

The Neighbors Who Feed Us: Farmworkers and Government Policy— Challenges and Solutions

*Alexis Guild & Iris Figueroa**

Farmworkers are not only vital to our economy and food security; they are also vital to our communities. Farmworkers encounter numerous challenges in their daily lives that make them among the most vulnerable and underserved populations in the country. A broad range of policies affects farmworkers' daily lives yet they have limited influence in their creation and enforcement. This article summarizes challenges and solutions specific to immigration, labor, occupational health and safety, and health-care policy. It begins with the historical exclusion of farmworkers from labor-protective laws and then outlines the impact of policy and proposed solutions to improve farmworkers' living and working conditions. We conclude that there need to be robust changes to federal policy to support farmworkers to live and work with dignity and ensure a sustainable rural economy.

INTRODUCTION	158
I. AGRICULTURAL EXCEPTIONALISM	159
II. WHO ARE FARMWORKERS?	162
III. IMPACT OF POLICY IN FARMWORKER COMMUNITIES	164
A. Immigration Policy	164
B. Immigration Policy Recommendations	167
1. Guestworker Programs Should Not Be Expanded or Weakened	167
2. Provide Work Authorization and a Path to Citizenship for Current Experienced Undocumented Farmworkers	167
C. Labor Policy	169
D. Labor Policy Recommendations	172
1. Amend Existing Labor Laws to Ensure Fairness for Farmworkers	172
2. Improve Enforcement of Current Labor Laws	172
3. Improve Farmworkers' Access to Legal Services	173
E. Corporate Social Responsibility	173
F. Corporate Social Responsibility Recommendations	175
1. Enact Policies to Advance Legitimate Corporate Social Responsibility Programs	175

* Alexis Guild, MPP, is a senior health policy analyst at Farmworker Justice. Iris Figueroa, JD, is a staff attorney at Farmworker Justice. This article was written with the support of our Farmworker Justice colleagues. The authors would like to thank these colleagues for their contributions: Bruce Goldstein, President; Adrienne DeVartanian, Director of Immigration and Labor; Virginia Ruiz, Director of Occupational and Environmental Health; and Carlos Ugarte, Director of Health Programs. Farmworker Justice is a national advocacy organization based in Washington, D.C. Farmworker Justice seeks to empower farmworkers and their families to improve their living and working conditions, immigration status, health, occupational safety, and access to justice. More information can be found at www.farmworkerjustice.org.

2. Encourage Federal and State Corporate Social Responsibility Incentives	176
G. Occupational Health and Safety Policy	177
H. Occupational Health and Safety Recommendations	180
1. Strengthen OSHA Safety Standards for Agricultural Workers	180
2. Improve Pesticide Safety	180
I. Health-Care Policy	180
J. Health-Care Policy Recommendations	184
1. Prioritize Farmworkers in National Research and Funding Initiatives	184
2. Remove Immigrant Eligibility Restrictions for Federal Health and Nutrition Programs	184
3. Adequately Fund Health Programs in Farmworker Communities	185
CONCLUSION	185

INTRODUCTION

Farmworkers are drivers of economic activity in the United States, both through their role in the essential task of producing our nation's food supply and as consumers of local goods and services. They are integral parts of the social fabric of their communities, involved in schools, churches, and other local institutions.

Unfortunately, farmworkers encounter numerous challenges in their daily lives that make them among the most vulnerable and underserved populations in the country. Much of our agricultural production continues to be extremely labor-intensive, requiring people who are able to quickly and efficiently plant and harvest fruits and vegetables ready for market. They work in dangerous conditions where they are exposed to pesticides and other environmental and occupational hazards. Many workers, especially undocumented workers and guestworkers,¹ are reluctant to assert basic workplace rights due to fear of employer retaliation. Often, that means that workers are discouraged from taking breaks (water, bathroom, or rest breaks) and forego seeking medical care, even if they are injured or ill. Further, many

¹ The term "undocumented worker" for purposes of this Article means an individual who does not have legal authorization to work in the United States, either because she or he entered without inspection or because she or he initially had work authorization which has now expired. The term "U.S. workers" refers to those individuals who are legally authorized to work in the United States, including but not limited to U.S. citizens, lawful permanent residents (LPRs), and current holders of Temporary Protected Status (TPS) or Deferred Action for Childhood Arrivals (DACA). The term "guestworker," in turn, means workers who are currently in the United States on temporary work visas. Though there are various different types of guestworker visas available under U.S. immigration law, this article uses the terms "guestworker" and "H-2A worker" interchangeably, as the H-2A visa is the main guestworker visa used by agricultural workers.

farmworkers, especially migratory² and H-2A workers, live in employer-provided housing, often in crowded, substandard conditions, isolating them from the surrounding communities.³ In addition, their immigration status affects their ability to access services to support their families' health. While low-income U.S. citizens and long-term legal permanent residents may be eligible for public benefits like food stamps and Medicaid, undocumented and recently documented immigrants (with limited exceptions) are ineligible for most public benefits.⁴

The poor living and working conditions of farmworkers in the United States are partly a result of their historical exclusion from federal and state laws aimed to protect the livelihood and well-being of other workers. This exclusion is commonly referred to as agricultural exceptionalism.⁵ Policies at the national, state, and local levels directly affect the lives of farmworker families, yet farmworkers are often overlooked or purposely disadvantaged in the formation and implementation of these policies. For the purpose of this article, we will focus on immigration, labor, corporate social responsibility, occupational health and safety, and health-care policy. Through a discussion of policy challenges and proposed solutions, we will demonstrate the need to prioritize farmworkers and empower them to assert their rights.

I. AGRICULTURAL EXCEPTIONALISM

A key factor in the creation and maintenance of agricultural exceptionalism has been the economic strength of agribusiness interests and their ability to exert a significant influence on public policy. Since the American Revolution, U.S. society has largely subscribed to an "agrarian ideal" that views farming as the fundamental industry of society.⁶ As a result of this societal view, agriculture has always held a privileged place in U.S. society,

² The term "migratory worker" is defined as a worker who travels or moves more than seventy-five miles for a farm job.

³ See FARMWORKER JUSTICE, ISSUE BRIEF: FARMWORKER HOUSING QUALITY AND HEALTH 2 (2015) <https://www.farmworkerjustice.org/sites/default/files/FJ%20Housing%20Issue%20Brief%20FINAL.pdf> [<https://perma.cc/F58W-Q6X9>].

⁴ The Personal Responsibility and Work Opportunity Act (1996) restricted eligibility for federal public benefit programs to U.S. citizens and "qualified aliens" defined as lawful permanent residents for more than five years, refugees, asylees, individuals granted a withholding of deportation or removal, parolees for a period of at least one year, Cuban and Haitian entrants, certain abused immigrants (including their children or their parents), and certain survivors of trafficking. See generally TANYA BRODER ET AL., NAT'L IMMIGRATION LAW CTR., OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 2 (Dec. 2015), <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf> [<https://perma.cc/MJY6-GN2E>].

⁵ See, e.g., Greg Schell, *Farmworker Exceptionalism under the Law: How the Legal System Contributes to Farmworker Poverty and Powerlessness*, in THE HUMAN COST OF FOOD: FARMWORKERS' LIVES, LABOR, AND ADVOCACY 139-66 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002); Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 488-89 (1998).

⁶ See MARGARET GRAY, LABOR AND THE LOCAVORE: THE MAKING OF A COMPREHENSIVE FOOD ETHIC 21-26 (2014). See also Luna, *supra* note 5, at 490.

and, in turn, in government attention and priorities.⁷ Even as agricultural practices in the United States have largely shifted from subsistence to profit,⁸ the “agrarian ideal” narrative still persists.

Agricultural employers have historically had powerful allies in Congress.⁹ They have also benefitted from a Cabinet-level agency at their service—the U.S. Department of Agriculture (USDA)—since the late nineteenth century.¹⁰ Growers first cited agricultural labor shortages as early as the 1890s, and since then the federal government has intervened extensively in the provision of agricultural labor.¹¹ Currently, agricultural employers and agribusiness interests are actively involved in policy discussions through a wide variety of trade associations and industry groups across different sectors and geographic locations—the American Farm Bureau Federation¹² and Western Growers Association¹³ are two prominent examples.

The issue of race has also influenced agricultural policy. Colonial planters relied on African slaves for agricultural labor, and during the late nineteenth and twentieth centuries, farm employers relied increasingly on people of color and immigrant labor to keep their labor costs low.¹⁴ Some of the most crucial pieces of labor rights legislation that currently exist in the United States, including the Fair Labor Standards Act of 1938 (FLSA), were crafted and implemented during the “New Deal” period of labor reforms of the 1930s. To obtain sufficient support for these reforms, President Roosevelt and his allies had to compromise with Southern congressmen. These compromises included exclusions of farmworkers and domestic workers from the law’s protections, preserving the plantation system in the South—a system that rested on the subjugation of racial minorities.¹⁵ These

⁷ See GRAY, *supra* note 6, at 22.

⁸ See *e.g.* U.S. DEP’T OF AGRIC., THREE DECADES OF CONSOLIDATION IN U.S. AGRICULTURE: REPORT SUMMARY (March 2018) (noting that by 2015, 51% of the value of U.S. farm production came from farms with at least \$1 million in sales, 90% of which were family farms (defined as farms operated by people related to one another by blood or marriage)).

⁹ See CINDY HAHAMOVITCH, THE FRUITS OF THEIR LABOR: ATLANTIC COAST FARMWORKERS AND THE MAKING OF MIGRANT POVERTY, 1870–1945, at 11–13 (1997).

¹⁰ See *id.*

¹¹ See *id.* at 9.

¹² Precursors to this powerful lobbying organization existed by the late 1800s. Upon the organization’s formal ratification in 1920, it embarked on a self-described “ambitious legislative agenda” at the federal level. See *History*, AMERICAN FARM BUREAU FEDERATION, <https://www.fb.org/about/history> [<https://perma.cc/5FFV-7QQ5>]. Currently, the organization’s policy department spends millions of dollars annually lobbying on a variety of agricultural issues at both the state and federal levels. See also Ian T. Shearn, *Whose Side is the American Farm Bureau On?*, THE NATION (July 16, 2012), <https://www.thenation.com/article/whose-side-american-farm-bureau/> [<https://perma.cc/R4U-UBM9>].

¹³ Western Growers has its own political action committee (PAC) with the stated aim of “providing critical support to the industry’s friends at key moments.” *Political Action Committee*, WESTERN GROWERS, <https://www.wga.com/fight> [<https://perma.cc/H4SB-WGW5>]. It provides funding to candidates for the U.S. Senate and U.S. House of Representatives, as well as state-level candidates in Arizona and California. See *id.*

¹⁴ See HAHAMOVITCH, *supra* note 9, at 11–13.

