STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FARM WORKERS OF AMERICA,

Petitioner,

-and- Case No. CU-6696

A & J KIRBY FARMS, LLC,

Employer.

In the Matter of

UNITED FARM WORKERS OF AMERICA,

Petitioner,

-and- Case No. CU-6695

PORPIGLIA FARMS, INC.,

Employer.

In the Matter of

UNITED FARM WORKERS OF AMERICA,

Petitioner,

-and- Case No. CU-6699

LYNN-ETTE & SONS, INC.,

Employer.

BRIEF OF *AMICI CURIAE* NEW YORK STATE AFL-CIO, UFCW LOCAL 888, LOCAL 338 UFCW/RWDSU AND UFCW DISTRICT LOCAL ONE

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STATEMENT OF INTEREST

I. THE NEW YORK STATE AFL-CIO

The New York State AFL-CIO ("NYS AFL-CIO") is a federation of approximately three thousand (3,000) labor unions in the State of New York, representing approximately 2.5 million working men and women. The NYS AFL-CIO's purpose is to represent, through united action, the interests of working men and women with respect to significant labor issues that arise in the New York State executive branch, courts and legislatures. In the past, the NYS AFL-CIO has been a party to, or has been heard as *Amicus Curiae* in numerous lawsuits involving health and safety issues impacting workers, terms and conditions of employment for workers, and other labor relations issues that arise in the courts, administrative fora, and various legislative bodies. Additionally, the NYS AFL-CIO, along with its affiliates, including the United Food and Commercial Workers ("UFCW"), UFCW District Union Local 1, UFCW Local 888, Retail Wholesale Department Store Union ("RWDSU") and RWDSU Local 338 advocated in favor of legislation codifying collective bargaining rights for agricultural workers for decades prior to the passage and enactment of the Farm Laborers' Fair Labor Practices Act ("FLFLPA") in 2019. The NYS AFL-CIO submits this brief as *Amicus Curiae* in support of the Public Employment Relations Board's ("PERB" or "Board") Acting Director of Private Employment Practices and Representation's decisions in *A&J Kirby Farms, LLC*, 56 PERB ¶ 4402 (2023), *Porpiglia Farms, Inc.*, 56 PERB ¶ 4406 (2023), and *Lynn-Ette & Sons, Inc.*, 56 PERB ¶ 4405 (2023).

PERB's determinations in these matters provide that farmworkers present in the United States on H-2A visas ("H-2A Workers") are subject to the same labor protections afforded to all farm laborers under the FLFLPA. The NYS AFL-CIO similarly recognizes the importance of legislation like the FLFLPA, which extends fundamental labor rights to a previously unprotected

group. As an organization that seeks to advance the rights of working men and women, the NYS AFL-CIO believes that the integrity of the FLFLPA must be maintained and that it cannot be interpreted to exclude certain farm laborers on the basis of their visa status.

II. THE UFCW/RWDSU

Trabajadores Agrícolas Unidos – NY, UFCW/RWDSU is the campaign sponsored by the UFCW and the RWDSU and a coalition of UFCW Local 888, Local 338 UFCW/RWDSU, and UFCW District Local One, who together represent close to 100,000 workers in New York State. The goal of Trabajadores Agrícolas Unidos – NY is to empower New York farmworkers to improve their wages, benefits and working conditions through the exercise of collective bargaining rights under the amendments to the State Employment Relations Act ("SERA") enacted in the FLFLPA. Members of Trabajadores Agrícolas Unidos – NY have filed most of the representation petitions that have been filed for farmworkers with PERB. Based on the experience of these petitioners, we believe that the purposes and policies of the SERA and the FLFLPA and the interests of New York farmworkers would be best served by the following approaches to the issues raised by the Board in its invitation for briefing: (1) The Board should not establish a uniform rule requiring that H-2A Workers be included in or excluded from units of other workers; rather, unit determinations should be made under the longstanding SERA standard as articulated by the Board in Warner Nursery and Woodward Mental Health Center. (2) The Board should affirm and adopt the Hearing Officer's rulings that the H-2A Workers who were working for the employer at the time the petition for certification was filed, but who have returned to their home countries at the time the certification issues, should continue to be considered unit employees for purposes of determining majority status. Put another way,

majority status should be determined based on the group of employees who were employed in the negotiating unit on the date the petition was filed.

