan-Migrant-Workers-In-Quebec.pdf>.

<sup>73</sup> Dalia Gesualdi-Fecteau, *The Recruitment of Guatemalan Agricultural Workers by Canadian Employers: Mapping the Web of a Transnational Network*, 1 INT'L J. MIGRATION & BORDER STUD. 291, 294–295, [https://www.researchgate.net/profile/Dalia-Gesualdi-Fecteau/publication/276081348\\_The\\_recruitment\\_of\\_Guatemalan\\_agricultural\\_workers\\_by\\_Canadian\\_employers\\_mapping\\_the\\_web\\_of\\_a\\_transnational\\_network/links/5732945c08ae298602da3954/The-recruitment-of-Guatemalan-agricultural-workers-by-Canadian-employers-mapping-the-web-of-a-transnational-network.pdf?sg%5B0%5D=started\\_experiment\\_milestone&origin=journalDetail](https://www.researchgate.net/profile/Dalia-Gesualdi-Fecteau/publication/276081348_The_recruitment_of_Guatemalan_agricultural_workers_by_Canadian_employers_mapping_the_web_of_a_transnational_network/links/5732945c08ae298602da3954/The-recruitment-of-Guatemalan-agricultural-workers-by-Canadian-employers-mapping-the-web-of-a-transnational-network.pdf?sg%5B0%5D=started_experiment_milestone&origin=journalDetail).

<sup>74</sup> Dalia Gesualdi-Fecteau et al., *A Story of Debt and Broken Promises? The Recruitment of Guatemalan Migrant Workers in Quebec*, 30.2 REVUE QUÉBÉCOISE DE DROIT INT'L 95, 99 (2017), <https://www.sqdi.org/wp-content/uploads/A-Story-Of-Debt-And-Broken-Promises-The-Recruitment-Of-Guatemalan-Migrant-Workers-In-Quebec.pdf>.

<sup>75</sup> FERME (FONDATION DES ENTREPRISES EN RECRUTEMENT DE MAIN-D'ŒUVRE AGRICOLE ÉTRANGÈRE), RAPPORT D'ACTIVITÉS 2016 2, [https://www.fermequebec.ca/wp-content/uploads/2015/11/RA\\_FERME\\_2016\\_Web.pdf](https://www.fermequebec.ca/wp-content/uploads/2015/11/RA_FERME_2016_Web.pdf).

<sup>76</sup> CHRISTOPHER RAMON ET AL., MIGRATION POLICY INSTITUTE, TEMPORARY WORKER PROGRAMS IN CANADA, MEXICO, AND COSTA RICA 4 (June 2022), [https://www.migrationpolicy.org/sites/default/files/publications/mpi-temp-work-pathways-ca-mx-cr\\_eng-final.pdf](https://www.migrationpolicy.org/sites/default/files/publications/mpi-temp-work-pathways-ca-mx-cr_eng-final.pdf).

<sup>77</sup> *Id.* at 5.

<sup>78</sup> *Id.* at 5.

<sup>79</sup> *Canada/Guatemala Temporary Guest Worker Program (TGWP)*, CTR. GLOBAL DEV., <https://gsp.cgdev.org/legalpathway/canada-guatemala-temporary-guest-worker-program-tgwp/>.

However, even with efforts from groups such as Amigo Laboral<sup>80</sup> and FERME<sup>81</sup> to create a clean recruiting program, workers are not immune to rights abuses. Ultimately, Canada was unable to ensure that workers received the promised protections of the program from recruitment onwards. A group led by Dalia Gesualdi-Fecteau, a professor in the Faculty of Political Science and Law at the University of Quebec in Montréal, performed a field study between June 2015 and November 2015 which included interviews with Guatemalan temporary former workers taking part in TFWP.<sup>82</sup> All workers in this study were recruited through Amigo Laboral.<sup>83</sup> Their responses illustrate some of the problems within the program.

We sign a document that we don't understand. Still, we sign and we come to Canada to work. Our mentality is, it's all ok, because we are going to work in Canada.<sup>84</sup>

Workers expressed that they were not aware of the content of the contract they signed, and 56% said that they never received a copy of the contract.<sup>85</sup> Only 48% signed a Spanish version of the contract, while many others were only given the contract in English or French.<sup>86</sup> The study found that “[n]o interviewee received information about the content of the contract,” and that some respondents “were not given enough time to read the contract.”<sup>87</sup> One worker stated that, “they make an X and you have to sign and sign and sign... But you cannot read... If one wishes to read, they will be told: ‘Gentlemen, here is the X.’ And that is it for the papeleria (paperwork).”<sup>88</sup>

Workers also reported predatory recruitment fees. 36% of respondents also “paid ‘cargos administrativos’ (‘administrative fees’) to Amigo Laboral in return for their work.”<sup>89</sup> 9% of respondents also reported that they were required to pay a “middle person” in addition to Amigo Laboral.<sup>90</sup> The “middle person” was not an Amigo Laboral employee but could be an individual with ties to the Amigo Laboral staff.<sup>91</sup> In other situations, respondents witnessed a “middle person” tied to Canadian employers.<sup>92</sup> Thus, the “middle person” could be tied to Amigo Laboral or to employers or organizations on the Canadian side, and some workers seemed to believe that the involvement of a “middle person” was inevitable.<sup>93</sup> As one worker put it:

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<sup>80</sup> See *Misión - Visión – Valores*, AMIGO LABORAL, <https://www.amigolaboral.com/acerca-de-nosotros/mision-y-vision>.