¹⁵ See, *e.g.*, Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J.

exclusions then continued to have a disparate impact on the racial minorities that constituted a significant portion of the agricultural labor force during the second half of the twentieth century¹⁶ and into the twenty-first.¹⁷ Currently, as detailed below, many farmworkers are Hispanic immigrants, including immigrants who come into the country without work authorization.¹⁸

In contrast to agricultural employers, agricultural workers do not have the same opportunities to influence and advocate for government policies. Agricultural workers are often in an economically vulnerable position and dependent on their employment to sustain themselves and their families. They are afraid of retaliation against themselves, their families, or co-workers, which in some cases may take the form of immigration enforcement. All of these factors combine to make farmworkers hesitant to speak out and advocate for themselves even when faced with potentially life-threatening conditions. Furthermore, restrictions on the provision of legal services, such as the requirement that federally funded legal services organizations only serve certain categories of immigrants,¹⁹ as well as farmworkers' limited economic resources, mean that many farmworkers are unable to access the legal services they need in order to fully exercise their rights.

95, 96 (2010) (“During the New Deal Era, the statutory exclusion of agricultural and domestic employees was well-understood as a race-neutral proxy for excluding blacks from statutory benefits and protections made available to most whites.”) and Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 (1987) (“As a result, New Deal legislation, including the FLSA, became infected with unconstitutional racial motivation.”). See also HAHAMOVITCH, *supra* note 9, at 11 (“Proponents of the notion of a racialist state have suggested that the New Deal did not just leave Jim Crow untouched but actually exacerbated racial inequality.”)

¹⁶ See e.g. Linder, *supra* note 15, at 1342 (noting that while Hispanics and blacks accounted for less than 15% of employed persons in the early 1980s, they accounted for at least half of all agricultural labor); see also DEBORAH COHEN, BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO (2011) (detailing the history of “Braceros,” millions of Mexican workers brought to the United States to do agricultural labor from the mid-nineteen-forties to the mid-nineteen-sixties) and Bruce Goldstein & Jessica Felix-Romero, *Food Justice: Combating Racism in the Agricultural System*, LIBERAL EDUC., Fall 2016, at 56–57 (summarizing the history of discrimination against people of color in the agricultural industry).

¹⁷ Within the fifteen-year period from 1999 to 2014, between 75 and 90% of agricultural workers surveyed self-identified as Hispanic. See *Agricultural Worker Tables: Demographic Characteristics: Other Demographics*, NATIONAL AGRICULTURAL WORKERS SURVEY, <https://naws.jbsinternational.com/table/2/3#top> [<https://perma.cc/NT8B-AKP4>].

¹⁸ According to the most recent NAWS data, approximately half of all agricultural workers are undocumented. See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2013-2014, at 38 (Dec. 2016) [hereinafter DOL NAWS 2013-2014], https://www.doleta.gov/agworker/pdf/NAWS_Research_Report_12_Final_508_Compliant.pdf [<https://perma.cc/L56W-82P6>].

¹⁹ Federally funded legal services programs receive funding from the Legal Services Corporation, an independent nonprofit established by Congress in 1974. Such programs are restricted to providing legal services to certain categories of immigrants. For more information on immigrant eligibility, see generally NAT'L IMMIGRATION LAW CTR., LSC-FUNDED LEGAL SERVICES (Mar. 2016), https://www.nilc.org/wp-content/uploads/2016/03/LSC-funded_services_rev-2016-03.pdf [<https://perma.cc/U2PU-EAWD>].

To this day, farmworkers remain excluded from federal overtime and certain child labor requirements under the FLSA, many state minimum wage laws and workers' compensation laws, and many occupational safety and health protections. The exclusions from labor protections that agribusinesses have achieved contribute to poor working conditions, lower wages, and less economic stability for workers and their families,²⁰ further limiting farmworkers' ability to influence policy and enforce existing law and exacerbating the specific challenges discussed in this article.

II. WHO ARE FARMWORKERS?

Before delving into relevant policies, it is important to understand who are our nation's farmworkers and their families. Though there is insufficient data on the exact number of individuals participating in agricultural work, there are currently an estimated 2.4 million farmworkers in the United States.²¹ According to the National Agricultural Workers Survey (NAWS), a survey of U.S. crop workers conducted by the U.S. Department of Labor, about 60% of these workers are married and approximately the same percentage have children.²² The median farmworker parent has two minor children living in his or her household.²³

According to the NAWS, approximately 80% of U.S. farmworkers are Latino, with the vast majority (68%) born in Mexico.²⁴ Only 27% of farmworkers were born in the United States.²⁵ Just under half of all workers (47%) lack work authorization,²⁶ though this is likely an underestimate.²⁷ Some estimates are as high as 70%.²⁸ Approximately 31% of workers are U.S. citizens and 21% are legal permanent residents.²⁹ Only 31% of farmworkers report being able to speak English well.³⁰ Spanish tends to be the dominant language (74%),³¹ though there are also farmworkers from regions and coun-

²⁰ See generally DOL NAWS 2013-2014, *supra* note 18, at 38.

²¹ See Philip Martin, *Immigration and Farm Labor: Policy Options and Consequences*, 95 AM. J. AGRIC. ECON. 470 (2013).

²² See DOL NAWS 2013-2014, *supra* note 18, at 54.

²³ See *id.*

²⁴ See *id.* at 52.

²⁵ See *id.*

²⁶ See *id.*

²⁷ There are few data sets about the demographic characteristics of farmworkers. Data on immigration status is especially difficult to obtain. The NAWS, while one of the better sources for farmworker data, has its own shortcomings. Undocumented workers are more reluctant to share their information with researchers. See, e.g., Alicia Parlapiano, *Are You a U.S. Citizen? How a 2020 Census Question Could Impact States*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/interactive/2018/03/30/us/impact-of-citizenship-question-on-census.html> [<https://perma.cc/R2M2-HJWU>].

²⁸ See Alfonso Serrano, *Bitter Harvest: U.S. Farmers Blame Billion-Dollar Losses on Immigration Laws*, TIME (Sept. 21, 2012), <http://business.time.com/2012/09/21/bitter-harvest-u-s-farmers-blame-billion-dollar-losses-on-immigration-laws> [<https://perma.cc/BZ65-8G33>].

²⁹ See DOL NAWS 2013-2014, *supra* note 18, at 12.

³⁰ See *id.* at 56.

³¹ See *id.*

tries where other languages are primarily spoken, such as Haiti and indigenous communities of Mexico and Guatemala.³²

Historically, many workers and their families were migratory, moving with the harvest. Today, only about 16% of workers are migratory.³³ Some farmworker families continue to migrate, though they are more likely to settle in a community.³⁴ There are many reasons why workers choose to settle in a community, including the instability of migratory work, immigration laws and policy, and family. Many farmworker families have children who are enrolled in public schools.³⁵ For these children, stability promotes academic success.³⁶

The majority of farmworkers are seasonal workers.³⁷ Over the course of a year, they may work on several farms near their home or they may harvest and plant during peak season and work in other industries, such as construction, during the off season. There are some types of agricultural work, such as tending to vineyards or dairy work that require year-round labor.

Currently, a growing number of the farmworker population is in the United States on temporary non-immigrant H-2A visas.³⁸ While fewer than 10% of farmworkers are H-2A workers, their number has grown significantly over the last ten years from 76,814 positions certified in FY 2007³⁹ to 200,049 in FY 2017.⁴⁰ Migratory workers, including H-2A workers who come to the United States to work short-term jobs in agriculture, are more isolated and vulnerable than those who are settled in local communities.⁴¹ These workers tend to live in employer-provided housing on employer prop-

³² See *id.* at ii, 3.

³³ See *id.* at 53.

³⁴ See *id.* at 53, 66.

³⁵ See Richard Mines, *Children of Immigrants: Health, Adjustment, and Public Assistance*, in CHILDREN OF IMMIGRANTS: HEALTH, ADJUSTMENT, AND PUBLIC ASSISTANCE Chapter 12 (Nat'l Research Council & Inst. of Medicine Comm. on the Health & Adjustment of Immigrant Children & Families; Hernandez DJ, ed., 1999), <https://www.ncbi.nlm.nih.gov/books/NBK224440/> [<https://perma.cc/5UDW-EF2P>].

³⁶ See Judy Wiseman, *Barriers to Education for Children of Migrant Farm Workers*, 13 SAN JOAQUIN AGRIC. L. REV. 49, 49–50 (2003).

³⁷ See DOL NAWS 2013–2014, *supra* note 18, at 5.

³⁸ See generally OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, H-2A ANNUAL PERFORMANCE REPORTS, (Jan. 23, 2018) [hereinafter OFLC, PERFORMANCE REPORTS], <https://www.foreignlaborcert.doleta.gov/performanceData.cfm> [<https://perma.cc/TNV8-W34F>].

³⁹ See OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION PERFORMANCE REPORT: OCTOBER 1, 2006 – SEPTEMBER 30, 2007, at 25 (2007), https://www.foreignlaborcert.doleta.gov/pdf/FY2007_OFLCPerformanceRpt.pdf [<https://perma.cc/JS6B-3S4M>].

⁴⁰ See OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, SELECTED STATISTICS FY 2017, https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-2A_Selected_Statistics_FY2017.pdf [<https://perma.cc/PRJ8-4UFJ>].

⁴¹ See HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT 15–19 (2012).

erty.⁴² Many lack their own form of transportation, relying on their employer, a labor contractor, or other workers for rides into town.

Agriculture routinely ranks among the most dangerous occupations in the United States. Fatalities among workers in the agricultural sector rank first among workers in all industries.⁴³ In 2016, 260 farmworkers involved in crop production suffered fatal injuries.⁴⁴ It is estimated that reporting systems annually miss an average of 77% of occupational injuries and illnesses in agriculture.⁴⁵

Poverty is persistent in farmworker communities. Most farmworkers earn low annual incomes; 30% of farmworker families have an annual income below the federal poverty level.⁴⁶ Many work on a piece rate:⁴⁷ the amount they earn corresponds to the number of containers filled or pounds harvested. Additionally, few farmworkers receive fringe benefits. Only 35% of farmworkers reported having health insurance with only 31% reporting that they receive employer-provided health insurance.⁴⁸

III. IMPACT OF POLICY IN FARMWORKER COMMUNITIES

A. Immigration Policy

Immigration policy plays a fundamental role in the current context and challenges of agricultural labor in the United States. Throughout the twentieth century, foreign workers proved essential for agricultural labor in rural communities across the United States, and that trend has continued into the

⁴² Employers who use the H-2A program are required to provide free housing to their workers who “cannot reasonably return to their permanent residence at the end of the work day.” See OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP’T OF LABOR, EMPLOYER GUIDE TO PARTICIPATION IN THE H-2A TEMPORARY AGRICULTURAL PROGRAM 10 (Jan. 2012), https://www.foreignlaborcert.doleta.gov/pdf/h-2a_employer_handbook.pdf [<https://perma.cc/878Q-EDGY>].

⁴³ According to the Dept. of Labor’s Bureau of Labor Statistics, agriculture’s fatal work injury rate was 23.2 per 100,000 full-time equivalent employees (FTEs). This rate is the highest fatality rate compared to other industries such as construction, mining, and transportation. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NUMBER AND RATE OF FATAL WORK INJURIES, BY INDUSTRY, 2016, <https://www.bls.gov/charts/census-of-fatal-occupational-injuries/number-and-rate-of-fatal-work-injuries-by-industry.htm> [<https://perma.cc/7Y47-7DLJ>]. See also *Agricultural Safety*, NATIONAL INSTITUTE OF OCCUPATIONAL SAFETY AND HEALTH (Apr. 12, 2018), <https://www.cdc.gov/niosh/topics/aginjury/default.html> [<https://perma.cc/JT9Q-33TX>].

