

Historical and Current Insights on Environmental Health and Agricultural Guestworkers

*Joan Flocks & Maria Espinoza**

Historically, during times of perceived labor shortages in the U.S. agricultural industry, the federal government has enacted policies to ensure the availability of temporary agricultural guestworkers. The current H-2A Temporary Agricultural Guestworker program has been in place for decades, and its use is expanding rapidly. Yet, policies that guarantee a stream of agricultural workers have often failed to protect the health and safety of those workers while they are in this country. Factors such as preexisting health issues, occupational hazards like pesticide and heat exposure, and conditions related to low socioeconomic status merge and accumulate for agricultural workers to negatively impact their health and well-being. H-2A workers face the same occupational and environmental health issues as all agricultural workers, but characteristics of the H-2A program may alter underlying determinants to make these workers even more vulnerable. The consequences of a lack of protective health measures became evident during the COVID-19 pandemic. Agricultural workers, including H-2A workers, were deemed essential during the pandemic and the H-2A program was expanded to meet critical food security needs of the nation, but there was no corresponding additional protection for workers' health at the federal level. Although some states implemented specific protective health measures for agricultural workers, most did not, and there were multiple reports

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of COVID-19 outbreaks among worker populations. Activists, advocates, and workers themselves recognized the risks of the situation and, as these groups have historically done with environmental health issues, rallied for reform.

This Article explores how past policies concerning the public health of agricultural workers, and especially guestworkers, mirror current policy. It offers a framework with which to contextualize the environmental health of agricultural workers, including the disproportionate impact that COVID-19 has had on this occupational community. It describes the efforts of agricultural workers and their advocates to address the current public health crisis. Finally, it recommends that, at the very least, lessons learned from the COVID-19 pandemic should be incorporated into future policy reform of the H-2A program.

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INTRODUCTION

Agricultural guestworkers are currently being brought to the United States in record numbers under the H-2A visa program.¹ For these guestworkers and domestic² agricultural workers, physical living and working environments can significantly affect personal health. The challenges that domestic agricultural workers face in these environments are well-documented.³ Yet, unless they are

1. *Temporary Agricultural Visas Increase in 2020, Despite Pandemic*, USAFACTS (Apr. 23, 2021), <https://usafacts.org/articles/temporary-h2a-agricultural-visas-increase-in-2020-despite-pandemic/>.

2. For purposes of this Article a “domestic” agricultural worker is someone whose permanent residence in the United States, whether they are a migrant or seasonal worker or whether they are documented or undocumented, as opposed to a “guest” agricultural worker, whose permanent residence is in another country. See *Migrant Division*, S.C. LEGAL SERVS., <https://sclegal.org/migrant/> (last visited June 27, 2021).

3. See generally DVERA I. SAXTON, *THE DEVIL’S FRUIT: FARMWORKERS, HEALTH, AND ENVIRONMENTAL JUSTICE* (2021); LATINX FARMWORKERS IN THE EASTERN UNITED STATES: HEALTH, SAFETY, AND JUSTICE (Thomas A. Arcury & Sara A. Quandt eds., 2d ed. 2020); SARAH BRONWEN HORTON, *THEY LEAVE THEIR KIDNEYS IN THE FIELDS: ILLNESS, INJURY, AND ILLEGALITY AMONG U.S.*

victims of human trafficking, domestic agricultural workers have more agency over these spaces than H-2A workers who are, by law, dependent on employers for many aspects of their livelihoods and physical well-being.⁴ This was illustrated recently by the disproportionate impact that COVID-19 had on H-2A workers, who were often exposed to the virus in the same physical living spaces that the law mandates employers provide for them.⁵

Environmental health issues have often been at the core of farmworker organizing efforts and subsequent policy response. This Article examines agricultural guestworker programs with an emphasis on environmental health issues. Part I provides historical background on agricultural guestworker programs and describes the current framework and use of the H-2A program. Part II describes general environmental health issues that historically and currently affect agricultural workers, and specifically focuses on how the interrelated issues of housing and COVID-19 have impacted H-2A workers. Part III describes how agricultural workers and their advocates have incorporated environmental health concerns in their efforts to challenge and reform the current agricultural guestworker program.

This topic is important and timely. As use of the H-2A program continues to expand, policymakers should consider lessons from the COVID-19 pandemic to ensure that the program's growth does not come at the expense of a safe and healthy workforce.

I. TEMPORARY AGRICULTURAL WORKER PROGRAMS

A. *The Bracero Program*

Since the mid-1900s, the U.S. government has addressed the need for an inexpensive, consistent agricultural workforce through programs that allow the importation of temporary guestworkers and that function simultaneously as immigration policy and labor control.⁶ Early immigration policy was more focused on characterizing European immigrants and restricting Asian immigrants than it was on regulating Mexican immigrants residing mainly in the southwestern United States.⁷ However, in 1917, Mexican immigrants became caught up in restrictive immigration legislation that imposed a literacy test, head

FARMWORKERS (2016); SETH M. HOLMES, *FRESH FRUIT, BROKEN BODIES: MIGRANT FARMWORKERS IN THE UNITED STATES* (2013).

4. See FARMWORKER JUST., *NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS US AND FOREIGN WORKERS* 21–28 (2011), <http://www.farmworkerjustice.org/wp-content/uploads/2012/05/7.2.a.6-No-Way-To-Treat-A-Guest-H-2A-Report.pdf> (explaining how H-2A workers are made dependent on their employers).

5. See *H-2A Employer Health Equity Toolkit*, CTNS. FOR DISEASE CONTROL & PREVENTION (Aug. 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/agricultural-employers.html>.

6. Patricia Garcia, *Documenting and Classifying Labor: The Effect of Legal Discourse on the Treatment of H-2A Workers*, 14 *ARCHIVAL SCI.* 345, 348–49 (2014).

7. See generally Katherine Benton-Cohen, *Other Immigrants: Mexicans and the Dillingham Commission of 1907-1911*, 33 *J. AM. ETHNIC HIST.* 33 (2011).

tax, and prohibition on contract labor, which made their numbers decline dramatically.⁸ That same year, U.S. involvement in World War I caused a shortage of native-born workers and an increased demand for food.⁹ In 1917, agricultural stakeholders convinced the U.S. Department of Labor (DOL) to suspend restrictions for Mexican immigrants entering the United States to work under short-term contracts.¹⁰ Between 1917 and 1921, when this initial guestworker program officially ended, approximately 73,000 Mexican workers entered the United States.¹¹ Despite policy requiring these temporary workers to return to their country of origin after their contracts ended, many remained in the United States, which led to increased immigration from Mexico during the 1920s.¹² During the Depression, undocumented workers were viewed as competition for jobs, and from 1929 to 1932, restrictive policies and negative public perception led to the repatriation of at least 345,000 Mexican immigrants.¹³

In 1942, during World War II and again in response to a shortage of agricultural labor, representatives from the U.S. and Mexican governments exchanged diplomatic notes and created an agreement allowing agricultural workers from Mexico to be brought into the United States.¹⁴ This started a series of such agreements between the two countries that set the terms of the *Bracero* Program,¹⁵ which allowed men recruited by the Mexican government to temporarily immigrate to the United States on short-term, seasonal agriculture contracts.¹⁶ More than 200,000 *braceros* entered the United States during and after World War II, and the two governments signed a new agreement to continue

8. *Id.* at 37; Jorge Durand, *The Bracero Program (1942-1964) A Critical Appraisal*, 9 MIGRACIÓN Y DESARROLLO 25, 28 (2007).

9. Durand, *supra* note 8, at 28.

10. *Id.* Workers were required to work for the employer who contracted them for up to one year. Philip Martin, *Guestworker Policies for the Twenty-First Century*, 23 J. ETHNIC & MIGRATION STUD. 483, 486 (1997). This is an early example of how policies regulating agricultural labor and immigration have been linked historically: when immigrant labor is needed in the agricultural industry, immigration policy is relaxed; when immigrant labor is not desirable—for political, economic, or social reasons—immigration policy becomes more restrictive. Gilberto Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L. REV. 66, 88–89 (1975).

11. Maria Elena Bickerton, *Prospects for a Bilateral Immigration Agreement with Mexico: Lessons from the Bracero Program*, 79 TEX. L. REV. 895, 898 (2001); *Study of Population and Immigration Problems, Administrative Preservations [III], Admission of Aliens into the United States for Temporary Employment. and "Commuter Workers" Hearing Before the Comm. on the Judiciary*, 88th Cong. 27 (1963).

12. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 TEX. HISP. J. L. & POL'Y 79, 83 (2004).

13. James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 243 (1995).

14. Otey M. Scruggs, *Evolution of the Mexican Farm Labor Agreement of 1942*, 34 AGRIC. HIST. 140, 140, 147 (1960).

15. *Bracero* comes from the Spanish word *brazo* which translates to arm. A *bracero* is, loosely translated, a man who works with his arms—such as an agricultural worker.