<sup>81</sup> See *La référence en matière de recrutement de main d'œuvre temporaire pour la filière agroalimentaire*, FERME (FONDATION DES ENTREPRISES EN RECRUTEMENT DE MAIN-D'ŒUVRE AGRICOLE ÉTRANGÈRE), <https://www.fermequebec.ca/main-doeuvre-agricole-etrangere/>.

<sup>82</sup> Gesualdi-Fecteau et al., *supra* note 72, at 95, 100–01.

<sup>83</sup> *Id.* at 103.

<sup>84</sup> *Id.* at 100.

<sup>85</sup> *Id.* at 103.

<sup>86</sup> *Id.* at 103.

<sup>87</sup> *Id.* at 103.

<sup>88</sup> *Id.* at 103.

<sup>89</sup> *Id.* at 105.

<sup>90</sup> *Id.* at 105.

<sup>91</sup> *Id.* at 105.

<sup>92</sup> *Id.* at 105.

<sup>93</sup> *Id.* at 105.

In the office [Amigo Laboral's], they say, workers should not have to pay money [to a middle person]. But one is forced to pay [a middle person], because if you go to the office [of Amigo Laboral in Guatemala City] looking for information, they won't give it to you. You must go as recommended by "x" persons from different [Guatemalan] departments who have contacts with office workers [Amigo Laboral].<sup>94</sup>

One worker reported that his colleagues had made payments to a "middle person," and that sum was allegedly split between the "middle person" and Amigo Laboral staff.<sup>95</sup> The research team was also told that workers in the past had paid Amigo Laboral in return for a place in the program.<sup>96</sup> Workers reported paying up to 15,000Q (around \$1,970 USD in 2016).<sup>97</sup> With an average monthly wage in 2016 in Guatemala at 2,131Q, these sorts of fees represented a significant expense for workers.<sup>98</sup>

As a result, 56% of respondents took out a loan in order to cover these fees.<sup>99</sup> Of those respondents, 32% paid interest to their lender, while 18% also had to provide the deed to their property to the lender.<sup>100</sup>

Finally, workers in the study demonstrated reluctance to disclose details around their employment despite a guarantee of anonymity.<sup>101</sup> Some workers were reluctant to give their identity, while some did not fill out questions regarding excessive recruitment fees on the survey.<sup>102</sup> These worries, combined with the threat of retaliation,<sup>103</sup> illustrate the real difficulties of ensuring a clean recruitment pipeline, even when ostensibly operated by reputable organizations.

In sum, FSA cannot depend on recruitment organizations to keep the recruitment pipeline free from abuse; workers themselves must be able to provide oversight and assert their rights through the FFP or a CBA.

### **III. THE WORKER-DRIVEN SOCIAL RESPONSIBILITY (WSR) MODEL AND CIW'S FAIR FOOD PROGRAM**

Over more than twenty years, CIW has developed an anti-slavery program that has worked

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<sup>94</sup> *Id.* at 105.

<sup>95</sup> *Id.* at 105–06

<sup>96</sup> *Id.* at 106.

<sup>97</sup> *Id.* at 105–06; see *US Dollar to Guatemala Quetzal Spot Exchange Rates for 2016*, EXCHANGE RATES, <https://www.exchangerates.org.uk/USD-GTQ-spot-exchange-rates-history-2016.html>.

<sup>98</sup> Gesualdi-Fecteau et al., *supra* note 72, at 106.

<sup>99</sup> *Id.* at 106.

<sup>100</sup> *Id.* at 106.

<sup>101</sup> *Id.* at 101.

<sup>102</sup> *Id.* at 101.

<sup>103</sup> See Morgan Lowrie, *Temporary Foreign Worker program must be changed, workers say*, MACLEAN'S (Jul. 30, 2017), <https://www.macleans.ca/news/canada/temporary-foreign-worker-program-must-be-changed-workers-say/>.

successfully with federal prosecutors to free over 1,200 workers.<sup>104</sup> In addition to its work with federal law enforcement on prosecution, in 2010, CIW established the Fair Food Program (FFP), the first-ever WSR program, to achieve prevention of forced labor and other violations of workers' legal rights. The FFP represents a unique partnership among farmers, farmworkers, and retail food companies that ensures humane wages and working conditions for the workers who grow and harvest fruits and vegetables on participating farms.<sup>105</sup> The Program has been called “the best workplace-monitoring program” in the United States on the front page of the New York Times,<sup>106</sup> and “one of the great human rights success stories of our day” in the Washington Post.<sup>107</sup> It has won widespread recognition for its unique effectiveness from a broad spectrum of human rights observers, from the United Nations to the White House.<sup>108</sup>

An independent third-party monitor, the Fair Food Standards Council (FFSC), was created to ensure compliance with the FFP Code of Conduct, which requires compliance with workers' rights laws and contains other preventive measures to promote that compliance and mitigate risk. FFSC carries out monitoring and enforcement with the necessary rigor to verify and ensure compliance within the FFP, in contrast to other social auditing organizations. FFSC's audits of farms in the Program—which take place annually or more often if significant compliance issues are found, and can be announced or unannounced—include interviews with all levels of management and 50% of workers present on the farm. FFSC also investigates and resolves workers' complaints of Code violations on a daily basis, with over half of all complaints received resolved within two weeks and 80% within one month.<sup>109</sup> Those complaints are made by workers to a hotline that is staffed 24/7 by FFSC's multilingual investigators. Furthermore, to ensure that this complaint system truly transforms the workplace, the CIW conducts worker-to-worker education sessions, held on-the-farm and on-the-clock, focused on workers' rights under the Code, empowering workers to serve as the frontline monitors of their own rights.