⁴⁴ See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES, 2016, at 19–20 (2016), <https://www.bls.gov/iif/oshwc/foi/cfch0015.pdf> [<https://perma.cc/TXB6-EYUB>].

⁴⁵ See J. Paul Leigh et al., *An Estimate of the U.S. Government’s Undercount of Nonfatal Occupational Injuries and Illnesses in Agriculture*, 24 ANNALS OF EPIDEMIOLOGY 254, 257 (2014).

⁴⁶ See DOL NAWS 2013–2014, *supra* note 18, at iii.

⁴⁷ See *id.* at 22.

⁴⁸ See *id.* at 42.

twenty-first century.⁴⁹ As discussed earlier in the article, the vast majority of U.S. farmworkers are immigrants.⁵⁰ Unfortunately, the increased focus on indiscriminate immigration enforcement, rise in deportations, and other recent immigration enforcement actions⁵¹ have worsened an already untenable situation for farmworkers and their families and created a tangible fear in farmworker communities throughout the country, exacerbating their vulnerability and isolation. Due to this increased immigration enforcement, farmworkers and their families are hesitant to leave their homes for fear of encountering immigration enforcement. Therefore, they are less likely to engage in community activities, run errands, or attend medical appointments. The increasingly hostile attitude toward immigrants instills such fear that many farmworker families are reluctant to access government programs and benefits that they may need and for which they may be eligible.

Agricultural employers are also concerned about what heightened immigration enforcement may mean for their labor force. As a result of these factors and others, agricultural employers are increasingly turning to the H-2A temporary agricultural worker visa program to find workers.⁵² The H-2A temporary agricultural worker program is a labor certification program that permits agricultural employers who are unable to find U.S. workers to apply for foreign workers on temporary work permits.⁵³ The H-2A program does not have an annual cap on the number of visas issued, and it has roughly tripled in size in the last decade.⁵⁴

The H-2A program is inherently flawed:⁵⁵ the workers are tied to their employer and dependent on them for present and future employment. H-2A workers hold a temporary non-immigrant status with no opportunity or path to become citizens. Although recruitment fees are illegal under the program,

⁴⁹ See CONG. RESEARCH SERV., FARM LABOR SHORTAGES AND IMMIGRATION 1 (Nov. 9, 2009), <https://www.everycrsreport.com/reports/RL30395.html> [<https://perma.cc/L2R9-AK4K>].

⁵⁰ According to NAWS, in 2013–2014 approximately 73% of all farmworkers were born outside the United States. The overwhelming majority (68%) were born in Mexico. See DOL NAWS 2013–2014, *supra* note 18, at i.

⁵¹ See, e.g., U.S. IMMIGRATION AND CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 1–2 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf> [<https://perma.cc/435J-24RK>].

⁵² In fiscal year 2017, over 200,000 H-2A worker positions were certified on the program, and applications increased by 14.9% from fiscal year 2016. See OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM - SELECTED STATISTICS, FY 2017, https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2017/H-2A_Selected_Statistics_FY2017.pdf [<https://perma.cc/BSP5-9Q7M>].

⁵³ See 8 U.S.C. § 1101(a)(h)(ii)(A) (Supp. II 2014).

⁵⁴ See OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION PERFORMANCE REPORT OCTOBER 1, 2006 – SEPTEMBER 30, 2007 22 (2007); *id.* at 25; see also OFLC, PERFORMANCE REPORTS, *supra* note 38.

⁵⁵ See FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 12 (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf> [<https://perma.cc/X73V-PMXA>].

many H-2A workers are charged fees by recruiters in their countries of origin, meaning that they have already accumulated a significant debt by the time they arrive in the United States, exacerbating their position of vulnerability.⁵⁶ Once they arrive at the job, workers are often expected to satisfy productivity requirements that test the limits of human endurance.⁵⁷

The H-2A program includes limited protections focused on U.S. workers' rights, such as recruitment obligations for U.S. workers, a minimum wage requirement, and employer-provided housing and transportation to offer protections against the displacement of U.S. workers and to prevent adverse effects on the wages and working conditions of U.S. workers. Many of these protections were developed in response to abuses that previously existed under the Bracero guestworker program.⁵⁸

With increased use of the H-2A program have come agribusiness attempts to strip away the modest but critically important protections in the current program, including efforts to limit government oversight, eliminate many recruitment requirements, lower wage standards, and shift the costs of housing and transportation to workers,⁵⁹ all of which would result in downward pressure on all workers' wages and working conditions with increased

⁵⁶ See, e.g., INT'L LABOR RECRUITMENT WORKING GRP., THE AMERICAN DREAM UP FOR SALE: A BLUEPRINT FOR ENDING INTERNATIONAL LABOR RECRUITMENT ABUSE 7 (2013), <https://fairlaborrecruitment.files.wordpress.com/2013/01/final-e-version-ilrwg-report.pdf> [<https://perma.cc/V4R7-5KFN>] and JORNALEROS SAFE, MEXICAN H-2A FARMWORKERS IN THE U.S.: THE INVISIBLE WORKFORCE 14 (2010-2013), <http://www.globalworkers.org/sites/default/files/EXECUTIVE%20SUMMARY%20Jornaleros%20SAFE.pdf> [<https://perma.cc/M323-UWMV>] ("42.6% of those interviewed for this study reported having to pay to receive an offer or obtain a job. In spite of the fact that it is illegal to charge someone for hiring them, almost half of all contractors continue to do so.")

⁵⁷ One way in which employers impose these productivity standards is through the use of "piece rates," meaning that workers are not paid hourly wages, but by the amount of a given crop that they pick. FRITZ M. ROKA, COMPENSATING FARM WORKERS THROUGH PIECE RATES: IMPLICATIONS ON HARVEST COSTS AND WORKER EARNINGS (2015), <http://edis.ifas.ufl.edu/fe792> [<https://perma.cc/8J2G-BE4W>]. For example, a recent H-2A order stated that workers are expected to cut 100 sticks of tobacco per hour. Often, though production standards are not explicitly stated in their job orders, workers are threatened with losing their jobs if they do not pick a certain amount or at a certain rate. *Id.*

⁵⁸ During World War II, the U.S. Congress responded to agricultural growers' worries about a worker shortage by approving the temporary entry of migrants from Mexico to do agricultural work. This program, which became known as the "Bracero" program, became the largest guestworker program in U.S. history, employing more than four million Mexican workers. It was characterized by severe labor abuses and was abolished in 1964. For more information on the Bracero program, see generally BRACERO HISTORY ARCHIVE, <http://braceroarchive.org/> [<https://perma.cc/MVE4-282X>]; ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964); KITTY CALAVITA, INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S. (1992); ERASMO GAMBOA, MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947 (2000); DEBORAH COHEN, BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO (2001); JOSE RADOLPHO JACOBO, LOS BRACEROS: MEMORIES OF BRACERO WORKERS, 1942-1964 (2004).

⁵⁹ See FARMWORKER JUSTICE, REP. GOODLATTE'S "AGRICULTURAL GUESTWORKER ACT" WOULD CONDEMN AGRICULTURAL WORKERS TO EXPLOITATIVE WORKING CONDITIONS 4 (2018), <https://www.farmworkerjustice.org/sites/default/files/Goodlatte%20Fact%20Sheet%20-%20UpdatedFeb2018.pdf> [<https://perma.cc/37B2-9TGF>].

displacement of domestic workers and a likelihood of abuses of vulnerable guestworkers.

There are also continued efforts to expand the H-2A program to year-round industries and to create a new, more expansive guestworker program including sectors beyond what are traditionally considered agriculture. This proposed expansion of the H-2A program to year-round industries would likely result in displacement of the current workforce and lower wages for agricultural workers in these sectors, including dairy and poultry, among others.⁶⁰ The H-2A program currently focuses on temporary or seasonal agricultural work because it is premised on the idea that it may be difficult to find U.S. workers for seasonal jobs that yield lower annual incomes than year-round jobs. That same logic does not apply to year-round employment.

These proposed changes to the H-2A guestworker program, as well as the trend of increasing use of the program, could result in the massive displacement of farmworkers who have been doing agricultural work for years and even decades, and who have established themselves in the rural communities in which they work. In turn, the agricultural guestworkers replacing them would have to accept low wages and poor working conditions, while being separated from their spouses and children and never having the opportunity to join the communities where they work or the society they feed.

B. Immigration Policy Recommendations

1. *Guestworker Programs Should Not Be Expanded or Weakened.* — The H-2A program is fundamentally flawed. It allows foreign workers to be exploited, while at the same time negatively impacting the job opportunities, wages, and working conditions of U.S. workers. If eliminating the H-2A guestworker program is not feasible for now, the focus should be on reforming the program based on labor migration program models that shift control over the labor migration process from employers to workers, elevate labor standards for all agricultural workers, respond to established labor market needs, respect family unity, and ensure equity and access to justice. Workers should have the freedom to choose and switch employers and the ability to obtain a path to U.S. citizenship, thus reducing the employer control and related worker vulnerability currently present in the H-2A and other guestworker programs. At the very least, the limited wage and labor protections that are currently in the program should be maintained and effectively enforced and the program should not be expanded to additional job categories or occupations, such as year-round work or non-agricultural jobs.

2. *Provide Work Authorization and a Path to Citizenship for Current Experienced Undocumented Farmworkers.* — Instead of expanding abusive

⁶⁰ See Daniel Costa & Jennifer Rosenbaum, *Using the H-2A Guestworker Program for Year-round Agricultural Jobs Would Lower Wages for Farmworkers*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 19, 2018, 12:30 PM), <https://www.epi.org/blog/using-the-h-2a-guest-worker-program-for-year-round-agricultural-jobs-would-lower-wages-for-other-farmworkers/> [<https://perma.cc/STQ2-YHSU>].

guestworker programs, the first step towards a modern agricultural labor system must be to ensure that the farmworkers who are currently here are given authorization to work in the United States as well as a pathway toward earning permanent immigration status and citizenship. Farmworkers should not be limited to accepting undocumented status or mere temporary work permits. Current undocumented farmworkers and their family members should be given a viable path to citizenship, a policy change that would recognize the reality of agricultural labor in this country.⁶¹ Farmworkers should have the same economic and democratic freedoms that apply to other residents and workers in the United States and be able to fully participate in the communities where they live.

In May 2017, Senator Dianne Feinstein of California and Representative Luis Gutierrez of Illinois introduced the Agricultural Worker Program Act of 2017.⁶² The bill would establish a path to lawful residency and citizenship for undocumented farmworkers who have been consistently employed in U.S. agriculture and meet other requirements.⁶³ This proposal is known colloquially as the “blue card” program because eligible workers can first earn a “blue card” and then apply for a “green card” after continuing to work in agriculture for three to five years.⁶⁴ A similar program was included in a 2013 comprehensive immigration bill that passed in the Senate⁶⁵ but unfortunately was never brought to a vote in the House.