16. Baker, *supra* note 12, at 84.

the program in 1948.¹⁷ While the *Bracero* Program was originally conceived only as a labor supplement during the War, it lasted for more than two decades and had to be renegotiated constantly because of ongoing debate about competition between domestic agricultural workers and *braceros* and the U.S. government's desire to control undocumented immigration.¹⁸

Agricultural workers—both domestic and *braceros*—endured difficult living and working conditions. In recognition of this, President Truman signed an executive order in 1950 establishing the President's Commission on Migratory Labor to investigate the "social, economic, health, and educational conditions among migratory workers, both alien and domestic, in the United States."¹⁹ The Commission made field trips to observe and speak with workers and employers; held public hearings in twelve locations throughout the country; heard testimony from employers, workers, labor organizations, governmental officials, social workers, health authorities, educational leaders, and religious groups; and attended conferences on topics related to its responsibilities.²⁰ Among the many issues reported by the Commission were several related to environmental and public health issues affecting domestic and temporary agricultural workers.²¹ Housing conditions were found to be at best substandard and at worst deplorable.²² One Florida public health worker testified:

Most [employer provided living quarters] do not have running water or adequate toilet facilities. The families are crowded into one or two rooms, and in many instances, we have found upon inspection, farm laborers living in quarters which in a good dairy country . . . you wouldn't place your good-blooded cattle.²³

The Commission also noted disproportionate rates of illness, disease, and death among agricultural workers, including conditions such as tuberculosis; infant and maternal mortality; dysentery; enteritis; smallpox; typhoid; and nutritional deficiencies including rickets, scurvy, and pellagra.²⁴ Importantly, the Commission illustrated the close relationship between unsanitary living conditions and poor health with this chilling testimony:

A sanitarian reports 180 people living in 60 rooms, with only one toilet stool that works . . . One of our public health nurses visited a nursery maintained

17. James F. Creagan, *Public Law 78 A Tangle of Domestic and International Relations*, 7 J. INTER-AM. STUD. 541, 542 (1965). The United States also entered into agreements with British West Indies governments to bring workers to the East Coast, first as the Emergency Labor Supply Program from 1943-1947, then as a guestworker program. Cindy Hahamovitch, *The Worst Job in the World' Reform, Revolution, and the Secret Rebellion in Florida's Cane Fields*, 35 J. PEASANT STUD. 770, 776 (2008).

18. Creagan, *supra* note 17, at 542-43.

19. Exec. Order No. 10,129, 3 C.F.R. ch. 2, at 101 (1950).

20. PRESIDENT'S COMM'N ON MIGRATORY LAB., MIGRATORY LABOR IN AMERICAN AGRICULTURE: REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR vii (1951).

21. *Id.* at 153-59.

22. *Id.* at 145.

23. *Id.*

24. *Id.* at 153.

on a private farm and found 48 . . . infants on two double beds. I might add that two of the babies in that location subsequently died.²⁵

In response to these findings, the Commission recommended that the government focus on using more domestic agricultural workers and that “no special measures should be adopted to increase the number of alien contract laborers.”²⁶ It also advised that the government improve relevant regulations and monitor wages, employer relations, undocumented workers, housing, and public health.²⁷ But President Truman was unable to fully enact the Commission’s recommendations by the end of his term because of pressure from agricultural producers and their congressional allies, and demand for labor due to U.S. involvement in the Korean War.²⁸

Instead, a bill described by one opponent as “diametrically opposed” to the Commission’s recommendations was introduced in the House and Senate; it proposed bringing more Mexican workers into the United States with little bureaucratic intervention.²⁹ Opponents of the bill cited public health concerns that were sometimes couched in culturally derogatory terms, focusing more on the health problems workers could bring into the United States than on those they would suffer once they arrived.³⁰ Ultimately, pressure from agricultural producers won out and in 1951 the bill became Public Law 78,³¹ amending the Agricultural Act of 1949 and essentially codifying the *Bracero* Program.³² The law established many of the provisions that still exist in the current H-2A program. For example, before an employer could bring in temporary guest workers they were required to show that there was a bona fide shortage of domestic agricultural workers, that they could not hire native labor at wages and hours comparable to those offered to immigrants, and that the use of *braceros* did not adversely affect the wages and working conditions of domestic workers.³³

In theory, the statutory requirements of the *Bracero* Program were meant to protect guestworkers and deter agricultural producers from abusing the program by using guestworkers as strikebreakers. These regulations included: guaranteed employment for the prevailing area wage and for three-fourths of the contract period; adequate and sanitary housing; reasonably priced meals; occupational

25. *Id.* at 155.

26. *Id.* at 178; Robert S. Robinson, *Taking the Fair Deal to the Fields: Truman’s Commission on Migratory Labor, Public Law 78, and the Bracero Program, 1950-1952*, 84 AGRIC. HIST. 381, 389 (2010).

27. PRESIDENT’S COMM’N ON MIGRATORY LAB., *supra* note 20, at 177–85.

28. Robinson, *supra* note 26, at 389.

29. *Id.* at 390.

30. Representative Emmanuel Celler is reported to have commented, “. . . Mexican workers coming in here are afflicted with tuberculosis, dysentery, and in some cases leprosy . . . this bill does nothing about it. It actually would encourage wetbacks to come cross the border – encourage more disease-ridden Mexicans to handle our raw food.” *Id.* at 391.

31. Act of July 12, 1951, Pub. L. No. 82-78, 65 Stat. 119.

32. See RICHARD B. CRAIG, *THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY* 4 (1971).

33. *Id.*

insurance; and free return transportation to Mexico.³⁴ But in practice, many of these requirements were viewed as vague and ambiguous.³⁵ The program became infamous for enabling exploitative labor and living conditions. Former *braceros* recall unlivable housing conditions, food poisoning, starvation, and wage theft.³⁶

During its lifespan, the *Bracero* Program brought about five million foreign workers into twenty-four states.³⁷ But after nearly two decades of heavy criticism from stakeholders including labor advocates and the Mexican government, Congress finally declined to renew the program after 1965.³⁸ One of the *Bracero* Program's most notable critics was President Eisenhower's Labor Secretary James Mitchell who focused on reforming the program in a way that would prioritize domestic agricultural workers he felt had been left behind.³⁹ Secretary Mitchell attempted to strictly enforce existing *Bracero* Program regulations and enacted new housing, food, and wage regulations.⁴⁰ Other opponents of the program were Representative Henry B. González from Texas, the longest serving Hispanic member of Congress (1961-1999),⁴¹ and Representative Edward Roybal from California, a Mexican-American with a background in public health who served in the House from 1963 to 1993.⁴² In addition to denouncing the low wages paid to *braceros*, both Congressmen opposed the program because of the poor public health and living conditions of the workers.⁴³

B. The H-2A Program

The Immigration and Nationality Act of 1952 renewed the *Bracero* Program, but it also created a new H-2 nonimmigrant category for individuals coming "temporarily to the United States to perform other temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country."⁴⁴ The H-2 program contained some of the same components as the *Bracero* Program, such as the guarantee of free housing,

34. *Id.* at 5.

35. *Id.*

36. See generally MIREYA LOZA, *DEFIANT BRACEROS: HOW MIGRANT WORKERS FOUGHT FOR RACIAL, SEXUAL, & POLITICAL FREEDOM* (2016) (for a collection of oral histories from former *braceros* describing all aspects of life in the program).

37. Garcia, *supra* note 6, at 348.

38. Andrew J. Hazelton, *Farmworker Advocacy Through Guestworker Policy: Secretary of Labor James P. Mitchell and the Bracero Program*, 29 J. POL'Y HIST. 431, 451 (2017).

39. *Id.* at 439–50.

40. *Id.*

41. HISPANIC AMERICANS IN CONGRESS, 1822-2012, 400 (Matthew A. Wasniewski et al. eds., 2013).

42. *Id.* at 410.

43. *Id.* at 403, 413; Natalia Molina, *Borders, Laborers, and Racialized Medicalization: Mexican Immigration and US Public Health Practices in the 20th Century*, 101 AM. J. PUB. HEALTH 1024, 1028–29 (2011).

44. Immigration and Nationality Act, Pub. L. No. 82-414, § 101(a)(15)(H)(ii), 66 Stat. 163, 168 (1952).

transportation, and a prevailing wage, but technical issues made it difficult and inconvenient for employers to use and it remained relatively underutilized for decades.⁴⁵ This changed in 1986 with the implementation of the Immigration Reform and Control Act (IRCA), which subdivided the H-2 visa category into H-2A for agricultural workers and H-2B for nonagricultural workers.⁴⁶

The H-2A visa is one of many classifications for foreign nationals who wish to come into the United States as temporary workers. The different classifications vary mainly by types of job and skills level,⁴⁷ but all these types of temporary workers are considered “nonimmigrants.”⁴⁸ The H-2A program allows “petitioners” (U.S. employers, associations of employers, farm labor contractors, and other authorized agents) who meet specific regulatory requirements to apply for permits to bring workers in from certain countries⁴⁹ to fill temporary or seasonal agricultural jobs.⁵⁰ Obtaining a H-2A permit requires several steps. Briefly, one of the first steps is for petitioners to file an application with the U.S. DOL that verifies two things about the temporary or seasonal jobs they seek to fill:

(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and

(B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.⁵¹

Initially, use of the H-2A program was modest, but it grew in the mid- to late 2000s and is currently in a period of rapid expansion.⁵² In 2006, the number

45. Baker, *supra* note 12 at 84, 89–91; Karla M. Campbell, *Guest Worker Programs and the Convergence of U.S. Immigration and Development Policies: A Two-Factor Economic Model*, 21 GEO. IMMIGR. L.J. 663, 666–67 (2007). The exception to this was in the Florida sugar cane industry, which began importing temporary workers first from the Bahamas in 1942, then from Jamaica. Hahamovitch, *supra* note 17, at 775–76. The Caribbean guestworker program was notorious for poor working conditions and wage disputes but was still in operation in 1952, when the guestworkers were reclassified as H-2 workers. *Id.* at 776–77.

46. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Baker, *supra* note 12, at 86–88.

47. The H-2A program is specifically for agricultural workers; other temporary worker programs pertain to a variety of occupations and classifications including registered nurses working where there are shortages of health care professionals; representatives of foreign media; internationally recognized athletes and entertainers; and religious workers. See *Temporary (Nonimmigrant) Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 12, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-nonimmigrant-workers>.

48. *Id.*

49. *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 9, 2021), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers>. As of November 2021, the Secretary of Homeland Security and Secretary of State had identified eighty-two eligible sending countries. *Id.*

50. 8 U.S.C. § 1188.

51. *Id.* § 1188(a)(1).