FFSC's unparalleled complaint investigation and resolution process, and the worker-to-worker education that makes it accessible, is guarded against retaliation by the FFP's legally-binding market consequences for farms that violate farmworkers' rights. The FFP's market consequences stem from the enforceable commitment of 14 large purchasers of produce—including fast food companies like McDonald's and Burger King, grocers like Wal-Mart and Whole Foods, and food service companies like Aramark and Compass Group—to suspend purchases from farms that cease to be in good standing with the FFP.

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<sup>104</sup> *Anti-Slavery Program*, COAL. OF IMMOKALEE WORKERS, <https://ciw-online.org/slavery/>.

<sup>105</sup> Fair Food Program, <https://www.fairfoodprogram.org/>.

<sup>106</sup> Steven Greenhouse, *In Florida Tomato Fields, a Penny Buys Progress*, NY TIMES, (Apr. 24, 2014), <https://www.nytimes.com/2014/04/25/business/in-florida-tomato-fields-a-penny-buys-progress.html>.

<sup>107</sup> Holly Burkhalter, *Fair Food Program helps end the use of slavery in the tomato fields*, WASH. POST, (Sep. 2, 2012), [https://www.washingtonpost.com/opinions/fair-food-program-helps-end-the-use-of-slavery-in-the-tomato-fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fec603a7\\_story.html](https://www.washingtonpost.com/opinions/fair-food-program-helps-end-the-use-of-slavery-in-the-tomato-fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fec603a7_story.html).

<sup>108</sup> Maria Grazia Giammarinaro, UN Special Rapporteur in Trafficking in Persons, especially Women and Children, *End of Visit Statement, United States of America*, OFF. OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS (Dec. 16, 2016), <https://www.ohchr.org/en/statements/2016/12/end-visit-statement-united-states-america-6-16-december-2016-maria-grazia?LangID=E&NewsID=21049>; *CIW, worker organizations from around the country, join President Obama at White House Summit on Worker Voice!*, COAL. OF IMMOKALEE WORKERS (Oct. 12, 2015), <https://ciw-online.org/blog/2015/10/worker-voice-summit/>.

<sup>109</sup> FAIR FOOD PROGRAM, FAIR FOOD PROGRAM 2021 REPORT (2021), <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>.

**In sum, the FFP’s multiple avenues for worker voice have achieved unprecedented advances for farmworker human rights.** The FFP’s proven impact prompted the Obama-Biden administration to award CIW a Presidential Medal in 2015 for its “extraordinary accomplishment” in “effectively eradicate[ing] human trafficking in the farms that participate in their Fair Food Program.”<sup>110</sup> And the United Nations’ Special Rapporteur on Trafficking in Persons has stated that the FFP “must be considered as an international benchmark” for addressing labor trafficking in corporate supply chains.<sup>111</sup> In 2021, on the 10-year anniversary of the United Nations Guiding Principles for Business and Human Rights, the UN Working Group recognized that “worker-driven social responsibility initiatives, such as the Coalition of Immokalee Workers’ Fair Food Program, demonstrate the benefits of developing site-level grievance mechanisms and that their usual shortfalls can be avoided by giving workers a leading role in shaping and monitoring these mechanisms.”<sup>112</sup>

It is also the consensus of government and academic experts alike that the FFP and WSR represent the rare counterexample to the ineffectiveness of traditional social auditing. Following new cases of modern-day slavery documented on Mexican tomato farms by U.S. Customs and Border Protection (CBP)<sup>113</sup> and on American farms by the U.S. Department of Labor (DOL) and other agencies in the past year,<sup>114</sup> **both CBP<sup>115</sup> and DOL<sup>116</sup> published guidance endorsing the Fair Food Program as the solution to the scourge of forced labor.** According to the CBP FAQ:

There is ample evidence-based research that demonstrates social audits, as they are currently administered, are ineffective in identifying and reducing forced labor. Instead, more investment should be made in worker-driven solutions. Examples of how this can be achieved are the Fair Food Program and Bangladesh Accord.

Evidence cited by the CBP FAQ included research by the Re:Structure Lab, a project of Sheffield, Stanford, and Yale Universities that combines academic, business, and policy expertise on how to

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<sup>110</sup> John Kerry, *Remarks at the White House Forum on Combating Human Trafficking in Supply Chains*, U.S. DEP. OF ST. ARCHIVES (Jan. 29, 2015); Amy Bennett Williams, *Coalition of Immokalee Workers gets Presidential Medal*, NEWS-PRESS (Jan. 30, 2015), <https://www.news-press.com/story/news/local/amy-williams/2015/01/30/coalition-immokalee-workers-gets-presidential-medal/22623915/>.

<sup>111</sup> Grazia Giammarinaro, *supra* note 108.

<sup>112</sup> U.N. WORKING GRP. ON BUS. & HUMAN RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AT 10: TAKING STOCK OF THE FIRST DECADE (2021), <https://www.ohchr.org/Documents/Issues/Business/UNGPs10/Stocktaking-reader-friendly.pdf>.