Some of the most vocal Congressional opponents of a pathway to citizenship for agricultural workers also oppose a pathway to citizenship for other undocumented individuals in the United States. An often cited reason for opposing a pathway to citizenship for undocumented workers is that immigrant workers will take jobs away from domestic U.S. workers.⁶⁶ The irony behind this argument is that providing a pathway to citizenship would actually limit employers’ current ability to exploit workers’ undocumented status for lower wages and working conditions,⁶⁷ thus improving labor standards for all workers and leveling the playing field for employers. Reform of our

⁶¹ Farmworkers interviewed by the NAWS in 2013–2014 had an average of 16 years of U.S. farm work. See DOL NAWS 2013–2014, *supra* note 18, at 29.

⁶² See Agricultural Worker Program Act, S. 1034, 115th Congress (2017); Agricultural Worker Program Act, H.R. 2690, 115th Congress (2017).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See Border Security, Economic Opportunity, and Immigration Modernization Act, S.744, 113th Congress (2013) (the bill was passed in the Senate by a 68–32 vote).

⁶⁶ See Brennan Hoban, *Do Immigrants “Steal” Jobs from American Workers?*, BROOKINGS NOW (Aug. 24, 2017), <https://www.brookings.edu/blog/brookings-now/2017/08/24/do-immigrants-steal-jobs-from-american-workers/> [<https://perma.cc/E82B-RM2H>].

⁶⁷ A 2018 report by the Migration Policy Institute notes that immigrants are twice as likely as native born workers to be employed in industries where violations of core labor standards are widespread. Current immigration law undermines workplace protections by deterring foreign-born workers from filing complaints. See ANDREW ELMORE & MUZAFFAR CHISHTI, MIGRATION POLICY INST., STRATEGIC LEVERAGE: USE OF STATE AND LOCAL LAWS TO ENFORCE LABOR STANDARDS IN IMMIGRANT-DENSE OCCUPATIONS 1 (Mar. 2018), https://www.migrationpolicy.org/sites/default/files/publications/StateLaborStandardsEnforcement_FinalWeb.pdf [<https://perma.cc/ZH2L-R3FN>].

current immigration system is a necessary stepping stone not just towards stabilizing the agricultural labor force but also towards addressing some of the myriad challenges faced by farmworkers. The uncertainty and vulnerability of undocumented status further exacerbates the severe challenges facing farmworkers in the other areas discussed below.

C. Labor Policy

As discussed earlier, farmworkers are excluded from many of the protections afforded to workers in other sectors of the U.S. economy due to a history of agricultural exceptionalism.⁶⁸ Discrimination in U.S. immigration and labor laws has persisted, depriving farmworkers of fundamental human and democratic rights, including basic workplace rights such as freedom of association.⁶⁹ Some of the protections that farmworkers have been excluded from include organizing and bargaining rights in the NLRA and certain protections of the FLSA. Farmworkers are excluded from the NLRA, which forbids employer retaliation against workers for joining, organizing, or supporting a labor union. The NLRA also establishes a structure for unions and employers to engage in collective bargaining. However, since its enactment, the NLRA has specifically excluded agricultural workers, thus depriving them of the law's protections.⁷⁰

The FLSA, in turn, guarantees most workers a minimum hourly wage and also requires that most employees be paid a premium for overtime work.⁷¹ Though the FLSA now applies the minimum wage provisions to most agricultural workers, many agricultural workers employed on small farms and certain other farms are excluded from this provision.⁷² Farmworkers are also still excluded from the right to overtime pay.⁷³ This is particularly significant because farmworkers' hours vary by season, crop, and task, and most farmworkers work an average of more than forty hours per week,⁷⁴ yet they are not compensated above their base wage rate for these extra hours. The lack of an overtime premium leads some employers to require an extraordinarily high number of work hours per week, which can lead to injury caused by fatigue and interference with family obligations.

Similarly, FLSA's child labor provisions offer less protection to those working in agriculture than in other industries. For most jobs, the minimum

⁶⁸ See *infra* "Agricultural Exceptionalism."

⁶⁹ See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 173–78 (Aug. 2000), <https://www.hrw.org/reports/pdfs/u/us/uslbr008.pdf> [<https://perma.cc/9XZ4-5LPX>].

⁷⁰ See *id.* at 14; see also Michael H. LeRoy & Wallace Hendricks, *Should Agricultural Laborers Continue to be Excluded from the National Labor Relations Act?* 48 EMORY L.J. 489, 490 (1999).

⁷¹ See 29 U.S.C. §§ 206, 207(a) (2012).

⁷² See 29 U.S.C. § 213(a)(6) (2012 & Supp. II 2014).

⁷³ See 29 U.S.C. § 213(b)(12) (2012 & Supp. II 2014).

⁷⁴ See DOL NAWS 2013–2014, *supra* note 18, at 20–22.

age at which a person can work is sixteen years old (with few exceptions);⁷⁵ in agriculture, a highly hazardous industry, the minimum age at which a person can work is fourteen years old (with many exceptions).⁷⁶ An estimated 400,000–500,000 children between the ages of twelve and seventeen are working in U.S. agriculture.⁷⁷

The principal federal labor law for farmworkers is the Migrant and Seasonal Agricultural Worker Protection Act (“AWPA”).⁷⁸ Congress enacted AWPA in 1983 to replace an earlier law, the Farm Labor Contractor Registration Act of 1963 (“FLCRA”). FLCRA focused on regulating farm labor contractors (“FLCs”),⁷⁹ who were notorious for refusing to pay workers their wages and subjecting farmworkers to debt peonage and even slavery. In enacting AWPA, Congress established labor law obligations on the part of the growers who employ farmworkers even if the growers use the services of FLCs.⁸⁰ These protections are particularly significant due to the widespread use of FLCs in agricultural employment, which poses unique challenges for workers’ ability to obtain redress for labor violations.

The AWPA includes the following requirements: agricultural employers must disclose terms of employment at the time of recruitment and comply with those terms;⁸¹ employers, when using FLCs to recruit, supervise, or transport farmworkers, must confirm that the FLCs are registered with and licensed by the U.S. Department of Labor;⁸² providers of housing to farmworkers must meet local and federal housing standards;⁸³ and transporters of farmworkers must use insured vehicles that meet basic federal safety standards.⁸⁴ However, AWPA specifically excludes H-2A workers⁸⁵ and, like

⁷⁵ See 29 U.S.C. § 203(l) (2012).

⁷⁶ See 29 U.S.C. § 213(c)(1)(C) (2012 & Supp. II 2014); see also HUMAN RIGHTS WATCH, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS (June 2, 2000), <https://www.hrw.org/report/2000/06/02/fingers-bone/united-states-failure-protect-child-farmworkers> [<https://perma.cc/9L3E-C46Y>].

⁷⁷ See ASS’N OF FARMWORKER OPPORTUNITY PROGRAMS, CHILDREN IN THE FIELDS: THE FACTS YOU SHOULD KNOW 4 (2018), <https://www.mediavoicesforchildren.org/mvc-commentary/2018/2/6/children-in-the-fields-the-facts-you-should-know> [<https://perma.cc/3GF2-B7A3>].

⁷⁸ See 29 U.S.C. § 1801 et seq. (2012).

⁷⁹ For the purposes of this paper, the term “farm labor contractor,” or “FLC,” refers to labor intermediaries, often called “crewleaders,” who fulfill a variety of roles, including recruiting and hiring job applicants, transporting and housing workers, and supervising workers in the field. Some labor contractors are quite large and have subcontractors. Under AWPA, the term “farm labor contractor” is defined as “any person, other than any agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.” See 29 U.S.C. § 1802(7).

⁸⁰ See 29 U.S.C. § 1822 (2012).

⁸¹ See 29 U.S.C. § 1822(c) (2012).

⁸² See 29 U.S.C. § 1811 (2012).

⁸³ See 29 U.S.C. § 1823 (2012).

⁸⁴ See 29 U.S.C. § 1841 (2012).

⁸⁵ See 29 U.S.C. § 1802(8)(b)(ii) (2012).

FLSA, it does not apply to small employers, although this exemption does not include farm labor contractors.⁸⁶

The farm labor contracting system poses a significant challenge for defending farmworkers' labor rights. Some farm operators hope to avoid compliance with labor laws by hiring FLCs, crew leaders, or other intermediaries and denying that they are the "employer" of the farmworkers in their fields. Congress has adopted a broad definition of employment relationships in FLSA and AWPÁ so that a farmworker is, in most cases, an "employee," and a grower using the services of an FLC is responsible as a joint employer with the FLC.⁸⁷ Joint employer liability helps reduce abuses associated with the subcontracting of labor by requiring a grower to share responsibility for compliance with employment law obligations. However, there are currently efforts underway to undo this broad definition of employment relationships, making it far more difficult, if not impossible, to hold more than one business as an employer of a worker.⁸⁸ Such proposals to end joint employer status would encourage businesses to use FLCs that provide workers at low cost by violating basic labor protections.

Another issue, and one that affects farmworker women especially, is the high prevalence of sexual harassment and assault in agricultural work. Agricultural work is covered by the Equal Employment Opportunity Act ("EEOA"), also known as Title VII, which protects workers from unlawful sex discrimination, including sexual harassment in the workplace.⁸⁹ However, investigations by news agencies and human rights organizations have highlighted this serious problem in agricultural work.⁹⁰ As an example of the prevalence of this problem, as part of the "#MeToo" movement—a recent effort to highlight the prevalence of sexual assault and harassment across industries—in November 2017 farmworker women sent an open letter to Hollywood actresses noting that they shared a common experience of being preyed upon by individuals in positions of power.⁹¹ Many farmworker women continue to endure this behavior for fear of retaliation, including the fear of being reported to immigration authorities and job loss for themselves or their family members who may work with the same employer.

⁸⁶ See 29 U.S.C. § 1803(a)(2) (2012).

⁸⁷ See Bruce Goldstein, Marc Linder, Laurence E. Norton II & Catherine K. Ruckelshaus, *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment* 46 UCLA L. REV. 983, 984 (1999).

⁸⁸ See Save Local Business Act, H.R. 3441, 115th Congress (2017).

⁸⁹ See 42 U.S.C. § 2000e (2012) (defining industries and employers for purposes of the Equal Employment Opportunities subchapter of Title 42).

⁹⁰ See generally *Frontline: Rape in the Fields* (PBS television broadcast June 25, 2013), <https://www.pbs.org/wgbh/frontline/film/rape-in-the-fields/> [<https://perma.cc/J4AT-ABEE>]; see also, e.g., HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE U.S. TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012), https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf [<https://perma.cc/4F4T-UJTZ>].

⁹¹ See Alianza Nacional de Campesinas, Editorial, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/> [<https://perma.cc/DV7D-XDCA>].

Beyond federal labor laws, many state laws also discriminate against farmworkers by excluding them from important protections such as the minimum wage, overtime, and workers' compensation.⁹² Some states have enacted state laws to provide farmworkers with some of the labor rights enjoyed by other workers. Most notably, California is unique in providing farmworkers with protection to organize labor unions and engage in collective bargaining under the state's Agricultural Labor Relations Act ("ALRA").⁹³ Additionally, in 2016, California passed a law that will gradually extend overtime pay to agriculture for more than forty hours of work, a significant victory for farmworkers.⁹⁴

D. Labor Policy Recommendations

1. *Amend Existing Labor Laws to Ensure Fairness for Farmworkers.* — We should continue to strive to achieve basic fairness in our labor system and undo the discriminatory legacy of agricultural exceptionalism. The Fair Labor Standards Act (FLSA) should be amended to: raise the federal minimum wage and ensure coverage for all farmworkers of the minimum wage protections; extend equal child labor prohibitions to agriculture; and end the exclusion of agricultural workers from overtime pay.