PRELIMINARY STATEMENT

On May 17, 2023, PERB invited parties and *amici* to submit briefs regarding certain issues raised in *A&J Kirby Farms*, LLC, 56 PERB ¶ 4402 (2023); *Porpiglia Farms, Inc.*, 56 PERB ¶ 4406 (2023); and *Lynn-Ette & Sons, Inc.*, 56 PERB ¶ 4405 (2023). The Board requested briefing on the following questions:

1. Should seasonal agricultural guest workers present in the United States on H-2A visas (H-2A workers) be included in a bargaining unit certified under the State Employment Relations Act, as amended by the Farm Laborers' Fair Labor Practices Act?

2. Should H-2A workers who worked for the Employer at the time the petition for certification was filed, but who have returned to their home countries at the time the certification issues, be considered employees who are included in the proposed unit?

The NYS AFL-CIO asserts that agricultural guest workers present on H-2A visas should be included in bargaining units certified under SERA, as amended by the FLFLPA; and that H-2A Workers who worked for an agricultural employer at the time a representation petition was filed, but who have returned to their home countries at the time a certification issues, should be considered employees who are included in the proposed unit. Further, NYS AFL-CIO adopts, supports, and fully incorporates the Arguments set forth by the United Farm Workers of America. As set forth in those matters, the plain statutory language of SERA as amended by the FLFLPA, PERB precedent, and the legislature's intent in their enactment of the FLFLPA, all require a finding that the FLFLPA's protections extend fully to H-2A Workers.

BACKGROUND

The H-2A visa program was established by the Immigration Reform and Control Act ("IRCA") of 1986, which amended the previously enacted Immigration and Nationality Act ("INA"), 8 U.S.C. § 1188. The INA allows an agricultural employer to petition the U.S. Attorney General for permission to import H-2A Workers, upon a certification from the Secretary of Labor that: (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. 8 U.S.C.A. § 1188. The Department of Labor ("DOL") issues H-2A certifications through the Agricultural Recruitment System. The Agricultural Recruitment System is part of the DOL's Employment Service, which was established by the 1933 Wagner-Peyser Act, 29 U.S.C. § 49 *et seq*.

The purpose of the Wagner-Peyser Act is to provide for a cooperative Federal-State system of public employment offices to be operated by the States under systems created by State law. *NAACP, W. Region v. Brennan*, 360 F. Supp. 1006, 1008 (D.D.C. 1973). In order for the State to obtain the financial assistance available under the Wagner-Peyser Act, the State must accept the provisions of the Act and establish a State Workforce Agency ("SWA") vested with the powers necessary to cooperate with the Employment Service. *Id*. Agricultural employers seeking to import H-2A Workers must submit a job clearance order (Form ETA-790) to the SWA for placement on its intrastate and interstate job clearance systems. 20 C.F.R. § 653.501. The SWA is responsible for ensuring that the working conditions in the clearance order comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws. *Id.*

Agricultural employers seeking to import H-2A Workers must certify to their SWA that they will provide H-2A Workers with certain "minimum benefits, wages and working conditions," including, *inter alia*: housing; workers' compensation; tools, supplies and equipment; meals; transportation; an hours guarantee; earnings records; hours and earnings statements; and rates of pay. 20 C.F.R. § 655.122. An agricultural employer must provide to an H–2A Worker, not later than the time at which the worker applies for the visa, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. *Id*. at (q). In the absence of a separate, written work contract entered into between the employer and the H-2A Worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. § 1188. *Id*.

Principal among these minimum work contract requirements is the rate of pay. An agricultural employer must pay an H-2A Worker either: the Adverse Effect Wage Rate ("AEWR"); the prevailing wage rate (if applicable); the agreed upon collective bargaining wage rate (if applicable); the Federal minimum wage rate; or the State minimum wage rate, whichever is highest. 20 C.F.R. § 655.122(l). The DOL added the agreed upon collective bargaining wage to the required wage rate sources for agricultural employers in 2010, and in so doing, explicitly acknowledged the role of the collectively bargained wage as a potential legitimate wage. *See* Fed. Reg., Vol. 75, No. 29, 6901 (2010). If the wage rate for any one of the above-listed wage sources changes, the change may impact which of the wage sources is the highest applicable to the employer's job opportunity and/or the rate governing the employer's minimum wage

obligation. In such cases an agricultural employer must adjust its pay to the higher wage rate upon the effective date of the new rate.[1]