<sup>113</sup> *CBP Issues Withhold Release Order on Tomatoes Produced by Farm in Mexico*, U.S. CUSTOMS & BORDER PATROL, DEP’T OF HOMELAND SEC. (Oct. 21, 2021), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-tomatoes-produced-farm-mexico>.

<sup>114</sup> *Human smuggling, forced labor among allegations in south Georgia federal indictment*, U.S. ATTY. OFF. S.D. GA., U.S. DEP’T OF JUSTICE (Nov. 22, 2021), <https://www.justice.gov/usao-sdga/pr/human-smuggling-forced-labor-among-allegations-south-georgia-federal-indictment>.

<sup>115</sup> U.S. CUSTOMS & BORDER PATROL, DEP’T OF HOMELAND SEC., VIRTUAL TRADE WEEK: FORCED LABOR FREQUENTLY ASKED QUESTIONS (FAQS) (2021), <https://www.cbp.gov/sites/default/files/assets/documents/2021-Aug/CBP%202021%20VTW%20FAQs%20%28Forced%20Labor%29.pdf>.

<sup>116</sup> Jessica Looman, *Exposing the Brutality of Human Trafficking*, U.S. DEP’T OF LABOR BLOG (Jan. 13, 2022), <https://blog.dol.gov/2022/01/13/exposing-the-brutality-of-human-trafficking>.

address exploitative labor practices. According to a November 2021 report by Re:Structure Lab:<sup>117</sup>

Research demonstrates that private sector initiatives such as worker reporting tools and hotlines, ethical auditing, and certification can have perverse effects and inadvertently harm workers in supply chains when those initiatives are not worker-driven. Investors can prompt review of these tools and initiatives and demand accountability for their role and effectiveness in relation to locating, reporting, and addressing forced labour in supply chains. In particular, where workers are demanding adoption of a worker-driven social responsibility (WSR) solution to address a human rights risk in a company’s supply chain, investors can, and should, follow the lead of those workers in pressing the company to adopt that solution.

Likewise, a landmark 10-year study released in July 2020 by the Institute for Multi-Stakeholder Initiative Integrity—an independent organization, incubated at Harvard Law School from 2010-12 and dedicated to measuring the effectiveness of corporate social responsibility (CSR) programs<sup>118</sup>—concluded that the “grand experiment” of “voluntary codes of conduct and oversight mechanisms” has “failed its goal of providing effective protection against abuse[.]”<sup>119</sup> The CSR approach does not “hold corporations to account for harm, or provide access to remedy” for victims of human rights abuses. In short, the study, which examined 40 such programs in-depth, concluded that those traditional forms of corporate responsibility “should not be relied on for the protection of human rights.”

The same study contrasted the failed CSR audit model directly with the Fair Food Program’s worker-driven social responsibility (WSR) model, finding as follows:

“Given the demonstrable failure of corporate social responsibility schemes and multi-stakeholder initiatives, **Worker-driven Social Responsibility (WSR) is the only existing model with the proven potential to afford protection for the most vulnerable and lowest-wage workers in global supply chains.**”

The FFP is the “gold standard,” the report concludes, because of two “fundamental distinctions”: (1) it “is structurally designed to center rights holders in the monitoring and implementation of standards; and (2) creates legally binding standards that workers can enforce outside of the initiatives.”

Crucially, the FFP not only provides rigorous monitoring and enforcement of workers’ rights, but

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<sup>117</sup> RE:STRUCTURE LAB, FORCED LABOUR EVIDENCE BRIEF: INVESTMENT PATTERNS AND LEVERAGE (Sheffield, Stanford, and Yale Univs. 2021),

[https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d5d71907ef68040bbc8602/1641404186331/ReStructureLab\\_InvestmentPatternsandLeverage\\_November2021.pdf](https://static1.squarespace.com/static/6055c0601c885456ba8c962a/t/61d5d71907ef68040bbc8602/1641404186331/ReStructureLab_InvestmentPatternsandLeverage_November2021.pdf).

<sup>118</sup> *History*, MSI INTEGRITY, <https://www.msi-integrity.org/test-home/history/>.

<sup>119</sup> MSI INTEGRITY, NOT FIT-FOR-PURPOSE (2020), [https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI\\_Not\\_Fit\\_For\\_Purpose\\_FORWEBSITE.FINAL\\_.pdf](https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf).

also helps growers come into compliance with labor laws, through an effective incremental approach, based on in-depth knowledge of their operations. The FFSC also assists growers in adopting risk prevention mechanisms to prevent future violations. In the ten years since the FFP's founding, participating growers have not been the subject of lawsuits by DOL, EEOC, or other government agencies, and they have shown a measurably increased willingness to resolve issues raised by workers, even when those issues are not strictly violations. This is because growers have come to truly value the Program's risk prevention mechanisms, leading many to take actions voluntarily, in order to resolve concerns and prevent potential risk, and to increase their own oversight in the areas flagged by complaint notifications. This measure is an excellent proxy for the degree of cooperation on the part of Participating Growers in resolving workers' complaints, as these are issues which growers are under no obligation to resolve.<sup>120</sup>