The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") should be strengthened and updated, including by increasing the outdated levels of damages a court can impose on defendants. Employers should not be able to incorporate violations of farmworkers' rights as a limited cost of doing business. In addition, AWPA's protections should extend to H-2A workers and all farmworkers, regardless of the size of their employers. The law's regulation of FLCs and their use by farm owners should be strengthened to reduce abuses. In addition, the law should grant farmworkers the right to engage in concerted activity for their mutual aid and protection free from retaliation, similar to the right granted to most other workers, including the freedoms to join together to demand better job terms, to strike, and to demand collective bargaining.

2. *Improve Enforcement of Current Labor Laws.* — Government enforcement of existing employment and labor laws should be substantially improved in quantity and quality to protect farmworkers and law-abiding businesses from the practices of unscrupulous agricultural employers and their labor contractors. Both federal and state departments of labor should be given adequate monetary resources to perform their enforcement obligations. Those resources should be used to address systemic abuses, ensuring ac-

⁹² See OXFAM AMERICA, INVENTORY OF FARMWORKER ISSUES AND PROTECTIONS IN THE UNITED STATES ii (Mar. 2011), <https://www.oxfamamerica.org/static/oa3/files/inventory-of-farmworker-issues-and-protections-in-the-usa.pdf> [<https://perma.cc/82AY-LTLK>].

⁹³ See Agricultural Labor Relations Act of 1975, CAL. LAB. CODE § 1140 (West 2017).

⁹⁴ See CAL. LAB. CODE §§ 857–864 (West 2017).

countability and liability of farm operators when using FLCs who engage in wage theft, labor trafficking, and other abuses.

Anti-retaliation protections must also be strengthened to ensure that workers who serve as whistleblowers are able to regularize their immigration status if needed. The fear of immigration enforcement and deportation is a very strong deterrent for would-be whistleblowers. The practical ability to remain in the country would allow workers to provide key information, including testifying in court if needed. Special attention should also be paid to eradicating widespread sexual harassment and other discrimination against women farmworkers and to combatting discrimination against indigenous workers.

3. *Improve Farmworkers' Access to Legal Services.* — Federally funded legal aid programs should be permitted to represent undocumented immigrant farmworkers and to bring class actions. This will ensure that there is actual accountability from employers who violate the law, as federal and state agencies' limited resources make it difficult for the government to identify and sanction all bad actors. To encourage private attorneys to accept farmworker cases, AWPAs should also be amended to enable successful plaintiffs in litigation to obtain statutory damage awards in higher amounts and obtain attorneys' fees and expenses (similar to FLSA and the Equal Employment Opportunity Act). These reforms are essential stepping stones to achieving broader structural change because, as discussed above, farmworkers are often unable to afford legal services.

E. Corporate Social Responsibility

For decades, farmworkers have suffered as each level of the economic structure in agriculture has sought to evade responsibility for the way farmworkers are treated. Supermarkets and fast-food chains have said they cannot control how employees on farms are treated.⁹⁵ Farmers have said they are “price takers” subject to the economic power of the supermarkets, brands, and restaurant chains and therefore cannot afford to pay workers more.⁹⁶ Farmworker organizations have long appealed to consumers to apply pressure on supermarket chains and other large buyers of fruits, vegetables, and milk to exert their influence with farms. Farm labor unions such as United Farm Workers (UFW) and the Farm Labor Organizing Committee

⁹⁵ See Carli Teproff, *Farmworkers to Publix: A penny more can change lives*, MIAMI HERALD (May 18, 2014) <http://www.miamiherald.com/news/local/community/miami-dade/coral-gables/article1964653.html> [<https://perma.cc/J8PZ-TS39>]; *Farmworkers Call for Wendy's Boycott Over Tomato Buying*, FOOD LOGISTICS (Mar. 4, 2016), <https://www.foodlogistics.com/sustainability/news/12178019/farmworkers-call-for-wendys-boycott-over-tomato-buying> [<https://perma.cc/CMV5-N5TH>].

⁹⁶ See ZIPPY DUVALL, AMERICAN FARM BUREAU STATEMENT TO THE U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS 5 (Feb. 7, 2018) and Addendum to attached letter 2, https://www.epw.senate.gov/public/_cache/files/9/a/9ad09eaa-1166-4227-9cb2-d3b59dd2f422/017DB0E861AD60F63AAB69D2E8B94FC2.duvall-testimony-02.07.18.pdf [<https://perma.cc/9K49-FET6>].

(FLOC) have advanced campaigns for union organizing and collective bargaining through the use of consumer boycotts against grocery chains as well as farms that had identifiable brands.⁹⁷ In recent years, farmworker organizations have tapped into consumers' demand to know more about how their food is produced. Corporations have begun to respond to this market pressure.⁹⁸

Many major corporations that sell food to consumers have established monitoring systems under which the corporation or a third-party examines conditions on farms—inside and outside the United States—to determine compliance with certain standards, especially food safety.⁹⁹ Some corporations expect their suppliers to operate consistently with internationally-recognized labor standards, including prohibitions against forced labor; employment of young children; discrimination based on race, gender, and other characteristics; and retaliation for exercising freedom of association.¹⁰⁰ Some corporations have adopted requirements regarding compliance with applicable labor laws and basic occupational safety and health standards with the goal of preventing occupational injuries, illnesses, and deaths.¹⁰¹

There have been criticisms of corporations for adopting weak labor standards and ineffective compliance mechanisms.¹⁰² In an effort to demon-

⁹⁷ See SUSAN FERRISS & RICARDO SANDOVAL, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKER MOVEMENT* 125–157 (1997); William Serrin, *Migrant Workers Organize a Boycott of Campbell*, N.Y. TIMES (Jul. 2, 1984); Patrick O'Neill, *Enjoy Some Good Mt. Olive Pickles Tonight: Boycott ends as company agrees to negotiate with farmworkers' union, increase pay, and increase worker protections*, INDY WEEK (Sept. 22, 2004); Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.-C.L. L. REV. 168, 180–181 (2018).

⁹⁸ See generally JOHN BOWE, *NOBODIES: MODERN AMERICAN SLAVE LABOR AND THE DARK SIDE OF THE NEW GLOBAL ECONOMY* (2007); MICHAEL E. CONROY, *BRANDED!: HOW THE 'CERTIFICATION REVOLUTION' IS TRANSFORMING GLOBAL CORPORATIONS* (2007).

⁹⁹ See Wal-Mart Stores, Inc., *Food Safety Requirements for Food and Beverage Suppliers* (2017) <https://cdn.corporate.walmart.com/6d/f3/05fffa84417f8e89f62ab756c998/2017-supplier-food-safety-requirements.pdf> [<https://perma.cc/QXN2-BN98>].

¹⁰⁰ Such standards are found in the *Declaration on Fundamental Principles and Rights at Work and its Follow-up* issued by the International Labor Organization, which is a unit of the United Nations. See generally INT'L LABOR ORG., *DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK AND ITS FOLLOW UP* (June 15, 2010), http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_467653.pdf [<https://perma.cc/7E6S-G8FV>]. These standards are intended as basic minimum standards that should be required by governments that belong to the UN and the ILO. See *id.* at 3.

¹⁰¹ See, e.g., *Supply Chain Transparency: Disclosure - California Transparency in Supply Chains Act of 2010*, ALBERTSON'S, <https://shop.albertsons.com/ecom/content/supply%20chain%20transparency> [<https://perma.cc/8745-4XNS>].

¹⁰² See Jennifer Gordon, *The Problem with Corporate Social Responsibility*, WORKER-DRIVEN SOCIAL RESPONSIBILITY NETWORK (Jul. 11, 2017), https://wsr-network.org/re-solution/the-problem-with-corporate-social-responsibility/?sf_paged=9 [<https://perma.cc/DXR6-XJNM>]; Brian Finnegan, AFL-CIO, *RESPONSIBILITY OUTSOURCED: SOCIAL AUDITS, WORKPLACE CERTIFICATION AND TWENTY YEARS OF FAILURE TO PROTECT WORKER RIGHTS* (2013); Stephanie Clifford & Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, N.Y. TIMES (Sept. 1, 2013), <https://www.nytimes.com/2013/09/02/business/global/superficial-visits-and-trickery-undermine-foreign-factory-inspections.html> [<https://perma.cc/N8FW-6CA6>]; Gillian B. White, *All Your Clothes Are Made with Exploited Labor*, THE ATLANTIC (June 3, 2015); GENEVIEVE LEBARON, PENELOPE KYRITSIS ET AL.,

strate the legitimacy of their systems and their good faith, some corporations retain third parties to conduct audits and certify compliance with standards. There are numerous auditing firms and there are also firms that audit the auditors and grant accreditation to auditors.¹⁰³ Most of these systems have little or no involvement of workers in the companies that are audited and therefore are criticized by worker organizations and others for being at best ineffective and at worst fraudulent.¹⁰⁴

There are several projects based in the United States in which farmworker organizations are directly involved with growers and other businesses in the food supply chain to develop and implement codes of conduct and compliance mechanisms as well as other forms of cooperation to advance mutual interest. Some examples of these corporate social responsibility initiatives include: the Agricultural Justice Project (AJP),¹⁰⁵ the Domestic Fair Trade Association (DFTA),¹⁰⁶ the Equitable Food Initiative (EFI),¹⁰⁷ and the Fair Food Program (FFP).¹⁰⁸ All have established standards regarding farmworkers' conditions that are intended to be adopted by businesses in the food supply chain and certification or other mechanisms to ensure compliance with those standards. While they differ in their standards, membership, and approaches, all include in their goals improvements in farmworkers' conditions.¹⁰⁹

F. Corporate Social Responsibility Recommendations

1. *Enact Policies to Advance Legitimate Corporate Social Responsibility Programs.* — Laws requiring disclosure of conduct in supply chains can serve as a useful tool to advance meaningful corporate social responsibility programs to improve labor conditions.¹¹⁰ The California Transparency in Sup-

UNIV. OF SHEFFIELD, CONFRONTING ROOT CAUSES: FORCED LABOR IN GLOBAL SUPPLY CHAINS 59–60, 64–68 (2018).

¹⁰³ See generally CONROY, *supra* note 98.

¹⁰⁴ See FINNEGAN, *supra* note 102, at 13–16, 25–30; Jill Ebensshade, *Corporate Social Responsibility: Moving from Checklist Monitoring to Contractual Obligation*, in *ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY* 51, 53–57 (Richard P. Applebaum & Nelson Lichtenstein eds., 2016), <https://wsr-network.org/wp-content/uploads/2018/05/Jill-Ebensshade-EbensshadeCornellChapter.pdf> [<https://perma.cc/PZ27-J8EU>]; Gordon, *supra* note 102, at 4–6; Garret Brown, *The Corporate Social Responsibility Mirage*, *INDUSTRIAL SAFETY AND HYGIENE NEWS* (May 1, 2017), <https://wsr-network.org/wp-content/uploads/2017/12/ISHN-CSR-mirage-May-2017-rev.pdf> [<https://perma.cc/UY5V-XRZW>].