52. Briana Beltran, *134,368 Unnamed Workers: Client-Centered Representation on Behalf of H-2A Agricultural Guestworkers*, 42 N.Y.U. REV. L. & SOC. CHANGE 529, 535–36 (2019).

of H-2A positions certified was around 59,000.⁵³ In 2020, it was 275,430.⁵⁴ Researchers offer several reasons for this expansion, including an aging domestic agricultural worker population and a decline in the undocumented agricultural worker population due to increased immigration enforcement during the Obama and Trump administrations.⁵⁵ In 2020, the majority of H-2A certified jobs were in the states of Florida, Georgia, Washington, California, and North Carolina, with Florida claiming 14.2 percent of the certified positions.⁵⁶

II. ENVIRONMENTAL HEALTH AND TEMPORARY GUESTWORKERS

A. Historical Considerations

In the early twentieth century, public health issues began to influence immigration policy, including laws regulating Mexican immigration.⁵⁷ For example, in 1916, an outbreak of typhus among Mexican railroad workers living in employer-provided camps in California prompted state health officials and the U.S. Public Health Services to initiate extreme health monitoring measures along the U.S.-Mexico border and at the railroad camps.⁵⁸ In U.S.-Mexico border towns, arrivals from Mexico were subjected to intrusive medical procedures at disinfection stations.⁵⁹ Immigrants arriving at the El Paso site were required to remove all clothing, which was then chemically laundered, and to stand naked in large groups before medical inspectors.⁶⁰ They had their scalps examined for lice, the vectors for typhus; if lice were found, they had their hair shaved or washed with kerosene and vinegar.⁶¹ They also had their bodies doused with soap, kerosene, and other chemicals; they were vaccinated for smallpox; and then they underwent medical examination, psychological profiling, and other personal interrogation.⁶² At the California railroad camps, the State Board of Health mandated that workers arriving from Mexico be quarantined in separate camps for fifteen days and that foremen boil all bedding and clothing, sweep and mop all living quarters with coal oil and water, bathe all individuals with coal oil and

53. OFF. OF FOREIGN LAB. CERTIFICATION, U.S. DEP'T OF LAB., FOREIGN LABOR CERTIFICATION: INTERNATIONAL TALENT HELPING MEET EMPLOYER DEMAND 17 (2007).

54. *Id.*

55. Pia M. Orrenius & Madeline Zavodny, *Help Wanted Employer Demand for Less-Skilled Temporary Foreign Worker Visas in an Era of Declining Unauthorized Immigration*, 6 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 45, 46 (2020).

56. OFF. OF FOREIGN LAB. CERTIFICATION, U.S. DEP'T OF LAB., H-2A TEMPORARY AGRICULTURAL PROGRAM – SELECTED STATISTICS, FISCAL YEAR (FY) 2020, https://www.dol.gov/sites/dolgov/files/eta/oflc/pdfs/h-2a_selected_statistics_fy2020.pdf.

57. Molina, *supra* note 43, at 1024.

58. *Id.* at 1025–26; Alexandra Minna Stern, *Buildings, Boundaries, and Blood Medicalization and Nation-Building on the U.S.-Mexico Border, 1910-1930*, 79 HISP. AM. HIST. REV. 41, 42 (1999).

59. Stern, *supra* note 58 at 45–46.

60. *Id.* at 45.

61. *Id.* at 45–46.

62. *Id.* at 46.

water, and dip all camp residents' shoes in gasoline.⁶³ Health officials also used cyanide gas to fumigate for vermin in the camps.⁶⁴

These public health measures were often shrouded in blatantly racist rhetoric. "Hundreds [of] dirty lous[y] destitute Mexicans . . . will undoubtedly . . . bring and spread Typhus unless a quarantine is placed at once," the mayor of El Paso wrote to the Surgeon General in Washington.⁶⁵ Although health officials acknowledged the significant role that substandard housing played in the spread of typhus, they nevertheless shifted the blame for those conditions onto the Mexican workers themselves. As one epidemiologist for the California State Board of Health wrote:

Unfortunately, housing conditions under which he is at present constrained to live are in many instances far from satisfactory and the Mexican himself is keen to note that all his attempts to maintain satisfactory hygienic and sanitary standards under such conditions are practically useless . . . It is true, nevertheless that the Mexican has himself to blame to a large extent, for such conditions. We can only account for this state of affairs by the fact that the Mexican peon . . . came from a class rather low in the social scale. The railroads, recognizing the unsanitary conditions under which the peon had lived in Mexico, had formerly always regarded him as incapable of appreciating anything better.⁶⁶

Mexican immigrants resisted the intrusive measures and racist overtones. In January 1917, domestic worker Carmelita Torres refused to submit to inspection at the border station in Juarez, Mexico and instead led a group of about two-hundred workers, mainly women, in what became known as the "Bath Riots"—several days of demonstrations at the border crossing and in the streets against the U.S. Public Health Services and other agencies enforcing the measures.⁶⁷ At one of the California railroad camps, a group of workers wrote a letter lamenting the "offensive and humiliating" regulations imposed on them:

When we crossed the border into this country, the health inspector inspected us. If the railroad line needs or wants to take such precautions it is not necessary that they treat us in this manner. For this, they would need health inspectors who assisted every individual with medical care and give us 2 rooms to live, one to sleep in and one to cook in, and also to pay a fair wage to obtain a change of clothes and a bar of soap . . . Health comes from this and these precautions are the basis for achieving sanitation. Health we have. What we need is liberty and the opportunity to achieve it . . .⁶⁸

63. James G. Cumming, *Typhus Fever in California*, 15 CAL. STATE J. MED. 154, 156–57 (1917).

64. Molina, *supra* note 43, at 1026.

65. Maclovio Perez, Jr., *El Paso Bath House Riots (1917)*, TEX. STATE HIST. ASS'N: HANDBOOK OF TEX. (July 30, 2016), <https://www.tshaonline.org/handbook/entries/el-paso-bath-house-riots-1917>.

66. H.F. Senftner, *Typhus and the Mexican Immigrant in California*, 12 CA. ST. BOARD OF HEALTH 253, 255 (1916).

67. Stern, *supra* note 58 at 43–45.

68. Molina, *supra* note 43, at 1026.

However, resistance ultimately failed to change the mandatory inspection practices, which continued into the 1920s.⁶⁹ Workers who participated in the *Bracero* Program from 1943 to 1964 were subject to similarly intrusive and humiliating medical procedures, undergoing multiple extensive medical examinations by Mexican and U.S. agency health officials.⁷⁰ In Mexico, prospective *braceros* were required to undress and be examined in groups by health officials who examined their bodies for calluses as evidence of hard work and scars as evidence of injury.⁷¹ They underwent chest x-rays, serological tests, and psychological screenings and were doused with chemicals.⁷² If they passed these examinations, they still underwent similar examinations once they arrived in the United States.⁷³ But once the *braceros* reached their work destinations, their health and well-being were no longer prioritized by employers.⁷⁴ Throughout the life of the *Bracero* Program, many employers failed to meet conditions required by law, causing their workers to endure substandard housing, inadequate nutrition, illness without health care, and inconsistent wages.⁷⁵

B. Current Environmental Health Issues for Agricultural Workers

Agricultural work is still one of the most dangerous jobs in the United States.⁷⁶ These workers and their families are disproportionately exposed to a variety of occupational and environmental hazards, including pesticides and excessive heat.⁷⁷ Studies have documented the negative health effects of pesticide exposure, including cancer, Parkinson's disease, asthma, and a variety of auto-immune diseases.⁷⁸ More recently, research has documented the health risks associated with the occupational heat exposure, physical exertion, and dehydration that many agricultural workers experience on a daily basis.⁷⁹

69. *Id.* at 1027.

70. *Id.*

71. *Id.* at 1028.

72. *Id.* at 1027.

73. *Id.* at 1028.

74. *See id.*

75. *Id.*

76. Joan Flocks, *The Environmental and Social Injustice of Farmworker Pesticide Exposure*, 29 GEO. J. ON POVERTY L. & POL'Y 255–58 (2012).

77. Federico Castillo et al., *Environmental Health Threats to Latino Migrant Farmworkers*, 42 ANN. REV. PUB. HEALTH 257, 259 (2021).

78. Sara A. Quandt et al., *Occupational Health Outcomes for Workers in the Agriculture, Forestry, and Fishing Sector Implications for Immigrant Workers in the Southeastern US*, 56 AM. J. INDUS. MED. 940, 942–43 (2013); *see generally* Jane A. Hoppin et al., *Pesticides Are Associated with Allergic and Non-Allergic Wheeze Among Male Farmers*, 125 ENV'T HEALTH PERSPS. 535 (2017); Stephanie M. Engel et al., *Prenatal Organophosphorus Pesticide Exposure and Child Neurodevelopment at 24 Months An Analysis of Four Birth Cohorts*, 124 ENV'T HEALTH PERSPS. 822 (2016); Marianne Van Der Mark et al., *Is Pesticide Use Related to Parkinson Disease? Some Clues to Heterogeneity in Study Results*, 120 ENV'T HEALTH PERSPS. 340 (2012).

79. *See generally* Madelyn C. Houser et al., *Inflammation-Related Factors Identified as Biomarkers of Dehydration and Subsequent Acute Kidney Injury in Agricultural Workers*, 23 BIOLOGICAL RSCH. NURSING 676 (2021).

Internationally, agricultural workers in certain countries have reported epidemics of chronic kidney disease of unknown etiology, and while researchers have grappled with potential causes such as pesticide exposure, heat stress, and exposure to heavy metals, a definitive explanation remains undetermined.⁸⁰ Other negative occupational health outcomes among agricultural workers include arthritis and musculoskeletal disorders,⁸¹ as well as mental health issues.⁸²

These adverse health outcomes are compounded by the fact that many agricultural workers often lack access to adequate health care, while others may not even seek health care due to deportation fears, language barriers, and other social determinants.⁸³ “Structural vulnerability” is a term used to describe how a range of historical and current forces, including economic, political, and cultural variables, may compound to harm an individual’s health.⁸⁴ Medical anthropologist Dvera Saxton describes how “toxic layers” of cumulative and chronic illnesses among agricultural workers can intertwine with environmental and social disparities, adding to workers’ “overall structural vulnerabilities, or the patterned suffering endured by people who are especially marginalized in our society.”⁸⁵ Saxton writes, “[f]armworkers’ lived experiences of toxic layering and invisible harm, and the failure of policies and industry to address them, have resulted in syndemic patterns of ill health and ecosocial suffering throughout farmworkers’ life courses and across generations.”⁸⁶

Although H-2A workers face the same occupational and environmental health hazards as all agricultural workers, characteristics of the H-2A program may alter underlying determinants that can make these workers even more structurally vulnerable.⁸⁷ These determinants include workers’ control over their work environments, their knowledge of the U.S. healthcare system, and the quality of the built environments they are exposed to everyday. H-2A regulations

80. Roxana Chicas et al., *Chronic Kidney Disease Among Workers: A Review of the Literature*, 67 *WORKPLACE HEALTH & SAFETY* 481, 484 (2019).