ARGUMENT

I. SEASONAL AGRICULTURAL GUEST WORKERS PRESENT IN THE UNITED STATES ON H-2A VISAS SHOULD BE INCLUDED IN A BARGAINING UNIT CERTIFIED UNDER THE STATE EMPLOYMENT RELATIONS ACT, AS AMENDED BY THE FARM LABORERS' FAIR LABOR PRACTICES ACT

A. The Plain Language and Legislative Intent of the FLFLPA Allows for Inclusion of H-2A Workers in Bargaining Units Certified Under SERA

On July 17, 2019, the Governor signed into law the FLFLPA, which codifies collective bargaining rights for "farm laborers" in the State of New York. 2019 NY Assembly Bill A8419. The Act defines farm laborers as, "any individual engaged or permitted by an employer to work on a farm." N.Y. Lab. Law § 701(c) (McKinney). The only limitation placed on this broad definition is that:

> members of an agricultural employer's immediate family who are related to the third degree of consanguinity or affinity shall not be considered to be employed on a farm if they work on a farm out of familial obligations and are not paid wages, or other compensation based on their hours or days of work.

Id. The FLFLPA's expansive definition of farm laborer was not an oversight. The New York Legislature intended the Act to apply to everyone who works on a farm, not related to the employer, including, specifically, H-2A Workers.

The stated purpose of the FLFLPA is to, "fill the gap left by the NLRA." 2019-2020 NY Assembly (June 19, 2019) (statement of Assemb. Ryan). The NLRA explicitly excludes "agricultural laborer," from the definition of employees that it protects. *See* 29 U.S.C. § 152(3).

[1] *See* U.S. DOL, Employment and Training Administration, Office of Foreign Labor Certification, 2022 H-2A Final Rule FAQs – Round 3: Job Offers, Assurances, and Obligations – Wages, ¶ 8 (December 7, 2022). Available at: https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H2A%20FR_FAQs%20Round%203_508.v1.0%2005.17.2023.pdf

Since 1946, the U.S. Congress has consistently enacted legislation directing the National Labor Relations Board ("NLRB"), the federal agency tasked with administering the NLRA, to adopt the definition of "agricultural laborer," set forth in Section 3(f) of the Fair Labor Standards Act ("FLSA"), as interpreted by the U. S. DOL. See e.g., *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 303 (1977); *Davis Grain Corp.*, 203 N.L.R.B. 319, 320–321 (1973); *Imperial Garden Growers*, 91 N.L.R.B. 1034, 1036–1038 (1950). Section 3(f) of the FLSA reads, in pertinent part:

> [A]griculture includes farming in all its branches and among other things includes . . . the production, cultivation, growing and harvesting of any agricultural . . . commodities . . . and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

Jack Frost, Inc., 201 N.L.R.B. 659, 660 (1973). The NLRB uses several criteria to determine whether workers fall under the definition of "agricultural laborers," and are thus excluded from the protections of the NLRA. Primary among these are whether the operation is an established part of agriculture, is subordinate to the farming aspect involved, and does not amount to an independent business. See i*d*. at 660. As such, the NLRB will only assert jurisdiction over cases involving H-2A Workers where there is evidence that those workers have consistently engaged in non-agricultural activities for the employer. See *D&G Frey Crawfish, LLC & Ismael Hernandez Martinez*, Nos. 15-CA-253705, 15-CA-261337, 2021 WL 5718542, at *1 (DCNET Nov. 30, 2021). Outside of these rare instances, however, H-2A Workers are generally considered agricultural laborers excluded from the protections of the NLRA and cannot rely on the services of the NLRB.

Exclusion from the protections of the NLRA marks a significant difference between the H-2A and H-2B visa programs. H-2B visa holders, for the most part, work in industries subject to the NLRA. This fact is reflected in the regulations governing the H-2B visa program, which

include assurances that the employer will not retaliate against a worker for consulting with a labor union (20 C.F.R. § 655.20); union notice requirements of a job order (20 C.F.R. § 655.33); and allowance for dues deductions for specialty occupations (20 C.F.R. § 655.731). The regulations governing the H-2A visa program lack these provisions, as H-2A Workers are specifically excluded from the protections of the NLRA and only a minority of the States provide for collective bargaining rights for farmworkers. Though the regulations governing the H-2A visa program do not assume worker collective bargaining rights, as discussed *infra*, they explicitly allow H-2A Workers to participate in collective bargaining where a State allows such participation, and certainly do not prohibit H-2A Worker collective bargaining.