¹⁰⁵ See AGRIC. JUSTICE PROJECT, www.agriculturaljusticeproject.org [<https://perma.cc/D8KH-4DQC>].

¹⁰⁶ See DOMESTIC FAIR TRADE ASS'N, www.thedfta.org [<https://perma.cc/GAW3-FZTK>].

¹⁰⁷ See EQUITABLE FOOD INITIATIVE, www.equitablefood.org [<https://perma.cc/X3HY-GZH3>].

¹⁰⁸ See FAIR FOOD PROGRAM, www.fairfoodprogram.org [<https://perma.cc/V9R7-ADNS>]. Manoj Dias-Abey, *supra* note 97, at 197–205.

¹⁰⁹ We do not provide details about their systems because the purpose of this article is to highlight potential government policies that could advance these programs. See the programs' individual websites, *supra* notes 105–108, for more information.

¹¹⁰ See FINNEGAN, *supra* note 102, at 48–49.

ply Chains Act of 2010 requires corporations doing business in the state and grossing more than one hundred million dollars to report annually on the efforts they are making, if any, to address human trafficking and slavery in their global supply chains.¹¹¹ Although the statute is weak in the sense that specific actions other than disclosure are not required, the obligation to disclose is a strong motivation for companies to take some action. The narrow focus on trafficking and slavery does not reach other forms of exploitative and dangerous employment practices, but companies must disclose whether they are addressing issues related to the use of labor contractors and recruiters, who are often used by farms as intermediaries to effectuate exploitative conditions.

More states, and ultimately the federal government, should consider enacting such disclosure laws and improving on the California statute. Disclosure would be more helpful if the law required disclosures regarding efforts to investigate and address additional topics including wage theft, sexual harassment, and dangerous working conditions. Currently, the California law does not directly allow for lawsuits when a company provides misleading or false information about its corporate social responsibility efforts; a cause of action for such misconduct would strengthen the law's impact. The law would also be more helpful to consumers and workers if it applied to more than the largest corporations.¹¹²

2. *Encourage Federal and State Corporate Social Responsibility Incentives.*

— Federal and state incentives for cooperation among farmworkers, agricultural businesses, retailers, restaurant chains, other sellers of agricultural products, and consumers could achieve voluntary changes in the food supply chain that result in empowerment of farmworkers and improved wages and working conditions, as well as enhanced productivity. Possible incentives include government promotion of products that earn labels from systems that operate with integrity and measurably improve wages and working conditions on farms. Federal and state laws require school districts, the military, and other public entities that purchase fruits and vegetables to adopt procurement policies that give preference to worker-centric certification systems.¹¹³ Agencies that enforce wages-and-hours and occupational safety laws could allocate their limited resources to target audits and investigations on companies that are not participating in credible corporate social responsibility projects.¹¹⁴

¹¹¹ CAL. CIV. CODE § 1714.43 (2012) (West, Westlaw with urgency legislation through Ch. 9 of 2018 Reg. Sess.).

¹¹² See FINNEGAN, *supra* note 102, at 48–49.

¹¹³ See FINNEGAN, *supra* note 102, at 55; Lars H. Gulbrandsen, *Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs*, REGULATION & GOVERNANCE 8, 74–92 (2014), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/rego.12005> [<https://perma.cc/2MFP-XYZZ>].

¹¹⁴ See DAVID WEIL, BOSTON UNIV., IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 30–38 (May 2010), <https://www.dol.gov/whd/resources/strategicEnforcement.pdf> [<https://perma.cc/8YZM-96UL>].

G. *Occupational Health and Safety Policy*

Agricultural exceptionalism is also pervasive when it comes to occupational health and safety, despite the fact that agricultural work is one of the most dangerous, physically straining, and potentially hazardous types of work. Furthermore, there is significant lack of training for workers about occupational hazards in agricultural work, particularly culturally and linguistically appropriate training.

Agriculture is explicitly exempted from most occupational health and safety standards.¹¹⁵ Some of the standards that exempt agriculture include protections against electrocution¹¹⁶ and unguarded machinery¹¹⁷ and requirements for ladder safety.¹¹⁸ Some other serious safety and health hazards farmworkers face include lack of adequate sanitation; vulnerability to heat stress; musculoskeletal injuries caused by lengthy stooping, lifting, and cutting in harvesting crops; injuries from farm machinery or equipment; and exposure to pesticides. The U.S. Occupational Safety and Health Administration (OSHA) has not issued adequate standards to address these hazards. Moreover, even where these standards exist, their effectiveness is limited because Congress prohibits OSHA from using federal funding to enforce these standards on smaller farms.¹¹⁹

OSHA did not issue its Field Sanitation Standard (FSS) until 1987,¹²⁰ when it was finally forced to do so by order of a federal court.¹²¹ The FSS requires that covered employers provide accessible toilets, potable drinking water, and hand-washing facilities to hand-laborers in the field. However, although hundreds of workers have died and thousands more have been seriously injured due to excessive heat exposure at work,¹²² there is still no fed-

¹¹⁵ See 29 C.F.R. § 1928.21 (2018) (noting agricultural exemption from Occupational Safety and Health Administration standards beyond those specifically listed).

¹¹⁶ See 29 C.F.R. § 1910.301 et seq. (2018).

¹¹⁷ See 29 C.F.R. § 1910.212 (2018).

¹¹⁸ See 29 C.F.R. § 1910.23 (2018).

¹¹⁹ See OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, CPL 02-00-051, ENFORCEMENT EXEMPTIONS AND LIMITATIONS UNDER THE APPROPRIATIONS ACT (2017), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=1519 [<https://perma.cc/GF6N-8XU2>].

¹²⁰ See 29 C.F.R. § 1928.110 (2018).

¹²¹ *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 633 (D.C. Cir. 1987).

¹²² This information is based on an analysis of aggregated data from the Bureau of Labor Statistics. See *Occupational Injuries and Illnesses and Fatal Injuries Profiles*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, <https://data.bls.gov/gqt/InitialPage> [<https://perma.cc/3ZRE-8DCW>]. Other research articles discuss the prevalence of heat-related illness in agriculture. See *Heat-Related Deaths Among Crop Workers — United States, 1992–2006*, CDC (2008), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5724a1.htm> [<https://perma.cc/QEG8-FXQD>]; Larry L. Jackson & Howard R. Rosenberg, *Preventing Heat-Related Illness Among Agricultural Workers*, 15 J. AGROMED. 3, 200–215 (2010), www.bu.edu/sph/files/2012/08/Jackson_2010_Preventing_Heat-related_Illness_Among_Agricultural_Workers.pdf [<https://perma.cc/44EF-DZGU>]; Nancy L. Fleischer et al., *Public Health Impact of Heat-Related Illness Among Migrant Farmworkers*, 44 AM. J. OF PREVENTIVE MED. 3, 199–206, <https://www.ncbi.nlm.nih.gov/pubmed/23415115> [<https://perma.cc/W5KA-MBQG>]; Thomas A. Arcury et al., *Heat Illness Among North Carolina Latino Farmworkers*, 57 J. OCCUP ENVIRON

eral OSHA standard to protect these workers from the preventable and tragic health effects of excessive heat exposure. This lack of action at the federal level is particularly concerning given that the effects of heat exposure are likely to increase in the coming years as a result of climate change.¹²³

There is also no OSHA standard relating to musculoskeletal injuries. In November 2000, following a ten-year battle between business and labor over rules designed to eliminate workplace musculoskeletal disorders, OSHA issued an ergonomics standard,¹²⁴ but it was repealed by Congress a year later.¹²⁵ Although there is an OSHA standard that requires farm machinery to be equipped with safety guards and shields, such as protective devices for tractors,¹²⁶ the statute specifically exempts most farm equipment manufactured prior to 1976.¹²⁷

One of the greatest hazards for the health of both farmworkers and their families is exposure to pesticides. Farmworkers have one of the highest rates of chemical exposures among U.S. workers. However, although OSHA's rules regarding hazardous workplace chemicals apply to farmworkers, they exclude the regulation of pesticides. Furthermore, the authority to regulate pesticides and their potential effects on agricultural workers is not under OSHA even though, as noted above, it is the government agency tasked with ensuring safe working conditions for most workers. Instead, this authority is under the U.S. Environmental Protection Agency (EPA), which also has primary responsibility for approving, restricting, and banning the use of agricultural pesticides. Unfortunately, the EPA's standards and decisions have been more responsive to the demands of pesticide manufacturers and agribusiness than to the safety and health concerns of farmworkers and their families.

The EPA recently revised two important worker protection regulations related to the use of pesticides: the Agricultural Worker Protection Standard (WPS) (revised in 2015) and the Certification of Pesticide Applicators (CPA) rule (revised in 2016).¹²⁸ The revised rules include measures to ensure timely and effective access to pesticide application information,¹²⁹ a minimum age of 18 for handling all classes of pesticides,¹³⁰ protection from drifting pesticides,¹³¹ anti-retaliation protections,¹³² enhanced applicator

MED. 12, 1299–1304 (Dec. 2015), <https://www.ncbi.nlm.nih.gov/pubmed/26641825> [<https://perma.cc/ZKL3-2REG>].

¹²³ See PHYSICIANS FOR SOCIAL RESPONSIBILITY, CLIMATE CHANGE AND HEALTH: THE EFFECTS OF HEAT (2015), <http://www.psr.org/environment-and-health/climate-change/results-impacts/heat-effects-fact-sheet-0514.pdf> [<https://perma.cc/WX63-UCBW>].

¹²⁴ See Ergonomics Program; Final Rule, 65 Fed. Reg. 68,261 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910).

¹²⁵ See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001).

¹²⁶ See 29 C.F.R. § 1928.57 (2011).

¹²⁷ See *id.* at § 1928.57(a)(3).

¹²⁸ See 40 C.F.R. § 170 (2015); 40 C.F.R. 171 (2016).

¹²⁹ See 40 C.F.R. §§ 170.409 and 503 (2015).

¹³⁰ See *id.* §§ 170.309(c), 313(c), and 501(c)(3)(xiii).

¹³¹ See *id.* § 170.505(a) and (b).

¹³² See *id.* § 170.315

competency standards,¹³³ and adequate training and supervision of pesticide applicators.¹³⁴ Although the revisions to these rules were the result of a multi-year, multi-stakeholder process, agribusiness groups have successfully lobbied the EPA to propose changes that would reverse some of these important safeguards in the revised rules.¹³⁵ As a result, the EPA has announced that it will begin a new rule-making process in 2018,¹³⁶ potentially undoing some of these important protections.