81. Quandt et al., *supra* note 78, at 942.

82. See generally Joseph G. Grzywacz et al., *Depressive Symptoms and Sleepiness Among Latino Farmworkers in Eastern North Carolina*, 16 *J. AGROMEDICINE* 251 (2011).

83. Amy K. Liebman et al., *Occupational Health Policy and Immigrant Workers in the Agriculture, Forestry, and Fishing Sector*, 56 *AM. J. INDUS. MED.* 975, 982 (2013).

84. James Quesada et al., *Structural Vulnerability and Health: Latino Migrant Laborers in the United States*, 30 *MED. ANTHROPOLOGY* 339, 341–42 (2011).

85. Saxton, *supra* note 3, at 96.

86. *Id.* at 171. “Syndemic” is a combination of the terms “synergistic” and “epidemic.” The criteria of a syndemic are:

- (1) two (or more) diseases or health conditions cluster within a specific population; (2) contextual and social factors create the conditions in which two (or more) diseases or health conditions cluster; and (3) the clustering of diseases results in adverse disease interaction, either biological or social or [behavioral], increasing the health burden of affected populations.

Merrill Singer et al., *Syndemics and the Biosocial Conception of Health*, 389 *LANCET* 941, 942 (2017).

87. Thomas A. Arcury et al., *Job Characteristics and Work Safety Climate Among North Carolina Farmworkers with H-2A Visas*, 20 *J. AGROMEDICINE* 64, 71–74 (2015).

contain no specific health-related requirements beyond any applicable federal, state, and local laws, which generally do not focus on the challenges of agricultural work.⁸⁸ The following Subparts describe how two environmental health issues, housing and COVID-19, have uniquely affected H-2A workers, illustrating the importance of centering environmental health in the program's policy.

1. Housing

The link between poor housing conditions and negative health outcomes is well established.⁸⁹ Farmworkers in general experience higher rates of substandard living environments because of their mobility, low income, and the fact that housing is often connected to their employment.⁹⁰ Substandard living conditions for farmworkers include exposure to vermin⁹¹ and toxins;⁹² overcrowding;⁹³ and structural problems such as peeling paint, water damage, holes in walls or screens, leaking roofs, poor plumbing and electricity, lack of heating or air conditioning, and inadequate cooking and eating facilities.⁹⁴ These conditions can adversely affect physical health through infectious disease, respiratory illness, and heat-related illness.⁹⁵ Moreover, the remoteness of some rural farmworker housing can cause feelings of social isolation and stress.⁹⁶

88. See 20 C.F.R. § 655.135(e) (2012).

89. DON VILLAREJO ET AL., (UN)SAFE AT HOME: THE HEALTH CONSEQUENCES OF SUB-STANDARD FARM LABOR HOUSING: A REVIEW OF THE LITERATURE AND CALL FOR RESEARCH 3–4 (2010); Ernie Hood, *Dwelling Disparities How Poor Housing Leads to Poor Health*, 113 ENV'T HEALTH PERSPS. A311, A312 (2005); Mary Shaw, *Housing and Public Health*, 25 ANN. REV. PUB. HEALTH 397, 397–98 (2004).

90. Sara Quandt et al., *Farmworker Housing in the United States and Its Impact on Health*, 25 NEW SOLS.: J. ENV'T & OCCUPATIONAL HEALTH POL'Y 263, 264 fig.1 (2015).

91. Asa Bradman et al., *Association of Housing Disrepair Indicators with Cockroach and Rodent Infestations in a Cohort of Pregnant Latina Women and Their Children*, 113 ENV'T HEALTH PERSPS. 1795, 1798–99 (2005).

92. Asa Bradman et al., *Pesticides and Their Metabolites in the Homes and Urine of Farmworker Children Living in the Salinas Valley, CA*, 17 J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 331, 344–45 (2006).

93. VILLAREJO ET AL., *supra* note 89, at 20.

94. See *id.* at 16–18; Bradman et al., *supra* note 91, at 1798–99; Amanda L. Gentry et al., *Housing Quality Among North Carolina Farmworker Families*, 13 J. AGRIC. SAFETY & HEALTH 323, 329–31 (2007); Sara Quandt et al., *Cooking and Eating Facilities in Migrant Farmworker Housing in North Carolina*, 103 AM. J. PUB. HEALTH e78, e80–81 (2013).

95. VILLAREJO ET AL., *supra* note 89, at 19–29; Sara Quandt et al., *Heat Index in Migrant Farmworker Housing Implications for Rest and Recovery from Work-Related Heat Stress*, 103 AM. J. PUB. HEALTH e24, e24 (2013).

96. See generally A. Georges et al., *Depression, Social Factors, and Farmworker Health Care Utilization*, 29 J. RURAL HEALTH s7 (2013); Kari Bail et al., *The Impact of Invisibility on the Health of Migrant Farmworkers in the Southeastern United States A Case Study from Georgia*, NURSING RSCH. & PRAC., Mar. 5, 2012, at 1; Thomas A. Arcury et al., *Safety, Security, Hygiene and Privacy in Migrant Farmworker Housing*, 22 NEW SOLS.: J. ENV'T & OCCUPATIONAL HEALTH POL'Y 153 (2012).

Under H-2A regulations, employers must provide housing at no cost to H-2A workers.⁹⁷ This employer-provided housing must meet standards set forth by the DOL's Employment and Training Administration⁹⁸ or the Occupational Safety and Health Administration.⁹⁹ Alternatively, an employer can procure housing that meets local or state standards through the private or public rental market.¹⁰⁰ Federal regulations require that H-2A housing facilities satisfy all established standards, including inspection by appropriate authorities, before employers can ultimately receive a H-2A permit.¹⁰¹

Limited studies show a negative correlation between the presence of H-2A workers in farmworker housing and housing code violations.¹⁰² But these data may not be generalizable across the nation because housing inspections are state-controlled, which creates an inconsistent pattern of inspection and enforcement.¹⁰³ In some states there is no dedicated agency for farmworker housing inspections, and in others, the state agencies charged with the task may be under resourced.¹⁰⁴ Furthermore, if an employer uses rental housing or other public accommodations to fulfill the housing obligation, it is that employer who provides documentation that the housing complies with the applicable local, state, or federal standards.¹⁰⁵ Overreliance on an employer's assurances and other lax inspection practices have led to cases such as one in Missouri where the U.S. DOL sued an H-2A employer for housing workers in "inhumane and unhealthy" conditions.¹⁰⁶ Incidents have not been limited to single states.

97. 20 C.F.R. § 655.122(d)(1) (2012).

98. *Id.* §§ 654.404–417.

99. 29 C.F.R. § 1910.142 (2005).

100. 20 C.F.R. § 655.122(d)(1)(i)(ii) (2012). If there are no local or state standards the housing must meet the OSHA standards at 29 C.F.R. § 1910.142 (2005).

101. 20 C.F.R. § 655.122 (2012).

102. Quirina M. Vallejos et al., *Migrant Farmworkers' Housing Conditions Across an Agricultural Season in North Carolina*, 54 AM. J. IND. MED. 533, 539 (2011).

103. MARY BAUER & MARIA PERALES SANCHEZ, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *RIPE FOR REFORM: ABUSES OF AGRICULTURAL WORKERS IN THE H-2A PROGRAM 27–28* (2020). Notably, this patchwork of regulation was described in the President's Commission on Migratory Labor Report back in 1951:

Twelve States have specific laws or regulations on labor camps. . . Four States have regulations applying to specified groups exclusive of agricultural workers; 4 others have somewhat limited regulations applying to all camps; 3 States, while having no regulations, exercise certain administrative control over labor camps; and the remaining 25 do not regulate labor camps in any way . . . The mere fact that a State has a code does not mean that its labor camp housing meets minimum standards of decency . . .

PRESIDENT'S COMM'N ON MIGRATORY LAB., *supra* note 20, at 139.

104. BAUER & SANCHEZ, *supra* note 103, at 27–28.

105. OFF. OF FOREIGN LAB. CERTIFICATION, U.S. DEP'T OF LAB., *EMPLOYER GUIDE TO PARTICIPATION IN THE H-2A TEMPORARY AGRICULTURAL PROGRAM 11* (2012), https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Employer_Handbook.pdf.