The New York State Assembly passed the FLFLPA, expecting that it would apply to H-2A Workers. Not only was the broad definition of the term "farm laborers" clearly meant to include every worker excluded from the protection of the NLRA by the "agricultural laborers" exception, the effect of the FLFLPA on H-2A Workers was openly debated in the Assembly prior to the Act's passage. See 2019-2020 NY Assembly (June 19, 2019) (statements of Assembs. Nolan, Palmesano, and Blankenbush). There was some question as to whether or not the FLFLPA should apply to H-2A Workers, but that the Act would, was uncontested. Accordingly, the definition of "farm laborers" under the FLFLPA must be read, as it was intended, to apply to H-2A Workers. To do otherwise would significantly undermine the intentions and purposes of the FLFLPA.

B. Inclusion of H-2A Workers in Bargaining Units Certified Under SERA is Not Preempted by Federal Law

The Supremacy Clause of the U.S. Constitution allows Congress to preempt state law. See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *Gibbons v. Ogden*, 22 U.S. 9 Wheat. 1, 210–211 (1824). Preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained

in its structure and purpose." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 98 (1992) (internal citations omitted). There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision. *Arizona v. U.S.,* 567 U.S. 387, 399 (2012).

The current H-2A visa program was made part of the INA by IRCA in 1986. IRCA includes an express preemption provision that states, in total:

> **(2) Preemption**
>
> The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.

8 U.S.C.A. § 1324a (West). As the FLFLPA does not seek to impose civil or criminal sanctions upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens, it does not run afoul of IRCA's explicit preemption provision.

Absent explicit preemptive language, the Supreme Court has recognized two types of implied preemption: field preemption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility." *Arizona v. U.S.,* 567 U.S. at 399. Prior to IRCA, the Supreme Court recognized that "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State." *De Canas v. Bica,* 424 U.S. 351, 356 (1976). Congress enacted IRCA as a comprehensive framework for "combating the employment of illegal aliens." *Arizona v. U.S.,* 567 U.S. at 404, quoting *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 147 (2002). Congress, however, has given the States wide latitude to supplement the scheme of federal regulation regarding the employment of H-2A Workers.

This is evidenced by the continued authority of the Wagner-Peyser Act, which provides for a cooperative Federal-State system of public employment offices to be operated by the States under systems created by State law. This integrated system of federal and state law comprises the bulk of H-2A Worker regulation. The Act establishes the SWAs that agricultural employers seeking to import H-2A Workers must submit their job clearance orders to. SWAs, in turn, have authority over the H-2A program, including ensuring that the working conditions in the clearance order comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration and other employment-related laws. The Wagner-Peyser Act's delegation of federal authority over the H-2A Worker program to States and State agencies is incompatible with a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Accordingly, the FLFLPA is not susceptible to field preemption.

There is also no conflict between the FLFLPA and the federal laws governing the H-2A program such that compliance with both federal and state regulations is an impossibility. The Code of Federal Regulation ("CFR") does mandate certain explicit minimum benefits, wages and working conditions that all job clearance orders and/or written work contracts must contain. These minimum standards are a floor below which the terms of a work contract may not fall, they are not, however, a ceiling designed to thwart the negotiation of more generous contract terms. *See* Fed. Reg., Vol. 87, No. 196, 61680 (2022). The CFR explicitly acknowledges this fact by mandating that the job order be the default contract in the absence of a separate, more generous, written work contract. *See* 20 C.F.R. § 655.122(q).

The only thing that a collective bargaining agreement cannot do, is impose wages and benefits on H-2A Workers below the minimums required by 20 C.F.R. § 655.122. So long as a

collective bargaining agreement covering H-2A Workers provides for wages and benefits equal or greater to the minimums required by the CFR, there is no conflict with the INA. There is no reason why an employer's compliance with the FLFLPA would make compliance with federal immigration law or regulation a physical impossibility. As such, the FLFLPA is not subject to conflict preemption.

C. PERB'S Mutual Interest Standard Should Continue to Determine the Appropriateness of Bargaining Units That Include H-2A Workers

In determining the appropriateness of a bargaining unit under SERA, PERB's primary consideration has been "to group employees who have a mutual interest in wages, hours, working conditions, and other subjects of collective bargaining." *Warner Nursery*, 55 PERB ¶ 4403 (2022). Under this standard, several factors, no one of which is controlling, enter into each particular finding of the appropriate bargaining unit: similarity of duties or functions, of wages, of working conditions, of qualifications or skills; interchange of employees, the desires of the employees and the extent of self-organization; the collective bargaining history in the establishment and in the industry; the size and organization of the employer's business; and the Board's prior decisions affecting the same establishment or the same industry. *Id*.