The EPA is also responsible for conducting health risk assessments as part of its authority to regulate pesticides and ban a specific pesticide in cases where there is no safe use. Recent decisions regarding various highly toxic pesticides, however, have shown that the agency's procedures do not adequately address the particular risks borne by farmworkers and their families. For example, the EPA recently ordered that chlorpyrifos, a pesticide linked to neurodevelopmental disorders in children and acute poisonings of farmworkers,¹³⁷ can continue to be used in agriculture, overruling the clear recommendation of its own staff without citing any compelling contrary evidence. The EPA failed to consider, among other things, the full extent of exposure for farmworker communities, including the length of exposure throughout the workday¹³⁸ and the potential for exposure through drift, volatilization, or take-home residue.¹³⁹

Another overarching challenge for farmworker occupational health and safety is widespread underreporting, not just of pesticide-related incidents, but of other injuries and illnesses. Agricultural workers may be hesitant to come forward to report incidents because they fear retaliation, including but not limited to, possible immigration enforcement.¹⁴⁰ Accurate reporting is also hindered by the unique features of the agricultural workforce described earlier in the article, including the migratory and seasonal nature of the workforce, limited English language skills, and economic vulnerability.¹⁴¹

¹³³ See *id.* § 170.501(c)(xiii).

¹³⁴ See *id.* § 170.401 and 501.

¹³⁵ See PETITION FOR RULEMAKING, https://www.epa.gov/sites/production/files/2017-01/documents/wps_petition_dec_21-508.pdf [<https://perma.cc/HP7T-53AW>]. See also Paul Shukovsky, *EPA to Consider Reducing Farmworker Pesticide Protections*, BLOOMBERG NEWS, (Dec. 13, 2017), <https://www.bna.com/epa-consider-reducing-n73014473148/> [<https://perma.cc/X85Q-P5B5>].

¹³⁶ See Pesticides; Agricultural Worker Protection Standard; Reconsideration of Several Requirements and Notice About Compliance Dates, 82 Fed. Reg. 60,576 (Dec. 21, 2017) (to be codified at 40 C.F.R. pt. 170); Pesticides; Certification of Pesticide Applicators Rule; Reconsideration of the Minimum Age Requirements, 82 Fed. Reg. 60,195 (Dec. 19, 2017) (to be codified at 40 C.F.R. pt. 171).

¹³⁷ See James R. Roberts, Catherine J. Karr & Council on Environmental Health, *Pesticide Exposure in Children*, 130 PEDIATRICS e1765 (2012).

¹³⁸ EARTHJUSTICE ET AL., FARMWORKER AND CONSERVATION COMMENTS ON CHLORPYRIFOS REVISED HUMAN HEALTH RISK ASSESSMENT 67–69 (Apr. 30, 2015).

¹³⁹ See *id.* at 45–49.

¹⁴⁰ See ELMORE & CHISHTI, *supra* note 67, at 12.

¹⁴¹ See Letter from Sammy Almashat, Staff Researcher, Pub. Citizen's Health Research Group, to David Michaels, Assistant Sec'y of Labor for Occupational Safety and Health 9 (Sept. 1, 2011), <https://www.citizen.org/sites/default/files/petition-for-a-heat-standard-090111.pdf> [<https://perma.cc/AMP7-PB7R>].

Additionally, workers are sometimes unaware of the particular risks they are exposed to because they have not been adequately trained on the symptoms of pesticide poisoning, heat stress, or other health conditions that may be caused or exacerbated by their working conditions. This hesitancy, combined with a lack of adequate training for workers, allows dangerous conditions to remain unaddressed and proliferate, ultimately resulting in a higher incidence of injuries and deaths.

H. Occupational Health and Safety Recommendations

1. *Strengthen OSHA Safety Standards for Agricultural Workers.* — OSHA should end its policy of excluding agricultural employers and their workers from occupational safety standards for general industry and should provide farmworkers with safeguards that are at least equivalent to those provided in other occupations. Additionally, OSHA's Field Sanitation Standard should be strengthened to address prevention of heat-related illness.¹⁴² Congress must also stop inserting an annual appropriations rider that prohibits enforcement of OSHA standards on small farms.

2. *Improve Pesticide Safety.* — The revised Agricultural Worker Protection Standard (WPS) and Certification of Pesticide Applicators (CPA) rule should be fully implemented and current efforts underway to roll back or weaken these rules should be rejected. EPA should demand better information about farmworkers' pesticide exposures and implement stronger protections for workers and their families. The implementation and enforcement of worker safety standards for pesticides in agriculture should be shifted from state departments of agriculture to state health, labor, or environmental agencies. The methods for evaluating the safety of agricultural pesticides to which farmworkers are exposed should be strengthened. Additionally, pesticide use and illness incident reporting should be required on a national level. California is one of the few states that require pesticide applicators and growers to report pesticide use and health-care providers to report suspected pesticide poisoning incidents.¹⁴³ Such information is necessary for making important decisions regarding medical treatment, public health, and pesticide regulation.

I. Health-Care Policy

Farmworkers are often overlooked in the design, development, and implementation of federal health policy. Federal funding, including grants and contracts, is rarely earmarked specifically for farmworkers. Few federal research initiatives account for the unique needs and realities of farmworker

¹⁴² See *id.* at 14–15.

¹⁴³ For more details on this program and its impact, see CAL. DEP'T OF PESTICIDE REGULATION, A GUIDE TO PESTICIDE REGULATION IN CALIFORNIA – CHAPTER 8: PROTECTING WORKERS AND THE PUBLIC 64 (2017), <http://www.cdpr.ca.gov/docs/pressrls/dprguide/chapter8.pdf> [<https://perma.cc/93BN-XSJD>].

communities. As a result, there are limited opportunities for research, creating a catch-22 for farmworkers and their advocates. In the absence of timely and relevant data on farmworker health, risks, and needs, government officials who wish to make evidence-based decisions often decline to improve policies or programs.

In 1962, Congress passed the Migrant Health Act, creating a system of federally-funded clinics to serve farmworkers and their families.¹⁴⁴ Today, there are 174 community health centers that receive funding from the federal government to provide health care to farmworkers and their families (more commonly referred to as migrant health centers).¹⁴⁵ Yet farmworkers are less likely to access health care than the general population. Thirty-eight percent of workers reported not using any U.S. health services in the last two years,¹⁴⁶ compared with 8.9% of the general population.¹⁴⁷ Fewer than 25% of farmworkers and their families went to a health center in 2016.¹⁴⁸

While the reasons for the low utilization are numerous, the most significant barrier is cost. Only 35% of farmworkers have health insurance.¹⁴⁹ Uninsured or underinsured workers and their families can receive care at a health center at a discounted cost. The centers' sliding fee scale adjusts the cost of the health-care visit based on a patient's family size and income.¹⁵⁰ Access to dental care and specialty care, such as dermatology, physical therapy, and endocrinology, is limited in rural communities and health centers often do not have the capacity or resources to offer specialized health services

¹⁴⁴ The Community Health Center Program was authorized under the Public Health Service Act. *See* Bipartisan Budget Act of 2018, Pub. L. 115-123, 132 Stat. 282, 287 (to be codified at 42 U.S.C. § 254b-2). In 1996, the Health Centers Consolidation Act consolidated migrant health centers, along with health centers that serve homeless populations and public housing residents, under Section 330 of the Public Health Service Act. *See* Health Centers Consolidation Act of 1996, Pub. L. 104-299, 110 Stat. 3626 (Oct. 11, 1996). Health centers that serve migratory and seasonal agricultural workers, commonly referred to as migrant health centers, are designated under section 330(g) of the Public Health Service Act.

¹⁴⁵ *See* 2016 National Health Center Data, BUREAU OF PRIMARY HEALTH CARE, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (2016) [hereinafter 2016 NATIONAL HEALTH CENTER DATA], <https://bphc.hrsa.gov/uds/datacenter.aspx?fd=MH> [<https://perma.cc/Q6ZK-E235>].

¹⁴⁶ *See* DOL NAWS 2013-2014, *supra* note 18, at 73.

¹⁴⁷ *See* NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL AND PREVENTION, AMBULATORY CARE USE AND PHYSICIAN OFFICE VISITS 1 (May 3, 2017), <http://www.cdc.gov/nchs/fastats/physician-visits.htm> [<https://perma.cc/3ZG2-5KP7>].

¹⁴⁸ In 2016, health centers served 957,529 agricultural workers and their families. *See* 2016 NATIONAL HEALTH CENTER DATA, *supra* note 145.

¹⁴⁹ *See* DOL NAWS 2013-2014, *supra* note 18, at 72.

¹⁵⁰ Community Health Centers are required to have a sliding fee discount schedule for patients who are uninsured or underinsured. The amount the patient pays for health center services is based on her or his income and family size. Health centers determine their sliding fee schedule based on locally prevailing rates, among other considerations. The discounts are only available to patients up to 200% of the Federal Poverty Level. *See* Chapter 9: Sliding Fee Discount Program, HEALTH RES. AND SERVS. ADMIN., HEALTH CENTER COMPLIANCE MANUAL (Jan. 2018), <https://bphc.hrsa.gov/programrequirements/compliancemanual/chapter-9.html#titletop> [<https://perma.cc/V64U-AKJ7>].

beyond preventative care.¹⁵¹ Even with health insurance, specialized care can be expensive and hard to access.¹⁵²

Workers who have health insurance reported that they utilized health-care services more frequently.¹⁵³ The main sources of health insurance for farmworkers are employer-provided health insurance, Medicaid/CHIP (the Children's Health Insurance Program), and the Affordable Care Act (ACA) marketplaces.¹⁵⁴ Thirty-seven percent of farmworkers are enrolled in Medicaid.¹⁵⁵ Under the Personal Responsibility and Work Opportunity Act (PRWORA) of 1996, eligibility for federal benefit programs, including but not limited to Medicaid and the Supplemental Nutrition Assistance Program (SNAP, also commonly referred to as food stamps), was restricted to individuals who are U.S. citizens or "qualified aliens."¹⁵⁶ Therefore, while the majority of farmworkers do not qualify for Medicaid or SNAP, the majority of their children, who are U.S. citizens, do qualify for these programs. According to the NAWS, while only 37% of workers have health insurance through the government, 82% of their children have government-provided coverage.¹⁵⁷ Furthermore, some states use their own funds to expand Medicaid eligibility to immigrants who do not meet the "qualified alien" definition but are lawfully present.¹⁵⁸ These states include New York and California,¹⁵⁹ which also have large farmworker populations.

¹⁵¹ See Kate Samuels et al., *Transforming Rural Health Care: High-Quality, Sustainable Access to Specialty Care*, BROOKINGS INSTITUTE: HEALTH AFFAIRS BLOG (Dec. 5, 2014), <https://www.brookings.edu/opinions/transforming-rural-health-care-high-quality-sustainable-access-to-specialty-care/> [<https://perma.cc/7C28-NZR6>].

¹⁵² Health insurance deductibles and co-pays, especially for out-of-network services, can result in high out-of-pocket costs for specialty care services. See Mabel C. Ezeonwu, *Specialty-care Access for Community Health Clinic Patients: Processes and Barriers*, 11 J. MULTIDISCIPLINARY HEALTHCARE 109, 112–113 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5826087/pdf/jmdh-11-109.pdf> [<https://perma.cc/ZH82-8X2W>].

¹⁵³ See DOL NAWS 2013–2014, *supra* note 18, at 43.

¹⁵⁴ See *id.* at 42. Note that NAWS data does not distinguish between Medicaid/CHIP and ACA marketplaces. The NAWS data was collected at the beginning of ACA implementation. NAWS data was collected from 2013 to 2014. Full ACA implementation, including the marketplaces, began in January 2014.