In addition to these protections, the FFP ensures H-2A workers on participating farms particular protections for ethical recruitment abroad—which, just as importantly, is backed up by the FFP's monitoring-and-enforcement mechanisms once the workers arrive stateside. In 2016, based on suggestions from workers in the FFP whose relatives had been recruited to work on farms in Canada through the Mexican Secretary of Labor and Welfare's National Employment Service (SNE) without having to pay illegal recruitment fees, FFSC engaged in a series of discussions—including during a fact-finding trip to Mexico—with U.S. State Department personnel; representatives of the SNE; the Project on Organizing, Development, Education and Research (PODER); the Economic, Social, and Cultural Rights Project (PRODESC); and the United Food and Commercial Workers International (UFCW). After confirming that H-2A workers who availed themselves of SNE's services were not charged recruitment fees, the FFP designated SNE as the sole recruitment channel for H-2A workers from Mexico to Fair Food Program farms. This “clean channel” recruiting mechanism is intended to eliminate otherwise endemic illegal recruiting fees, as well as to protect workers against discrimination, retaliation, and/or any other abuses in the H-2A recruitment or retention process. Like many other systemic solutions in the FFP, this relationship with SNE has always been worker-driven, from its inception to the creation of materials for Mexico-based worker education, and continues to be informed and improved by worker feedback.

As outlined in the most recent FFP Annual Report,<sup>121</sup> there has been increased worker confidence in the recruitment channel through SNE over time, matched by a drastic decline in reports of illegal recruitment fees. In fact, only one of the very few reports received involved any SNE personnel. Just as importantly, all concerns raised by workers concerning their rights in the recruitment process, as well as their wages and working conditions while on Fair Food Program farms, are addressed promptly in an effective and collaborative manner among the Participating Grower, FFSC, and SNE.

For example, as detailed in the 2021 FFP Annual Report, FFSC received one report of illegal fees

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<sup>120</sup> 2017 Annual Report: *A new level of analysis, transparency...*, COAL. OF IMMOKALEE WORKERS (Apr. 19, 2019), <https://ciw-online.org/blog/2018/04/2017-ffp-report-analysis/>; FAIR FOOD PROGRAM, FAIR FOOD PROGRAM 2017 REPORT, (2018), <https://fairfoodprogram.org/wp-content/uploads/2022/02/Fair-Food-Program-2017-Annual-Report-Final.pdf>.

<sup>121</sup> FAIR FOOD PROGRAM, FAIR FOOD PROGRAM 2021 (2021), <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>.

charged to a group of workers by a member of a regional office of SNE. As a result, SNE’s federal office temporarily stopped recruitment operations at that regional office, performed an internal investigation and extensively interviewed workers who had been recruited there. The employee accused by workers of charging fees was fired, and the private individuals who were suspected to have aided him were banned from any contact with SNE. SNE also arranged for an in-person meeting in that region at which the affected workers’ relatives were provided with orientation and encouraged to pursue formal legal action, with support from SNE. SNE has continued to engage in an extensive public education campaign for present and potential H-2A workers on the free nature of its services and the fact that no worker should be charged for access to information or during any part of the recruitment process. The requirement that all recruitment must be carried out only by SNE staff — and that the use of any sub-contractors or “recommendations” from others is strictly prohibited — is emphasized. Information is also provided on how to make confidential complaints during the recruitment process with SNE, free of the fear of retaliation.

Also critical to the FFP’s successful risk mitigation efforts in the H-2A program—and distressingly rare outside the FFP—is the requirement that growers be the direct employers of any H-2A workers on FFP farms, including listing on the petition. The farm labor contractor (FLC) model—whereby workers are employed by an intermediary who brings in workers to staff one or more farms—diminishes employer accountability for wages and working conditions, thereby exacerbating inequities in the fields. FLCs are also the worst violators of employment laws in agriculture, comprising more than their proportionate share of cited labor law violations relative to their prevalence in the industry.<sup>122</sup> Though just 14% of farmworkers are employed by FLCs, FLCs committed 24% of the agricultural violations that DOL identified from 2005-2019.<sup>123</sup> Seventy-five percent of WHD investigations into FLCs uncovered violations and almost half of those FLCs had five or more violations.<sup>124</sup> Investigations have discovered some of the most “inhumane” and “deplorable” living conditions in FLC-provided housing.<sup>125</sup> During the early months of the pandemic, workers employed by FLCs were less likely to receive employer-provided PPE.<sup>126</sup>

Unlike cases of direct employment, growers can distance themselves from violations by imputing responsibility to FLCs. The FLC arrangement obscures farmworkers’ relationship to the producer for whom they are performing work, making it difficult to hold these growers accountable for violations as joint employers—both because it can, in some circumstances, provide a shield against liability and because workers may not know the name of the producer/grower for whom they

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<sup>122</sup> 70% of all investigations in agriculture detected violations of federal wage and hour laws and farm labor contractors are the biggest violators, ECON. POL’Y INST. (Dec. 15, 2020), <https://www.epi.org/press/70-of-all-investigations-in-agriculture-detected-violations-of-federal-wage-and-hour-laws-and-farm-labor-contractors-are-the-biggest-violators-policymakers-must-do-more-to-protect-farmworkers-and-hol/>.

<sup>123</sup> COSTA ET AL. *supra* note 4.

<sup>124</sup> COSTA ET AL. *supra* note 4.