106. See Complaint at 1, *Acosta v. Marin J. Corp.*, No. 18-cv-184 (E.D. Mo. July 26, 2018), ECF No. 1; see also Sky Chadde, *Missouri's Housing Inspections for H-2A Workers Missed Deficiencies for Years*, ST. LOUIS POST DISPATCH (August 22, 2019), https://www.stltoday.com/news/local/state-and-regional/missouri-s-housing-inspections-for-h-2a-workers-missed-deficiencies-for-years/article_6914b8ad-ebec-5740-9613-cab883cf3dad.html. A news article reported that the workers were cramped in a dirty

Recently, farmworker advocates surveyed former H-2A workers in Mexico and found that forty-five percent had lived in conditions that were overcrowded, unsanitary, or both while in the program.¹⁰⁷

Historically, many H-2A employers have found the housing requirement costly and burdensome, and even lobbied to have it removed or altered.¹⁰⁸ Some who have tried to provide decent housing to the H-2A workers they bring in have been met with hostile NIMBYism (“not in my backyard”) from native-born residents, including death threats, lawsuits, and, in one case, possible arson.¹⁰⁹ One result of this has been employers choosing instead to house workers in motels and other less desirable locations with less pushback, to ensure, as one employer stated, “they’re in a suitable area, both for them and their neighbors.”¹¹⁰

Even housing that complies with H-2A regulations can contribute to negative health outcomes. H-2A regulations require minimal spatial dimensions per worker in employer-provided housing: fifty square feet per occupant if using single beds; forty square feet per occupant if using bunk beds; and sixty square feet per occupant for combined cooking, eating, and sleeping purposes.¹¹¹ Although a standard measurement of “crowding” in living spaces has shifted over time,¹¹² household population density has been associated with poor health outcomes, including airborne respiratory disease and psychological distress.¹¹³ This was clearly illustrated by the impact of COVID-19 in agricultural worker housing.¹¹⁴

motel infested with bedbugs, then a former county jail that used to be a Halloween haunted house and that was surrounded with barbed wire, while other workers were placed in houses surrounded by trash piles and plagued by leaking plumbing and no functioning refrigerator. *Id.* The complaint alleged that, among other things, the employer required H-2A workers to live and sleep in overcrowded hotel rooms with four to six workers per room; unsafe deteriorating and unsanitary residences without the spacing required by the program’s regulations; and in a substandard former country jail with inoperable kitchen facilities and limited lighting. Complaint, *supra* note 106, at 3.

107. BAUER & SANCHEZ, *supra* note 103, at 29.

108. DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 86 (2008). In states such as California, the increasing cost of living, including rent, has also contributed to overall agricultural labor shortages and altered the historic migratory pattern of domestic agricultural workers. Geoffrey Mohan, *Desired for Their Labor, Rejected as Neighbors. Farmworkers in California Face Hostile Communities*, L.A. TIMES (June 2, 2017), <https://www.latimes.com/projects/la-fi-agricultural-worker-housing/>.

109. Mohan, *supra* note 108.

110. *Id.* This sentiment, that housing in a motel room is more suitable for workers, appears reminiscent of the earlier noted comment from the California state epidemiologist in 1917 that workers had themselves to blame for poor housing because they did not know any better. *See supra* note 66 and accompanying text.

111. 20 C.F.R. § 654.407(c) (2012).

112. *See* VILLAREJO ET AL., *supra* note 89 at 29–30.

113. *Id.* at 30.

114. In many of the reported outbreaks of COVID-19 among agricultural workers, crowded living conditions were deemed to be a contributing factor to the virus’ spread. Michelle Fawcett & Arun Gupta, *The Food Industry’s Next Covid-19 Victims Migrant Farmworkers*, THESE TIMES (June 11, 2020), <https://inthesetimes.com/article/COVID-19-farms-pandemic-essential-workers-undocumented-coronavirus>.

2. COVID-19

During the COVID-19 pandemic, the Department of Homeland Security (DHS) identified workers in all stages of agricultural commodity production as essential infrastructure workers to ensure the continuity of the nation's critical functions.¹¹⁵ Notably, data reveal that agricultural workers as a group are at a higher risk of developing COVID-19, with one factor being the prevalence of underlying health conditions.¹¹⁶ Typical work and living environments for agricultural workers also put them at higher risk of exposure to COVID-19 as they often labor close together and occupy crowded housing and transportation.¹¹⁷ Access to facilities where they can clean their hands and clothing is often inadequate.¹¹⁸ Early in the pandemic, agricultural worker organizations reported difficulty procuring personal protective equipment (PPE) and culturally appropriate information about the virus and how to prevent its spread.¹¹⁹

In response to these concerns, the Centers for Disease Control and Prevention (CDC) and the DOL developed the *COVID-19 Guidance for Agricultural Workers and Employers*, which includes recommendations for safety practices in worksites, transportation vehicles, and shared housing.¹²⁰ Later, the CDC also released a toolkit designed for H-2A employers, recognizing that “H-2A workers are at increased risk of getting or spreading COVID-19 during travel to and from the U.S., at work sites, in shared housing, and during shared transportation.”¹²¹

The toolkit describes several reasons why H-2A workers are at greater risk, including their status as essential, in-person workers; physical living conditions

115. The category of workers that covered field crop harvesters is

[f]armers, farm and ranch workers, and support service and supplier workers producing food supplies and other agricultural inputs for domestic consumption and export, to include those engaged in raising, cultivating, phytosanitation, harvesting, packing, storing, or distributing to storage or to market or to a transportation mode to market any agricultural or horticultural commodity for human or animal consumption.

CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON THE ESSENTIAL CRITICAL INFRASTRUCTURE WORKFORCE: ENSURING COMMUNITY AND NATIONAL RESILIENCE IN COVID-19 RESPONSE, 10 (2021) https://www.cisa.gov/sites/default/files/publications/essential_critical_infrastructure_workforce-guidance_v4.1_508.pdf

116. Gulcan Onel et al., *Covid-19 Risk Factors Vary by Legal Status Among Florida Crop Workers*, 35 CHOICES MAG. 1, 2 (2020).

117. For example, many harvesters must work side-by-side, share transportation and living quarters, migrate between farms, and may have inadequate access to facilities where they can clean their hands and clothing. Nezahualcoyotl Xiuhtecutli & Annie Shattuck, *Crisis Politics and US Farm Labor Health Justice and Florida Farmworkers Amid a Pandemic*, 48 J. PEASANT STUD. 73, 76 (2021); Joan Flocks, *The Potential Impact of COVID-19 on H-2A Agricultural Workers*, 25 J. AGROMEDICINE 367, 368 (2020).

118. Flocks, *supra* note 117, at 367.

119. Xiuhtecutli & Shattuck, *supra* note 117, at 76.

120. *Agriculture Workers and Employers Interim Guidance from CDC and the U.S. Department of Labor*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-agricultural-workers.html> (last updated June 11, 2021).

121. *H-2A Employer Health Equity Toolkit*, *supra* note 5.

and work spacing between workers; lack of sick leave and access to health care; language and literacy barriers; and mobility of the workforce.¹²² In terms of housing, the CDC guidance documents explicitly acknowledge that “[f]armworkers may have limited control over their environment in some employer furnished housing”¹²³ and that employer-provided H-2A housing is often crowded, making social distancing, quarantining, and isolating difficult.¹²⁴ The guidance documents provide substantial and specific recommendations for employers to implement at the worksite and in housing and transportation vehicles.¹²⁵ It is important to note, however, that these CDC documents provide recommendations, not mandates, and that they are best implemented when workers have some agency over their working and living conditions. For example, domestic agricultural workers who acquire their own housing and transportation may be able to control these spaces in ways that provide more protection from the spread of illness, while H-2A workers who are assigned spaces may not.¹²⁶

H-2A workers may also be more vulnerable during the pandemic due to the inherent power imbalance between a worker and their employer.¹²⁷ The H-2A visa ties a worker to a single employer for the duration of their contract; even if conditions are poor, the individual is unable to seek work elsewhere.¹²⁸ If an H-2A worker is fired, they must return to their home country at their own cost and may be blacklisted from future employment in the United States.¹²⁹ Workers may fear retaliation if they raise concerns.¹³⁰ Furthermore, H-2A workers may be more geographically and socially isolated than domestic workers, and more reluctant to access medical care out of concerns about cost and lack of knowledge of the U.S. healthcare system.¹³¹

Rather than recognizing the additional health risks to this subset of an already vulnerable population, the federal government chose to expand the H-2A program during the pandemic.¹³² In April 2020, the DHS published a rule temporarily expanding the program in order to provide agricultural employers a

122. *Id.*

123. *Agriculture Workers and Employers Interim Guidance from CDC and the U.S. Department of Labor*, *supra* note 120.

124. *H-2A Employer Health Equity Toolkit*, *supra* note 5.

125. *Agriculture Workers and Employers Interim Guidance from CDC and the U.S. Department of Labor*, *supra* note 120.

126. Xiuhtecutli & Shattuck, *supra* note 117, at 87.

127. *See generally* BAUER & SANCHEZ, *supra* note 103 (describing factors of the H-2A program that keep workers from asserting rights and accessing services).

128. Petition for Judicial Review, Declaratory Judgment and Injunctive Relief at 6, *Familias Unidas por la Justicia, AFL-CIO v. Wash. State Dep’t of Lab. & Indus.*, No. 20-2-01556-34 (Wash. Super. Ct. June 4, 2020).

129. *Id.*

130. *See* BAUER & SANCHEZ, *supra* note 103, at 26–27, 37.

131. *See id.* at 8–9, 27, 39.

132. Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency, 85 Fed Reg 21,739 (Apr. 20, 2020) (to be codified at 8 C.F.R. pt. 214, 274a).

flow of legal foreign workers “thereby protecting the integrity of the nation’s food supply chain and decreasing possible reliance on unauthorized aliens, while encouraging agricultural employers’ use of the H-2A program, which protects the rights of U.S. and foreign workers.”¹³³ One concern motivating the rule was fear that the number of available H-2A workers would decrease during the pandemic due to travel restrictions or COVID-19 related illness.¹³⁴ The rule was issued without prior notice or opportunity to comment¹³⁵ and provisions of it were subsequently extended in August¹³⁶ and December 2020.¹³⁷

Although the rule was enacted in response to a national public health crisis, it contained no specific health-related protections for workers. Since the start of the pandemic, there has been no mandated health protection or disease tracking for agricultural workers at the federal level.¹³⁸ Some states implemented specific COVID-19 protections for agricultural workers¹³⁹ but most did not, and there were multiple reports of outbreaks among worker populations.¹⁴⁰ One example

133. *Id.* at 21,739. The changes allowed employers to avoid delay in beginning work with H-2A workers and allowed the workers to stay beyond the 3-year maximum. *Id.* at 21,742.

134. *Id.* at 21,741.

135. *Id.* at 21,743.

136. Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency: Partial Extension of Certain Flexibilities, 85 Fed. Reg. 51,304 (Aug. 20, 2020) (to be codified at 8 C.F.R. pt. 214, 274a).

137. Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency: Extension of Certain Flexibilities, 85 Fed. Reg. 82,291 (Dec. 18, 2020) (to be codified at 8 C.F.R. pt. 214, 274a). At the same time as the H-2A program was being expanded, former President Trump restricted other guestworker programs. In June 2020, he signed an executive order that suspended a variety of temporary work visa programs, including those involving tech workers, hospitality industry workers, work-study students, and au pairs, to reserve these jobs for U.S. citizens considering the unemployment caused by the pandemic. Michael D. Shear & Miriam Jordan, *Trump Suspends Visas Allowing Hundreds of Thousands of Foreigners to Work in the U.S.*, N.Y. TIMES (July 23, 2020), <https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html>. The order did not apply to H-2A agricultural workers. *Id.*

138. Arun Gupta & Michelle Fawcett, *Undocumented Farmworkers Are Refusing Covid Tests for Fear of Losing Their Jobs*, INT’L VIEWPOINT (July 5, 2020), <https://internationalviewpoint.org/spip.php?article6706>.

139. These states included Washington, Oregon, and California. *Id.* In Washington State, for example, Governor Jay Inslee issued a proclamation prohibiting agricultural employers from continuing to operate beyond June 3, 2020, unless they complied with previously enacted requirements that included provisions for PPE, physical distancing and disinfection at the workplace, employee training, response plans, and safe transportation. Proclamation by the Governor Amending Proclamations 20-5, 20-25, 20-25.1, 20-25.2, and 20-25.3, https://www.governor.wa.gov/sites/default/files/proclamations/20-57%20-%20COVID-19%20Concerning%20Agr%20Workers%20Health%20%28tmp%29_0.pdf. “I’d like to address the over 100,000 people in Washington who are working in the agricultural industry. We know that your labor is so critical to providing food for all of us . . .” the Governor said at a press conference. James Drew & Cameron Probert, *Inslee Announces Additional COVID-19 Safety Standards for Agricultural Workers*, TACOMA NEWS TRIBUNE (May 28, 2020), <https://www.thenewstribune.com/latest-news/article243074266.html>.

140. In May 2020, 169 of 340 workers at a greenhouse in New York state tested positive for COVID-19. Marnie Eisenstadt, *Inside Green Empire Farm Upstate NY’s Biggest Coronavirus Outbreak Slams Migrant Workers*, SYRACUSE.COM (May 8, 2020, 6:48 PM), <https://www.syracuse.com/coronavirus/2020/05/inside-green-empire-farm-upstate-nys-biggest-coronavirus-outbreak-slams-migrant-workers.html>. Other reports that month described a farm in Tennessee where all two hundred employees were COVID-

of this occurred in north Florida after two workers in a crew of more than one hundred H-2A watermelon harvesters were discovered to have tested positive for COVID-19 at a previous work location. When the crew supervisor brought one hundred of the workers in for testing at the local health department, ninety-one tested positive.¹⁴¹ Health department staff discovered the crew was being housed in a motel with six to ten workers per room and that most had returned to work the morning after being tested.¹⁴² Several workers reported that they had gone to local emergency departments, and one was reported to have been admitted to the hospital. The crew departed Florida for work in other states shortly after the testing and the health department staff was not able to track them.¹⁴³

Some responses to the spread of COVID-19 among agricultural workers are reminiscent of earlier responses to outbreaks among immigrant labor populations. During the 1916 typhus outbreak in Los Angeles County, government officials shifted blame onto Mexican railroad workers, placing the burden of containment squarely onto the workers and others living in the employer-provided railroad camps.¹⁴⁴ More than one hundred years later, Florida Governor Ron DeSantis shifted blame for the state's surging COVID-19 cases onto agricultural workers.¹⁴⁵ At one press conference, the governor asserted, "some of these guys go to work in a school bus, and they are all just packed there like sardines . . . and there's all these opportunities to have transmission."¹⁴⁶ At another media event, referring to outbreaks among agricultural workers, he warned, "you don't want those folks mixing with the general public if you have an outbreak."¹⁴⁷

19 positive and farms in New Jersey where groups of fifty and sixty workers were infected. Mike Dorning & Jen Skerritt, *Every Single Worker Has Covid at One U.S. Farm on Eve of Harvest*, BLOOMBERG LAW (May 30, 2020, 9:00 PM), <https://news.bloomberglaw.com/daily-labor-report/every-single-worker-has-covid-at-one-u-s-farm-on-eve-of-harvest>. In June 2020, the New York Times reported on several Florida agricultural communities with higher than average confirmed cases of the virus, including the rural town of Immokalee, home to more than 20,000 agricultural workers, which had one of the highest rates of COVID-19 in the state. Patricia Mazzei, *Florida's Coronavirus Spike is Ravaging Migrant Farmworkers*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/18/us/florida-coronavirus-immokalee-farmworkers.html?searchResultPosition=1>; Mica Rosenberg et al., *Coronavirus Spreads Among Fruit and Vegetable Packers, Worrying U.S. Officials*, REUTERS (June 11, 2020, 3:03 AM), <https://www.reuters.com/article/us-health-coronavirus-usa-farmworkers/coronavirus-spreads-among-fruit-and-vegetable-packers-worrying-u-s-officials-idUSKBN2311FO>.

141. Michael Lauzardo et al., *An Outbreak of COVID-19 Among H-2A Temporary Agricultural Workers*, 111 AM. J. PUB. HEALTH 571, 571 (2021).

142. *Id.* at 572.

143. *Id.*

144. Molina, *supra* note 43, at 1026.

145. Daniel Chang et al., *Ron DeSantis Blames Florida Farmworkers for COVID. Aid Groups Say Testing Help Came Late*, TAMPA BAY TIMES (June 19, 2020), <https://www.tampabay.com/news/health/2020/06/19/ron-desantis-blames-florida-farmworkers-for-covid-aid-groups-say-testing-help-came-late/>.

146. Ana Ceballos, *Farmworkers DeSantis' Remarks About Coronavirus Spread Shameful*, WUSF PUB. MEDIA (June 18, 2020, 9:55 AM), <https://wusfnews.wusf.usf.edu/health-news-florida/2020-06-18/farmworkers-desantis-remarks-about-coronavirus-spread-shameful>.

147. Anthony Man, *DeSantis Says Miami and Broward Better at Mask Wearing Than Palm Beach County, Where Coronavirus Case Numbers Aren't Falling as Fast*, S. FLA. SUN SENTINEL (June 9, 2020,

Despite the governor's comments and repeated requests by farmworker advocates and activists for the DeSantis administration to provide more testing, contact tracing, PPE, economic relief, access to health care, and culturally appropriate information,¹⁴⁸ the state was slow to respond to the crisis in agricultural worker communities.¹⁴⁹ Later in the pandemic, the governor prioritized certain occupational groups for vaccinations but agricultural workers were not among them.¹⁵⁰ Furthermore, during Florida's first year in its vaccination campaign, recipients were required to provide identification showing that they lived at least part time in the state, which is difficult for some agricultural workers to do.¹⁵¹ This requirement was finally rescinded by the state's surgeon general in a public health advisory issued in April 2021.¹⁵²

Like other examples of negative health outcomes discussed above,¹⁵³ the stories of COVID-19 outbreaks among H-2A workers are best understood when viewed through a *relational* model of health-environment interaction. According to geographers Nari Senanayake and Brian King, a relational model represents a shift from documenting "conscious, controlled, and contained processes of interaction" to instead highlighting "distributed agency, synergistic effects, and overlapping but distinct assemblages that might better illuminate the radical contingency of disease onset."¹⁵⁴ This approach is employed by historian Linda Nash in her description of agricultural workers' pesticide exposure in the 1950s and 1960s and how public health officials grew frustrated by an inability to monitor and study mobile bodies:

Migrants passed from field to field, county to county, state to state, often not knowing where they would be the following day, unable to recall all the places they had already been. Occupational health professionals found they could not even begin to calculate worker exposures nor track and test worker

8:53 AM), <https://www.sun-sentinel.com/coronavirus/fl-ne-coronavirus-masks-south-florida-desantis-agriculture-20200608-437rgi3tjba5thz4juaq7btmsi-story.html>.

148. Coal. of Immokalee Workers, *Governor DeSantis, Collier County Protect Florida Farmworkers During the COVID-19 Crisis!*, CHANGE.ORG, <https://www.change.org/p/florida-governor-desantis-and-collier-county-health-dept-protect-florida-farmworkers-during-the-covid-19-crisis> (last visited July 1, 2021); *DeSantis Prioritize Vaccine for Frontline Farmworkers in Florida!*, AM. FRIENDS SERV. COMM., <https://secure.everyaction.com/-F3sLUESUkulBEw3Gw4pOg2> (last visited July 1, 2021).

149. Chang et al., *supra* note 145. In one agricultural community, the lack of state response was so concerning that the international medical humanitarian organization Doctors Without Borders, a group that generally works in developing countries, sent in teams of medical workers to provide testing and education. *Id.*

150. Jane Musgrave, *DeSantis Done with Vaccinating by Job; Leaving Out Farmworkers Called Cruel*, PALM BEACH POST (Mar. 5, 2021), <https://www.palmbeachpost.com/story/news/coronavirus/2021/03/05/desantis-done-vaccinating-job-leaving-out-destitute-florida-farmworkers/4592515001/>.

151. *Id.*

152. FLA. DEP'T OF HEALTH, IN RE: RESCISSION OF PRIOR COVID-19 PUBLIC HEALTH ADVISORIES, ELIGIBILITY FOR COVID-19 VACCINES, RESUMING IN-PERSON GOVERNMENT SERVICES (2021), <https://floridahealthcovid19.gov/wp-content/uploads/2021/04/Public-Health-Advisory-filed-4.29.21.pdf>.

153. *Supra* Subpart II.B.