With regard to temporary employees, PERB has adopted the view of its predecessor, the New York State Labor Relations Board, that "'most employment is at will, with no guarantee as to how long it will continue,' and that it is 'the Board's consistent practice and established policy to include in the unit all regularly employed employees who perform the same work.'" *Maker Stables, LLC*, 54 PERB ¶ 4401, quoting *Wyckoff Heights Hosp.*, 35 SLRB 313, 316-317 (1972). Further, "whether an individual employee has a continuing interest in terms and conditions of employment is not a matter of unit inclusion, but a separate matter to be determined when addressing an employee's eligibility to vote." *Id*. As such, "'seasonal employees are covered

employees under the Act. The issue is merely one of unit placement, not one of denial of the protection afforded by the Act.'" *Id*., quoting *Funtastic Carnival Supplies, Inc.*, 46 SLRB 460, 462-463 (1985).

In the cases before it, PERB should apply the same mutual interest standard to H-2A Workers as it does to all other employees. The factors described above in *Warner*, should be applied against the facts of each case to determine whether the workers in the petitioned-for bargaining unit have a mutual interest in wages, hours, working conditions, and other subjects of collective bargaining, regardless of whether those employees are traditional seasonal H-2A workers. Only after engaging in the fact-specific analysis required of each case will the Board be able to determine whether the workers in question share a mutual interest sufficient for inclusion in the same bargaining unit. A bright line rule including or excluding H-2A Workers from bargaining units with non-H-2A Workers would undermine the legislative purposes of both the FLFLPA and the INA.

Pursuant to the INA and its regulations, the U.S. DOL must assist the Attorney General in assuring that the importation of foreign laborers will not have an adverse effect on domestic workers. *NAACP, Jefferson Cnty. Branch v. Donovan*, 566 F. Supp. 1202, 1207 (D.D.C. 1983). A bright line rule whereby H-2A Workers would automatically be excluded from bargaining units with non-H-2A Workers would pose a threat to domestic workers. Such a rule would put downward pressure on collectively bargained wages for similarly situated domestic employees who would be forced to compete against H-2A Workers not subject to the collectively bargained wage rate. Though the Secretary of Labor must ensure that domestic workers will not be adversely affected by the importation of foreign workers by means of setting an annually revised "adverse

effect wage rate" for specific states. *Fla. Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 301 (5th Cir. 1976). There is no reason to expect that the AEWR would be the highest legitimate wage rate. *See* 20 C.F.R. § 655.122(l). Especially when compared against a collectively bargained wage rate. *See* Fed. Reg., Vol. 75, No. 29, 6901 (2010).

Conversely, a bright line rule that requires H-2A Workers to always be included in a bargaining unit with non-H-2A Workers could in many cases lead to bargaining units with employees that do not have a mutual interest in wages, hours, working conditions, and other subjects of collective bargaining. Such a rule would likely frustrate collective bargaining and would make it more difficult for farmworkers to designate an exclusive collective bargaining representative. Notably, it may be appropriate in certain situations for PERB to allow for multiple bargaining units on one farm. Certainly, nothing in the FLFLPA would prohibit such an outcome. For these reasons, the Board should continue to apply its fact-specific analysis on a case-by-case basis to determine whether or not the petitioned-for workers have a mutual interest appropriate for inclusion in the same bargaining unit.

II. H-2A WORKERS WHO WORKED FOR THE EMPLOYER AT THE TIME THE PETITION FOR CERTIFICATION WAS FILED, BUT WHO HAVE RETURNED TO THEIR HOME COUNTRIES AT THE TIME THE CERTIFICATION ISSUES SHOULD BE CONSIDERED EMPLOYEES WHO ARE INCLUDED IN THE PROPOSED UNIT

A. The FLFLPA Does Not Provide a Basis for a Separate Mechanism to Determine Majority Status of Employee Organizations Seeking to Represent Bargaining Units That Include H-2A Workers

The FLFLPA amended Section 705 of SERA to include subdivision 1-a, which provides the basis for determining majority status. Section 1-a states:

> If the choice available to the employees in a negotiating unit is limited to selecting or rejecting a single employee organization, that choice shall be ascertained by the board on the basis of dues deduction authorizations instead of by an election. In such case, the employee organization involved will be

> certified without an election if a majority of the employees within the unit have executed a showing dues deductions authorizations.