<sup>125</sup> See Cristian Ponce, *Soledad Farm Labor Contractor Fined \$168K for ‘Inhumane’ Housing Conditions*, THE CALIFORNIAN (Feb. 27, 2018), <https://www.thecalifornian.com/story/news/2018/02/27/soledad-farm-labor-contractor-fined-inhumane-housing-conditions/378470002/>; *Farm Labor Contractor, Vineyard Pay \$42K in Penalties for Providing Deplorable Housing Conditions to Farm Workers in Sonoma County*, U.S. DEP’T OF LAB. (Feb. 26, 2016), <https://www.dol.gov/newsroom/releases/whd/whd20160226>.

<sup>126</sup> NAT’L CTR. FOR FARMWORKER HEALTH, *COVID-19 IN RURAL AMERICA: IMPACT ON FARMS & AGRICULTURAL WORKERS* (2021), [http://www.ncfh.org/uploads/3/8/6/8/38685499/msaws\\_and\\_covid-19\\_fact\\_sheet\\_april\\_2021\\_final.pdf](http://www.ncfh.org/uploads/3/8/6/8/38685499/msaws_and_covid-19_fact_sheet_april_2021_final.pdf); FAIR FOOD STANDARDS COUNCIL, *FAIR FOOD PROGRAM* (2021), <https://fairfoodprogram.org/wp-content/uploads/2022/02/Attachable-Size-SOTP-2021-Report.pdf>.

worked—and enabling growers to ignore their FLC’s bad practices.<sup>127</sup> This further weakens protections available to H-2A workers, with disastrous consequences.<sup>128</sup> As a recent example, FLCs were directly implicated in the Blooming Onion case detailed above, circumstances the federal indictment termed “modern day slavery” involving the trafficking and abuse of farmworkers on Georgia onion farms.<sup>129</sup> Other prominent examples of labor trafficking cases involving FLCs in the H-2A program include *U.S. v. Orian* (2010) and *EEOC v. Global Horizons* (2011), the federal criminal and civil cases involving the trafficking of over 200 Thai workers to farms in Hawaii and Washington by an FLC in California, that led to a judge finding the conduct “clearly and convincingly” “malicious and with reckless disregard of” the[] farmworkers’ “federally protected rights”;<sup>130</sup> *Eliseo Alonso-Miranda, et al., v. Cirila Garcia-Pineda* (2018), a labor trafficking suit brought by 13 H-2A workers against the FLC who recruited them;<sup>131</sup> *Reyes-Trujillo v. Four Star Greenhouse* (2021), a case involving allegations of failure to pay wages, threats of blacklisting, and threats of deportation by the FLC used to recruit the plaintiffs to work at a Michigan nursery;<sup>132</sup> and, most recently, the owner of an FLC that recruited H-2A workers and sent them to farms in Florida, Kentucky, Indiana, Georgia, and North Carolina pled guilty to charges of conspiracy to commit forced labor after forcing workers to work six to seven days a week for extremely low pay, subjecting them to “unsanitary and degrading living conditions,” and threatening to harm their families, among other serious abuses.<sup>133</sup> Because FLCs are frequently under-capitalized, workers seeking redress against them too often go uncompensated. The FFP’s requirement that growers directly employ workers without using an FLC must be a vital component of any pilot program.

Finally, although the FFP is proven worker-driven model for protecting workers’ rights, a bona fide collective bargaining agreement may also be able to provide sufficient protections and worker-backed enforcement mechanisms. Though rare in agriculture due to the exclusion of farmworkers from the National Labor Relations Act’s (NLRA) definition of “employee,”<sup>134</sup> CBAs offer a means of protecting farmworkers from employer abuse. Despite their benefits, CBAs remain difficult to

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<sup>127</sup> *Sub-contracted Workers*, FARMWORKER JUSTICE, [https://www.farmworkerjustice.org/advocacy\\_program/sub-contracted-workers/](https://www.farmworkerjustice.org/advocacy_program/sub-contracted-workers/).

<sup>128</sup> Ximena Bustillo, *Georgia farm labor indictments raise pressure on Biden for Farmworker Reforms*, POLITICO (Apr. 14, 2022), <https://www.politico.com/news/2022/04/14/georgia-farm-labor-indictments-pressure-biden-to-move-on-farmworker-reforms-00025380>.

<sup>129</sup> Lautaro Grinspan, *This has been happening for a long time’: Modern day slavery uncovered in South Georgia*, ATL. JOURNAL-CONSTITUTION (Dec. 3, 2021), <https://www.ajc.com/news/this-has-been-happening-for-a-long-time-modern-day-slavery-uncovered-in-ga/SHBHTDDTTBG3BCPSVCB3GQ66BQ/>.

<sup>130</sup> *EEOC Files Its Largest Farm Worker Human Trafficking Suit Against Global Horizons, Farms*, U.S. EQUAL EMP. OPP. COMM’N (Apr. 20, 2011), <https://www.eeoc.gov/newsroom/eeoc-files-its-largest-farm-worker-human-trafficking-suit-against-global-horizons-farms>; *Federal Judge Awards EEOC \$7,658,500 in Case Against Farm Labor Contractor Global Horizons*, U.S. EQUAL EMP. OPP. COMM’N (May 2, 2016), <https://www.eeoc.gov/newsroom/federal-judge-awards-eeoc-7658500-case-against-farm-labor-contractor-global-horizons>.

<sup>131</sup> Johana Bravo, *Farmworker Unit Secures \$75,000 Settlement in Labor Trafficking Case*, LEGAL AID OF N.C. (Apr. 1, 2019), <https://www.farmworkerlanc.org/farmworker-unit-secures-75000-settlement-in-labor-trafficking-case/>.