¹⁵⁵ See *id.*

¹⁵⁶ See 8 U.S.C. §§ 1641(b), 1642(a)(1) (2012).

¹⁵⁷ See DOL NAWS 2013–2014, *supra* note 18, at 42–43.

¹⁵⁸ Under Section 214 of the Children's Health Insurance Program Reauthorization Act (CHIPRA), states have the option to provide Medicaid and CHIP coverage to "lawfully residing" children and pregnant women. See Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 56 § 214 (2009) (codified as amended at 42 U.S.C. § 1396b(v) (2012)). Some states have gone beyond CHIPRA, using state funds to expand Medicaid eligibility to additional groups of immigrants. For example, California's Medicaid program (Medi-Cal) is open to all lawfully residing adults up to 138% of the Federal Poverty Level, pregnant women up to 322% of the Federal Poverty Level, and children up to 266% of the Federal Poverty Level. See THE HENRY J. KAISER FAMILY FOUND., MEDICAID IN CALIFORNIA (June 2017), <http://files.kff.org/attachment/fact-sheet-medicare-state-CA> [<https://perma.cc/E8T8-CQVJ>].

¹⁵⁹ In May 2016, California further expanded Medi-Cal eligibility to undocumented children (SB 75). See *SB 75 - Full Scope Medi-Cal for All Children*, CAL. DEPT. HEALTH CARE SERVICES (Aug. 31, 2017), <http://www.dhcs.ca.gov/services/medi-cal/eligibility/Pages/sb-75.aspx> [<https://perma.cc/AG3U-ABRQ>]. According to data from the UC Berkeley Labor

Under the ACA, more workers and their families have gained access to health insurance because anyone who is lawfully present in the United States, with the exception of Deferred Action for Childhood Arrivals (DACA) program recipients, is eligible to purchase health insurance in the ACA's marketplace.¹⁶⁰ If their household income is below 400% of the federal poverty level, they qualify for financial assistance to lower the cost of health insurance.¹⁶¹ Some farmworkers and their families who were previously ineligible for Medicaid or health insurance from their employer are able to enroll in affordable and comprehensive health insurance through the ACA marketplaces. H-2A workers are among those who are eligible to enroll in health insurance and to receive financial assistance.¹⁶²

Although there is little research providing quantitative data, anecdotally, the ACA has increased farmworker health insurance enrollment, especially among H-2A workers. In North Carolina, for example, more than two thousand H-2A workers have enrolled in health insurance.¹⁶³ Unfortunately, despite any progress made, there are still numerous barriers to enrollment in farmworker communities. One of the biggest barriers to enrollment is insufficient availability of in-person assistance. Farmworkers especially rely on in-person assistance to enroll in health insurance.¹⁶⁴ In-person assisters not only help enroll workers, they also provide education about the U.S. health-care system prior to enrollment and help enrolled workers connect to health-care services, pay their premiums, and understand notices from their health insurance plan and the marketplace post-enrollment. Many of these in-person assisters are from health centers or community organizations that received funding from the Centers for Medicare and Medicaid Services (CMS) to

Center, the San Joaquin Valley and other rural areas of California experienced some of the greatest gains in Medi-Cal coverage. See UC BERKELEY CTR. FOR LAB. RESEARCH AND EDUC., DATA BRIEF 7 (Mar. 2017), <http://laborcenter.berkeley.edu/pdf/2017/Medi-Cal-Expansion-under-AHCA.pdf> [<https://perma.cc/35V7-8SMX>].

¹⁶⁰ See *Immigration status and the Marketplace*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/immigration-status/> [<https://perma.cc/F8F3-7D33>]; *Coverage for lawfully present immigrants*, HEALTHCARE.GOV, <https://www.healthcare.gov/immigrants/lawfully-present-immigrants/> [<https://perma.cc/F5DL-4BLV>].

¹⁶¹ See Amendment of 1986 Code, Pub. L. No. 115-97, Title I, § 11002(d)(1)(E), 131 Stat. 2060 (2017) (to be codified at 26 U.S.C. § 36B(a)(3)(A)(i)).

¹⁶² Individuals on non-immigrant visas (including H-2A workers) are among those considered lawfully present under the ACA. See *Immigration status and the Marketplace*, *supra* note 160. They are eligible to enroll in health insurance in the ACA marketplaces and are eligible for subsidies to reduce the cost of health insurance. See FARMWORKER JUSTICE, THE AFFORDABLE CARE ACT AND H-2A AGRICULTURAL WORKERS: FREQUENTLY ASKED QUESTIONS 2 (2015), https://www.farmworkerjustice.org/sites/default/files/Brief_ACA_H2A_FINAL%202015.pdf [<https://perma.cc/7QQG-9HTD>].

¹⁶³ Interview with A. Pollard, North Carolina Community Health Center Association, via phone in June 2016. Farmworker Justice works with the North Carolina Community Health Center Association to provide training and technical assistance to health center staff on H-2A workers and ACA outreach and enrollment.

¹⁶⁴ Between May and October 2015, FJ conducted focus groups with farmworkers and community health workers (*promotores de salud*) to learn about their health-care needs and barriers to health-care and health-insurance access. The focus groups were held in New York, Maryland, Michigan, California, and Arizona. In total, FJ staff met with forty agricultural workers and sixty *promotores de salud*.

provide enrollment assistance. Recent cuts to these outreach and enrollment programs¹⁶⁵ further reduce access to in-person assistance in farmworker communities, where funding for these programs was already insufficient.

J. Health-Care Policy Recommendations

1. *Prioritize Farmworkers in National Research and Funding Initiatives.* — The U.S. Department of Health and Human Services (HHS), which oversees the health center program as well as the National Institutes of Health, should expand its capacity and capability to focus on and address health issues specific to farmworkers and their families. It is important to prioritize farmworkers when drafting and evaluating funding for research, especially in rural communities. Farmworker advocates and community-based organizations should be involved throughout the process, creating opportunities with and for farmworker communities. Further, there must be active and meaningful participation of farmworkers and the organizations that represent and serve them on national boards and advisory groups that influence health policy.¹⁶⁶ Their active participation would ensure effective planning and delivery of health promotion, preventive, and treatment services that reflect the needs of farmworker communities.

2. *Remove Immigrant Eligibility Restrictions for Federal Health and Nutrition Programs.* — Congress should remove certain eligibility restrictions for federal health and nutrition programs, specifically SNAP and Medicaid, under PRWORA. While 53% of farmworkers have legal status in the United States,¹⁶⁷ only 31% are U.S. citizens.¹⁶⁸ A large number of farmworkers, therefore, are not eligible for these federal programs due to their immigration status, despite their lawful status. All lawfully present individuals should be able to access SNAP and health insurance to support their health and well-being. At the very least, all states should elect to expand Medicaid and CHIP eligibility to lawfully-residing children and pregnant women. Currently, twenty states offer coverage to lawfully-residing pregnant women under the Children's Health Insurance Program

¹⁶⁵ In August 2017, the Centers for Medicare and Medicaid Services (CMS) announced that it would cut funding to assister programs as well as advertising to promote open enrollment in the marketplaces. Funding for advertising was cut by 90% from \$100 million to \$10 million and funding for assister programs was cut by 42% from about \$62 million to about \$36 million. See *CMS Announcement on ACA Navigator Program and Promotion for Upcoming Enrollment*, CENTERS FOR MEDICARE & MEDICAID SERVICES (Aug. 31, 2017), <https://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2017-Press-releases-items/2017-08-31-3.html> [<https://perma.cc/L36F-8MH6>].

¹⁶⁶ Examples of national boards and advisory groups include the HHS' Advisory Committee on Minority Health and the National Advisory Committee on Rural Health and Human Services. See generally Dep't of Health and Human Services, *National Advisory Committee on Rural Health & Human Services*, HEALTH RESOURCES AND SERVICE ADMINISTRATION (Nov. 2017), <https://www.hrsa.gov/advisory-committees/rural-health/index.html> [<https://perma.cc/9BWD-2A59>].

¹⁶⁷ See DOL NAWS 2013-2014, *supra* note 18, at i.

¹⁶⁸ See *id.*

Reauthorization Act of 2009 (CHIPRA).¹⁶⁹ We acknowledge that there is likely to be resistance to these ideas, especially given the current political climate as it relates to health care and immigration. However, research shows that there are economic benefits to expanded health insurance coverage. These benefits include improved education and employment outcomes for the individual; health-care systems also benefit because high rates of uninsured put considerable financial strain on hospitals and health centers, adversely impacting community access to health care.¹⁷⁰

Federal agencies must also ensure that they maintain the privacy and protection of information of applicants to federal programs such as SNAP, Medicaid, and the ACA marketplace. Information provided by applicants must not be shared with immigration enforcement agencies. This is especially important for farmworkers who are in mixed-immigration status families, where one (or more) family member is undocumented. These families may be reluctant to enroll eligible family members in these programs if there are not assurances that their information will be protected. Educational resources for these programs must explicitly state that information is not shared with immigration authorities. This message should be reinforced by enrollment assisters and organization outreach staff during informational sessions with farmworker and immigrant communities.

3. *Adequately Fund Health Programs in Farmworker Communities.* — Community and migrant health centers need guaranteed and sufficient funding to properly serve the health needs of farmworker communities. Investments should be made in outreach and enabling services, including transportation and interpretation. Furthermore, resources should be prioritized to support the development and integration of health information technology in health centers. States should expand telemedicine opportunities in health centers and rural health clinics to facilitate access to specialty care providers. Finally, funding for in-person assistance programs should be restored and prioritized to support health insurance access in farmworker and other vulnerable, hard-to-reach communities. Without sufficient funding, many programs have been forced to cut their outreach and enrollment services, disproportionately affecting rural communities where there are fewer resources.

CONCLUSION

Farmworkers and their families are valuable members of our rural communities. Yet farmworkers are often excluded from and overlooked by our federal policies and programs. As a result, farmworker communities are

¹⁶⁹ See *The Children's Health Insurance Program*, GEORGETOWN UNIV. HEALTH POLICY INST. CTR. FOR CHILDREN AND FAMILIES (Feb. 6, 2017), <https://ccf.georgetown.edu/2017/02/06/about-chip/> [https://perma.cc/E4MK-4BTJ].

¹⁷⁰ See SHANNON McCONVILLE ET AL., PUB. POL. INST. CAL., HEALTH COVERAGE AND CARE FOR UNDOCUMENTED IMMIGRANTS 1 (Nov. 2015), http://www.ppic.org/content/pubs/report/R_1115SMR.pdf [https://perma.cc/Z69Z-E9VR].

among the most vulnerable, disadvantaged, and underserved in the United States. While discussed separately in this article, immigration, labor, occupational health and safety, and health-care policy are intertwined when it comes to the daily lives of farmworker families. Underlying all of these issues are immigration status and our broken immigration system. Meaningful immigration reform with a path to citizenship would help empower farmworkers to advocate for improved policies in their workplaces and in government while ensuring a stable workforce. Ending the fear of arrest and deportation for law-abiding undocumented farmworkers would enable families to access health care, attend school functions, and in other ways participate in the communities that they enrich. Our recommended improvements would be steps toward true and sustainable revitalization of these communities, as well as an acknowledgement of the crucial role that farmworkers play for the present and future of rural America.