The Legislature has clearly indicated how majority status is to be determined when there is a single employee organization claiming to represent employees in a bargaining unit. The employee organization will be certified without an election if a majority of the employees within the unit have executed a showing of dues deductions authorizations. The FLFLPA does not provide any other means that PERB may use to determine majority status when there is only a single employee organization claiming to represent employees in a bargaining unit. There is thus no legal basis to establish a separate mechanism to determine majority status in cases involving H-2A Workers.

B. PERB Precedent Supports the Inclusion of H-2A Workers in Proposed Bargaining Units, Even After Those Workers Have Returned to Their Home Country

Under SERA, PERB has broad discretion to determine the appropriateness of bargaining units. Subsection 705 provides in relevant part:

> the board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit.

N.Y. Lab. Law § 705(2) (McKinney 2020), see also *Long Island Coll. Hosp. v. N.Y. State Lab. Rels. Bd.*, 32 N.Y.2d 314, 321 (1973) ("The board has an exceedingly broad discretion in fixing appropriate bargaining units."). In *Maker Stables*, the Board determined that seasonal employees were entitled to the protections of SERA and were eligible to be included in bargaining units certified by PERB. 54 PERB ¶ 4401. The Board found that, "the issue of a particular employee's continuing interest in the terms and conditions of his employment should be addressed as a voting eligibility issue." *Id*. The ALJ in that case, however, ordered an election only if the union failed to file with PERB, "indications of employee support sufficient to satisfy the requirements of § 251.15

of SERA's Rules of Procedure for certification without an election." *Id*. PERB precedent has stressed the importance of fostering a bargaining relationship between employers and employees. The Board has found that, "bargaining relationships focus upon job titles, not the individual incumbents in those titles. Contract negotiation and administration are not materially affected by whether an employer keeps the same persons in a job from year to year." *Town of Brookhaven*, 30 PERB ¶ 3040 (1997). There is no good reason then why H-2A Workers should be treated differently from their domestic seasonal worker counterparts.

H-2A Workers are seasonal farmworkers. Pursuant to the FLFLPA, they are entitled to collective bargaining rights under SERA. It is therefore appropriate for H-2A Workers to be included in a proposed unit, even where they have returned to their home countries prior to certification. H-2A Workers, like other seasonal employees, only perform work for their employer for a limited amount of time. While there is no guarantee that H-2A Workers will return for an additional season of work, PERB precedent clearly demonstrates that this factor is not determinative and cannot prohibit H-2A Workers from being included in a bargaining unit.

In any regulatory framework governing labor relations, there is likely to be an inherent tension between employee choice and the need for labor stability. Due to the transient nature of modern work, new employees are routinely hired into bargaining units represented by unions they did not vote for and subjected to collective bargaining agreements for which they had no say in. The People of the State of New York, through their elected representatives, however, have chosen to accept these tradeoffs in exchange for the overwhelming benefits provided to workers by collective bargaining. In determining bargaining unit eligibility, a line must be drawn somewhere with regard to which employees are to be included and which excluded. The FLFLPA and PERB precedent has clearly set this line: where the choice involves a single employee organization, or

else the union has satisfied the requirements of § 251.15 of SERA's Rules of Procedure for certification without an election, the employee eligibility date is the date the petition is filed.

By establishing the filing date as the eligibility date, as opposed to the certification date, the Legislature and PERB have wisely disincentivized unscrupulous employers from filing frivolous election challenges and other litigation in a cynical attempt to drag out the certification process and attrit union support in the unit. By changing the rule for H-2A Workers, unscrupulous agricultural employers would have a powerful weapon for defeating union organizing drives. Through the use of frivolous, time-consuming election challenges, such employers would be able to unilaterally determine who gets to be included in any bargaining unit determination. Such a ruling would completely undermine the aims of the FLFLPA.

CONCLUSION

For the foregoing reasons, the Board should affirm the Acting Director's decisions in *A&J Kirby Farms, LLC*, *Porpiglia Farms, Inc*, and *Lynn-Ette & Sons, Inc*; and should hold that H-2A Workers are eligible for inclusion in bargaining units certified under SERA, and that H-2A Workers who worked for the employer at the time a petition for certification was filed, but who have returned to their home countries at the time the certification issues, are employees that should be included in the proposed unit.

Dated: June 28, 2023

Respectfully submitted,

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