<sup>132</sup> 513 F. Supp. 3d 761 (E.D. Mich., 2021).

<sup>133</sup> *Owner of Farm Labor Contracting Company Pleads Guilty in Racketeering Conspiracy Involving the Forced Labor of Mexican Workers*, U.S. DEP’T OF JUSTICE (Sep. 27, 2022), <https://www.justice.gov/opa/pr/owner-farm-labor-contracting-company-pleads-guilty-racketeering-conspiracy-involving-forced>.

<sup>134</sup> 29 U.S.C. §§ 152(3). See *Farming, fishing, and forestry occupations*” had among the lowest unionization rates in 2021, U.S. BUREAU OF LABOR STAT., (Jan. 20, 2022), <https://www.bls.gov/news.release/union2.nr0.htm>.

obtain because while farmworkers may attempt to organize for collective bargaining, they must do so without federal protection from employer retaliation.<sup>135</sup> Several states have passed laws to extend collective bargaining rights to farmworkers; however, the laws are inconsistent and have faced legal challenges.<sup>136</sup> When these challenges can be overcome,<sup>137</sup> CBAs offer a mechanism for recalibrating power imbalances and increasing job security.<sup>138</sup> Like the FFP, CBAs can reliably help ensure compliance with key legal terms and conditions of employment through legally-binding grievance and arbitration procedures accessible to farmworkers. Conditioning pilot program funds on participating in the FFP or implementing a CBA is the only reliable way to reduce the burdens and risk of workers enforcing their basic rights.

#### **IV. PROPOSED CHANGES TO USDA PILOT PROGRAM FOR H-2A EXPANSION**

Unless properly designed, the USDA pilot program will not be able to protect H-2A workers from Northern Triangle countries from labor and human rights abuses. Expanding the H-2A program without the safeguards outlined below will place workers at high risk of exploitation, wage theft, sexual assault, human trafficking, and forced labor. FLPC and CIW would actively oppose an expansion lacking these safeguards because it will lead to such predictable harm.

To protect H-2A workers, the pilot program would need to add requirements of:

- (1) clean recruiting channels with no profit incentive for the recruiter (i.e., no for-profit entity involved in the recruitment whatsoever);
- (2) before the H-2A pilot expansion goes into effect, an additional preliminary vetting process, conducted by the United States government in consultation with respected farmworker and human rights organizations (both in the United States and in the sending countries), to evaluate the predicted reliability of these nonprofit or government recruiting channels;
- (3) establishment of clear, mandatory standards of what level of reliability (i.e., compliance with law) a nonprofit recruiter must be (a) predicted to achieve in order to become a pilot program recruiter, and (b) maintain in practice in order to remain a pilot program recruiter, as well as (c) a mechanism for both workers and their organizations to file complaints

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<sup>135</sup> *Collective Bargaining Rights for Farmworkers*, NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/collective-bargaining-rights-for-farmworkers/>.

<sup>136</sup> *Id.*; Evan Davis, *Lawmakers, Courts Show Rising Interest in Farmworker Rights*, NAT'L CONF. OF ST. LEGISLATURES (Jul. 9, 2021), <https://www.ncsl.org.ezp-prod1.hul.harvard.edu/research/labor-and-employment/lawmakers-courts-show-rising-interest-in-farmworker-rights-magazine2021.aspx>.

<sup>137</sup> Gosia Wozniacka, *Less than 1 Percent of U.S. Farmworkers Belong to a Union. Here's Why.*, CIV. EATS (May 7, 2019), <https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/>.

<sup>138</sup> Josh Bivens et al., *How today's unions help working people*, ECON. POL'Y INST. (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/>.

- that a recruiter has violated a worker's rights, including access to immigration status adjustment/relief for any worker who makes such a colorable complaint;
- (4) perhaps most importantly, enforceable worker protections on the pilot farms employing H-2A workers, exclusively in the form of having either the FFP or a bona fide CBA in place, including mandatory workers' rights education conducted by the CIW (in the case of the FFP) or a union representing farmworkers (in the case of a CBA);
  - (5) financial incentives for growers to participate and remain in the FFP or the CBA (and not for any other, lesser social responsibility initiatives); and
  - (6) funding for the organizations that are enforcing workers' protections under the FFP or CBA—both to defray the costs of that time-intensive work, and also to fund specifically-commissioned worker interviews and surveys that can inform the design of the broader H-2A program going forward.

First, there must be a trustworthy partner controlling the recruiting channel in the country sending workers to the United States. A trustworthy partner must be clearly committed to protecting workers from the exploitation that has become commonplace through much of the H-2A program. The partner must have the authority to protect workers and ability to deliver these protections in tandem with the employment opportunities and job placement. They must also be a nonprofit or government entity, to lessen the risk of corruption that is already inherent in the concept of foreign labor recruitment from states with weak rule of law. In Mexico, SNE is a trusted partner that has demonstrated that it can commit to non-coercive recruitment and deliver on that promise. Any recruitment partner permitted under this pilot should have to demonstrate that, at a minimum, it can not only make, but also honor, that same commitment at that same high level.

Second, there must be a preliminary vetting process (beyond any vetting that may already have occurred), conducted by the United States government in consultation with respected farmworker and human rights organizations (both in the United States and in the sending countries), to evaluate the predicted reliability of any potential nonprofit or government recruiting channels being considered for (or desiring) participation in the pilot. SNE did not gain its status as a trusted partner of the FFP merely with assurances and goodwill. SNE earned its trusted partner status by the initial vetting done by farmworkers through the CIW. This trust was confirmed over time and with experience collaborating with workers and the FFP to resolve reports of illegal recruitment fees.