154. Nari Senanayake & Brian King, *Health-Environment Futures Complexity, Uncertainty, and Bodies*, 43 PROGRESS HUM. GEOGRAPHY 711, 713 (2019).

bodies. Movement itself obscured the relationship between bodies and environments, between sick workers and modern orchards.¹⁵⁵

In Nash's account of the agricultural workers' descriptions of illnesses related to pesticide exposure, she notes they did not locate the illnesses as something within their own bodies but instead within a physically threatening environment over which they had little control.¹⁵⁶ Agricultural workers' bodies become such a part of their physical environments that they may, in a sense, become indistinguishable from those settings. Bodies moving through so many environments over time can become unpredictable and resistant to scientific quantification and description.¹⁵⁷ And agricultural workers often recognize that just as they cannot control the physical environments around them, they also cannot control negative health outcomes caused by those environments.¹⁵⁸

For H-2A workers during the COVID-19 pandemic, as for other populations exposed to potentially contaminated spaces, the "environment" includes not only the natural, but also the built environment of worksites and housing.¹⁵⁹ In a relational health-environment framework, workers' bodies, and all their organs and systems, do not simply exist within the built environments they inhabit—they become part of them.¹⁶⁰ Unhealthy spaces become unhealthy workers. Their lack of control over these spaces became increasingly evident as the pandemic wore on. For example, to reduce COVID-19 cases, one Virginia tomato farmer confined H-2A workers to their housing camps and the fields for months without

155. Linda Nash, *The Fruits of Ill-Health Pesticides and Workers' Bodies in Post-World War II California*, 19 OSIRIS 203, 209 (2004).

156. *Id.* at 213. "In their epistemology," Nash writes "the environment, rather than the body, was the site of the pathology." *Id.*

157. *Id.* at 210.

158. *See id.* at 212–13 (relating how agricultural workers in the 1950s described the illnesses they experienced and believed to be related to pesticide exposure); Joan Flocks et al., *Florida Farmworkers' Perceptions and Lay Knowledge of Occupational Pesticides*, 32 J. CMTY. HEALTH 181, 189 (2007) (relating similar descriptions by modern-day farmworkers, including the following quote: "When you empty a bag of soil, there is dust. It can make you sick for two to three months. When you empty the soil there is a powder, very fine. It rises up, gets in your brain and it makes you sneeze. When you breathe it in, it makes[] you feel sick. But I don't think there is a solution to this problem, every time you work with this soil, when you turn it with your hands, you make this dust and you breathe it in. It's the cause of sickness").

159. *See generally* Michelle Murphy, *The "Elsewhere Within Here" and Environmental Illness; or, How to Build Yourself a Body in a Safe Space*, 8 CONFIGURATIONS 87 (2000) (describing the connection between built environments and Multiple Chemical Sensitivity). In Murphy's words, "[t]he built environment, so familiar, that pervades your daily life becomes the site of your suffering. Bewilderingly, painfully, against all logic, your body seems to be rebelling against the inside." *Id.* at 87.

160.

The body is so intimately tied to that environment that every symptom is a reaction to the constantly shifting assemblage of body-building-ecology. Here, in the grapplings between sick bodies and environments, I find 'ecology,' not simply moving from nature to a corporeal scale, but extending from the built environment through the skin, such that the body ecology and the building ecology materially intermingle.

Id. at 110.

outside interaction.¹⁶¹ The company was able to do this because the H-2A workers were dependent on their employment for their visas, housing, and wages.¹⁶² Although the measure was believed to have reduced the number of COVID-19 cases in the worksite, workers felt imprisoned. “You put up with a lot already,” one worker said, “I never expected to lose my freedom.”¹⁶³

III. CONSIDERATION OF ENVIRONMENTAL HEALTH IN GUESTWORKER PROGRAM REFORM

Health concerns and environmental illnesses have often been at the core of social movements,¹⁶⁴ including efforts to organize agricultural workers and bring about policy reform. During the United Farm Workers’ (UFW) boycott of California table grapes in the 1960s, for example, pesticide exposure became a key issue in negotiations with employers after the UFW began noting increased reports of workers experiencing pesticide poisonings.¹⁶⁵ The focus on environmental health has continued into the twenty-first century, with agricultural worker groups forming coalitions with organizations striving to improve housing, transportation, pesticide regulation, and most recently to enact a federal heat protection standard.¹⁶⁶

More recently, even H-2A workers have organized to protest poor working and living environments, despite the risks of being discharged and deported. In 2017, a group of H-2A workers in Washington State went on strike because of poor conditions, including poor quality and quantity of food, lack of shade at the worksite, and being required to work in smoke from nearby wildfires.¹⁶⁷ The workers especially decried the death of a coworker they attributed to being forced

161. Miriam Jordan, *Migrant Workers Restricted to Farms Under One Grower’s Virus Lockdown*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/coronavirus-tomato-migrant-farm-workers.html?searchResultPosition=4>.

162. *Id.*

163. *Id.*

164. Murphy, *supra* note 159, at 87–120.

165. Robert Gordon, *Poisons in the Fields: The United Farm Workers, Pesticides, and Environmental Politics*, 68 PAC. HIST. REV. 51, 56–63 (1999). In 1969, the California Department of Health surveyed 774 workers and found that 71 percent of them had one or more symptoms of pesticide poisoning. *Id.* at 58.

166. Xiuhtecutli & Shattuck, *supra* note 117, at 84. In 2011, the non-profit consumer advocacy group Public Citizen petitioned the Occupational Safety and Health Administration (OSHA) for a mandatory federal heat standard for outdoor workers. Nano Riley, *Farmworkers Are on the Frontlines of Climate Change. Can New Laws Protect Them?*, CIVIL EATS (Feb. 27, 2019), <https://civileats.com/2019/02/27/farmworkers-are-on-the-frontlines-of-climate-change-can-new-laws-protect-them/>. The request was denied, and in 2018 a coalition of 130 environmental, labor, public health, faith-based, and other groups and individuals again petitioned OSHA for a federal standard. *Id.* On October 27, 2021, OSHA published the advance notice of proposed rulemaking to protect indoor and outdoor workers from hazardous heat and at the time of this writing is in the public comment phase. Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings. 86 Fed Reg 59,309 (Oct. 27, 2021) (to be codified at 29 C.F.R. pt. 1920, 1915, 1917, 1918, 1926, 1928).

167. David Bacon, *Braceros Strike After One Worker Dies*, AM. PROSPECT (Aug. 9, 2017), <https://prospect.org/labor/braceros-strike-one-worker-dies/>.

to work during an illness.¹⁶⁸ After the group decided to unionize with Familias Unidas por la Justicia (FUJ), seventy workers were fired.¹⁶⁹ The employer withheld their pay and demanded they leave employer housing immediately without providing the means or resources to relocate.¹⁷⁰ In January 2018, the workers brought a class action against the employer and its parent company, alleging violations under state nondiscrimination law and the federal Trafficking Victims Protection Act and describing harsh working conditions and a pattern of employer intimidation.¹⁷¹ Nearly five hundred agricultural workers joined the class, and in mid-2020, the federal district court approved a \$3.75 million settlement in their favor.¹⁷²

While the impact of the COVID-19 pandemic has disproportionately affected agricultural workers, it has also inspired social action, bringing visibility and support to worker communities and organizations. The conditions underlying agricultural workers' susceptibility to COVID-19 parallel those that farmworker movements have struggled to change.¹⁷³ These conditions include crowded housing and transportation, an employee/employer power imbalance, punitive immigration policies, and an exclusion from protective health, safety, and labor regulations.¹⁷⁴ In California, agricultural workers went on strike to demand more accountability and response after supervisors and employers in various industries failed to inform employees about COVID-19 outbreaks at worksites, provide PPE, and implement other safety and health measures.¹⁷⁵ In Washington State, FUJ petitioned the labor and health departments to adopt emergency rules consistent with science-based guidance on preventing exposure to COVID-19.¹⁷⁶ Petitioners claimed that medical experts recommended more stringent protections for agricultural workers who were at higher risk for complications of COVID-19, including those at risk due to pre-existing medical conditions related to environmental factors.¹⁷⁷

168. *Id.*

169. *Id.*

170. *Id.*

171. *Rosas v. Sarbanand Farms, LLC*, 329 F.R.D. 671 (W.D. Wash. 2018). The case relates an incident where a representative of the employer told the workers that they were expected "to work every day, and only those 'on their death beds' could remain in their housing." *Id.* at 681.

172. Don Jenkins, *Judge OKs Settlement in Suit Against Washington Berry Farm*, THE BULLETIN (July 15, 2021), https://www.bendbulletin.com/business/judge-oks-settlement-in-suit-against-washington-berry-farm/article_c8b55f4d-b3dc-5778-9947-19724bcaa72e.html.

173. *Xiuhtecutli & Shattuck*, *supra* note 117, at 93.

174. *Id.*

175. *Id.* at 78.

176. Petition for Judicial Review, Declaratory Judgment and Injunctive Relief, *supra* note 128, at 13. The petition noted that Washington agricultural employers planned to bring in approximately 30,000 workers from Mexico in the spring and summer of 2020 and would apply for H-2A visas for them; that none of the workers would be tested for COVID-19 before leaving Mexico or after their arrival to Washington; and that such workers are typically housed with other unrelated workers in cramped dormitory-style quarters with common cooking, bathing, and transportation facilities. *Id.* at 5–6.