SNE should be considered an acceptable recruiter for this pilot program. Any other recruiters in Northern Triangle countries should be vetted by worker organizations in advance and shown to be at least as reliable as SNE in protecting against illegal recruitment fees and other forms of worker exploitation in the recruitment process.

Third, before the pilot launches, the United States government must promulgate clear, mandatory standards of what level of legal compliance constitutes sufficiently “responsible” recruitment for a recruiter to be allowed to recruit under the pilot program. These standards must first set forth what level of predicted level of reliability (i.e., compliance with law) a nonprofit recruiter must be predicted to achieve, through the preliminary vetting process, in order to become a pilot program recruiter in the first place. The standards must further enforce that standard of reliability as a mandatory requirement for any recruiter to maintain its status as a pilot program recruiter. Likewise, to ensure that these standards are able to be monitored and enforced, the government must maintain a mechanism—accessible by both workers and their organizations—to investigate complaints that a pilot recruiter has violated a worker’s rights, and provide as part of that complaint mechanism real access for complainants to immigration status adjustment/relief in the case of any colorable complaint.

Fourth, separate from who qualifies as a *recruiter*, the ability of a *grower* to participate in the pilot program and receive funds must be conditioned on: (a) grower participation in the FFP or having a CBA in place during the term of the pilot; (b) only recruiting H-2A workers using one of the responsible recruitment sources as determined through the government process outlined above; (c) directly employing the recruited H-2A workers (i.e., not using farm labor contractors (FLCs) to do recruitment and employment); and (d) mandatory workers’ rights education for both workers and growers.

Requiring grower participation in the FFP or a CBA allows for proper monitoring on the ground to verify worker protections at US-based farms and provides the most legitimate, enforceable protections against retaliation for workers who speak up about abusive and illegal employment practices. Thorough monitoring and proper safeguards against retaliation are the only reliable mechanisms to accurately understand how workers are treated during the recruitment process abroad and once they arrive and have begun working on U.S. farms.

Requiring recruitment only through responsible, vetted sources, as described previously, reduces the likelihood of labor and human rights abuses from the beginning of the recruitment process—but it will not mean much (if anything) with meaningful on-farm complaint mechanisms through a worker-driven third party (as in the case of the FFP or a CBA). As has been proven time after time, the H-2A program creates dangerous and highly exploitable conditions for workers, both in the origin country and the United States. Participation in the FFP or having a CBA *and* using responsible recruiters must be mandatory components of any program that seeks to expand H-2A without also expanding labor and human rights abuses.

Growers must also be required to commit to hiring H-2A workers directly and not using an FLC as an intermediary to hire the workers. This direct employment relationship has proven extremely effective in reducing wage theft, retaliatory firings, and degrading working conditions on farms in the FFP—and outside the FFP, the evidence is clear that FLCs perpetuate worker rights violations—including forced labor—at a higher rate than farms that directly employ their workers, as detailed at length earlier in this Comment (including that the Blooming Onion prosecution, as well as others announced by federal prosecutors in 2022, have involved FLCs).

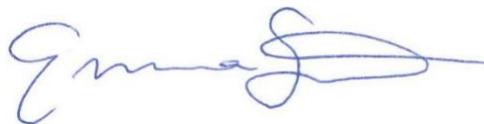
Mandatory workers' rights education, provided by the CIW under the FFP or the appropriate union under a CBA, is necessary to ensure that workers are aware of their rights on the job and that growers understand how to remain in compliance with the law and the standards of the FFP or the terms of the applicable CBA.

Fifth, it is not enough for a grower to merely join the FFP or sign a CBA if the grower then leaves the FFP or CBA after receiving the pilot program funding and H-2A workers. Pilot program funding should incentivize growers to remain in the FFP or the CBA making any pilot funds refundable if the grower leaves the FFP or CBA (or through some other funding structure that comparably incentivizes not just grower participation at first, but long-term).

Sixth, in addition to allocating funds to businesses that recruit responsibly, the pilot program should direct funds to the organizations that are enforcing workers' rights under the required mechanisms and thereby expending their own resources to eliminate labor violations. Under the FFP, such funds would be directed to the Fair Food Standards Council (FFSC) to help fund its systematic and efficient monitoring work. Under a CBA, such funds should be used to pay the union for the costs of handling grievances. These funds should also account for specifically commissioned worker interviews and surveys that can inform the design of the broader H-2A program going forward and address the program's features that currently lead to labor and human rights abuses.

## V. CONCLUSION

As this comment has demonstrated, the H-2A program is rife with abuse. Expansion of the program without the critical safeguards outlined in Part IV and reflected in the FFP will exacerbate extortionary and exploitative labor practices in the United States and the targeted Northern Triangle countries. While funds would be better spent improving jobs and facilitating worker-driven reforms in the agricultural sector without expanding the H-2A program, FSA must, at minimum, adopt the six requirements outlined above if it opts to move forward with the pilot program. Continuing the H-2A program in its current form and piloting an expansion of the program without adequate safeguards is dangerous for workers and raises a serious risk of federal tax dollars being used in ways that perpetuate exploitative working conditions, including wage theft, sexual assault, and forced labor.



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