177. *Id.* at 7–9. The State defended the agencies' actions as the best that could be achieved at the time. Don Jenkins, *Farm Groups Win, as Washington Judge Upholds Housing Rules*, CAP. PRESS (July

Despite the efforts of workers and their advocates in pressing for environmental health protection, federal policy has not ultimately advanced a significant response. The most recent federal legislation pertaining to agricultural workers is the Farm Workforce Modernization Act (FWMA),¹⁷⁸ which was passed with bipartisan support in the U.S. House of Representatives in March 2021 and, at the time of this writing, is before the Senate. The FWMA is controversial among agricultural worker groups but nevertheless represents a compromise reached after months of negotiation between the largest farmworker union, UFW; a major farmworker advocacy organization, Farmworker Justice; members of Congress from both parties; and most U.S. grower associations.¹⁷⁹ It focuses primarily on immigration matters and consists of three parts. Title I includes provisions for how domestic workers can qualify for five-year renewable Certified Agricultural Worker (CAW) status.¹⁸⁰ Workers with CAW status would be able to adjust to lawful permanent resident (LPR) if they continue to work in agriculture for an additional period and pay certain fees.¹⁸¹ Although CAW status protects a worker from deportation, it does not allow them to receive certain public assistance, including health care subsidies under the Patient Protection and Affordable Care Act.¹⁸² Title II outlines changes to the H-2A program including streamlined application procedures for employers.¹⁸³ It includes a few provisions related to health, such as requiring employers to maintain a procedure for prevention of heat illness¹⁸⁴ and expanding funding opportunities for worker housing.¹⁸⁵ Finally, Title III mandates employer use of the Electronic Employment Eligibility Verification System, or E-Verify.

More than 250 agricultural and labor groups joined UFW in support of the Act, hailing it as a commitment to emancipating agricultural workers who feed

20, 2020), https://www.capitalpress.com/state/washington/farm-groups-win-as-washington-judge-upholds-housing-rules/article_98dcacee-c894-11ea-8841-e3143a38b102.html. State Attorney Elliott Furst is reported as stating “Before early this year, we had never heard of COVID . . . [e]verything was quickly discussed and given as much time as it possibly could. . . [t]his is just new ground for everybody.” *Id.* Unfortunately, for workers and their advocates, the superior court judge upheld the state agencies’ policies in July 2020 and is quoted as saying “This is a difficult time and these are extremely difficult issues . . . I can’t find the state acted in an arbitrary or capricious manner.” *Washington Judge Upholds Farm Housing Coronavirus Rules*, ASSOCIATED PRESS (July 20, 2020), <https://apnews.com/article/213a498b2a7cdf0e2416db6c395f0bcd>.

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

179. Jocelyn Sherman, *Farm Workers and Advocates Help Forge Compromise Bill Providing Legal Status to Immigrant Farm Workers During Months of Tough Talks with Growers and Lawmakers from Both Parties*, UNITED FARM WORKERS (Oct. 30, 2019), <https://ufw.org/fwmaintro/>.

180. H.R. 1603 § 101(a).

181. *Id.* § 111(a). Agricultural workers who have worked in the United States for at least ten years prior to the date of enactment of the bill could apply for LPR status they work for at least four more years in agriculture while in CAW status. Agricultural workers who have worked for less than ten years before enactment of the bill would have to work for at least eight years more in agriculture while in CAW status before they could apply for LPR status. *Id.* § 111(a)(1)(A).

182. *Id.* § 102(c).

183. *Id.* § 202.

184. *Id.*

185. *Id.* § 220.

the nation.¹⁸⁶ Some supporters believe that although the FWMA is imperfect, it is the best option for legalization at the moment, given the politically divided Senate.¹⁸⁷ But many smaller worker and food justice organizations oppose the FWMA.¹⁸⁸ A diverse group including FUJ, Food Chain Workers Alliance, Farmworker Association of Florida, California Institute for Rural Studies, and Worker Justice Center of New York released a petition against the FWMA, arguing that it does nothing to address the root causes of labor exploitation and demanding a more immediate path for domestic workers to gain legal status.¹⁸⁹ These opponents also object to the expansion of the H-2A program under the FWMA because they believe the potential rights of current domestic workers would be exchanged for the rights of future H-2A workers whose lives will still be controlled by employers.¹⁹⁰

But despite their varying positions, advocacy groups are more aligned on at least one thing: if the H-2A program is to exist, it needs significant reform. Policy recommendations range from specific suggestions that the DOL and other federal department increase oversight and data collection¹⁹¹ to broad reimagination of guestworker programs.¹⁹² At the core of most these recommendations—including those that could have a more direct impact on the health of H-2A workers—are basic tenets of workers' rights: control over where one is employed, the ability to change employers, freedom from workplace discrimination, and inclusion in protective regulation.¹⁹³

CONCLUSION

Throughout U.S. history, immigration and labor policies have converged to ensure the availability of an agricultural workforce.¹⁹⁴ This pattern has historically included the use of sanctioned guestworker programs when there was

186. Jocelyn Sherman, *UFW & UFW Foundation Hail Passage of Landmark Immigration Bills Emancipating Farm Workers and Dreamers and TPS Recipients*, UNITED FARM WORKERS (Mar. 18, 2021), <https://ufw.org/fmwa31821/>; Jacqui Fatka, *House Sends Ag Labor Bill to Senate*, FARM PROGRESS (Mar. 19, 2021), <https://www.farmprogress.com/farm-policy/house-sends-ag-labor-bill-senate>.

187. Jessica Fu, *The House Approved a Pathway to Citizenship for Farm Workers. Why Do Some Farm Workers Oppose It?*, THE COUNTER (Mar. 23, 2021, 1:44 PM), <https://thecounter.org/farm-workforce-modernization-act-citizenship/>.

188. Elizabeth Henderson, *The Farm Workforce Modernization Act Does Not Solve the Farm Labor Dilemma*, ECOWATCH (Mar. 29, 2020, 5:38 AM), <https://www.ecowatch.com/farm-workforce-modernization-act-2645583314.html?rebellitem=3#toggle-gdpr>.

189. *Oppose the Farm Workforce Modernization Act of 2021*, THE ACTION NETWORK, <https://actionnetwork.org/letters/oppose-the-farm-workforce-modernization-act-of-2021> (last visited July 1, 2021).

190. Fu, *supra* note 187. The opposing organizations do not believe the difficult compromise was worth the trade-offs. One FUJ representative stated that “[i]f it’s going to be a hard thing to pass, then why not fight for what we really believe in? . . . I’d rather fight for something I believe in and lose, than pass something that’s going to be hurtful.” *Id.*

191. FARMWORKER JUST., *supra* note 4, at 38.

192. BAUER & SANCHEZ, *supra* note 103, at 32.

193. *Id.*; FARMWORKER JUST., *supra* note 4, at 39–40.

194. HORTON, *supra* note 3, at 174.

a perceived shortage of domestic workers (as during wartime) or when reliance on domestic undocumented workers became unfeasible because of restrictive immigration policy. Yet, federal laws and policies guaranteeing a steady stream of agricultural workers often fail to protect these workers' health and well-being. For all agricultural workers, environmental health is of particular concern because of merging and cumulative factors such as preexisting health issues, occupational hazards like pesticide and heat exposure, and low socioeconomic status. Stressors on workers' living and working environments become stressors on workers' health. Moreover, guestworker programs are structured so that guestworkers have minimal control over these environments and conditions.

Policy failures exacerbate these challenges. From the anachronistic doctrine of "agricultural exceptionalism," which excluded agricultural workers from virtually every protective labor law passed before 1960,¹⁹⁵ to the failure of EPA's Worker Protection Standard to shield agricultural workers from pesticide exposure¹⁹⁶ and the current lack of a federal standard to protect agricultural workers from excessive heat,¹⁹⁷ scant and ineffective regulations remain largely as a result of the significant political interests held by the agricultural industry and the power imbalance between those who want to ensure the continuous availability of inexpensive labor and those who must perform that labor.¹⁹⁸

Since the inception of agricultural guestworker programs in the United States, environmental and occupational health concerns have been at the forefront of efforts to organize for improved conditions. Advocates have recently achieved some small victories toward worker protections after years of painstaking activism,¹⁹⁹ but the H-2A program remains fraught with challenges.

The COVID-19 pandemic has highlighted some of these challenges. The federal government expanded the H-2A program during a global pandemic without mandating additional public health protection for workers enrolled in the program.²⁰⁰ This is evidence of the extent to which agricultural workers in general and guestworkers in particular are viewed as an expendable commodity. They have been called upon in a crisis to ensure that the rest of the country can continue to eat but are not valued enough so that their own health and safety are

195. The doctrine, still largely in effect today, emerged during a time in history when institutional discrimination was prevalent in the United States and was a concession by President Franklin D. Roosevelt to Southern Democrats in order to obtain votes for his New Deal programs. Flocks, *supra* note 76, at 264; 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* 140–43 (Charles D. Thompson, Jr. & Melinda F. Wiggins eds., 2002).

196. Flocks, *supra* note 76, at 267–68.

197. Riley, *supra* note 166.

198. Schell, *supra* note 195, at 142–44.

199. In addition to the coalition work on a federal heat standard noted earlier, another example of this was work undertaken by a coalition supporting revisions to the Worker Protection Standard. REBECCA E. BERKEY, *ENVIRONMENTAL JUSTICE AND FARM LABOR* 112 (2017).

200. See generally *Temporary Changes to Requirements Affecting H-2A Nonimmigrants Due to the COVID-19 National Emergency*, 85 Fed Reg 21,739 (Apr. 20, 2020) (to be codified at 8 C.F.R. pt. 214, 274a).

protected.²⁰¹ At the very least, federal programs should not *contribute* to environmental health disparities. Certain features of the H-2A program, however, do just that.

Because environmental health disparities are historically entrenched in law and policy regulating agricultural workers, it is unlikely that meaningful improvement can be achieved merely through compromises with the agricultural industry and the State, even when some advocacy groups participate in and acquiesce to those compromises. Rather, agricultural workers and their advocates have been successful where they build coalitions with food, climate, and consumer justice organizations and when they position themselves clearly within the food production chain.²⁰² This yields potential avenues for progress: working in coalitions builds strength through numbers, increases the variety of perspectives considered, and diversifies the strategies that can be used to resolve issues. Most importantly, it allows stakeholders to focus on the long game—building sustainable and healthy food production systems.

201. Ismael García-Colón, *The COVID-19 Spring and the Expendability of Guestworkers*, 44 *DIALECTICAL ANTHROPOLOGY* 257, 262–63 (2020).

202. The importance of workers within the food production chain was, at least, officially recognized during the pandemic when the federal government deemed agricultural workers as “essential.”

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