STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the matter of	)		
A & J KIRBY FARMS, LLC	)	**Case No.**	**CU-6696**
PORPIGLIA FARMS, INC.	)	**Case No.**	**CU-6695**
and	)		
LYNN-ETTE & SONS, INC.	)	**Case No.**	**CU-6699**

AMICI CURIAE BRIEF REGARDING QUESTIONS RAISED BY THE BOARD AS TO H-2A EMPLOYEES

Amici curiae, Grow NY Farms, New York State Vegetable Growers Association, New York State Wine Grape Growers, New York State Horticultural Society, and Northeast Dairy Producers Association (NEDPA) (collectively, "amici"), respectfully submit this brief regarding issues raised in the above-captioned matters before the Public Employment Relations Board (the "Board"), in the hopes that this additional information may be of assistance to the Board in considering those pending cases. On May 17, 2023, the Board invited parties and amici to submit briefs 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?

On both questions, amici submit that H-2A workers should not be included in a proposed or certified bargaining unit, for the reasons set forth below.

PRELIMINARY STATEMENT

The H-2A program is already highly regulated, setting non-negotiable terms and conditions of employment, requiring employers to provide benefits far above-and-beyond what non-H-2A employers are expected to offer (free housing, premium wages, etc.). Those government-set requirements are specifically set to avoid any possibility of "adverse effect" on U.S. farmworkers "similarly employed," including setting a minimum wage at the mean wage for workers in that occupation; ensuring that H-2A workers (and U.S. workers for the same employer in "corresponding employment") are paid above-average wages at all times. The government-set minimum wage for H-2A employment in New York is $16.95/hour for 2023, and will increase again for 2024 based on surveys conducted by the U.S. Department of Agriculture this year. Nothing in the H-2A program makes that wage a "ceiling," and employers are free to offer more than that, but the rules do set that higher minimum wage than employees of non-H-2A employers would be required to receive.

By definition and by design, H-2A workers are employed on contracts lasting no longer than that particular season, capped by the Department of Labor at a maximum of 10 months in duration. An H-2A visa is a "non-immigrant" visa, meaning that the visa holder may only be in the United States for a defined period of time and remains committed to their home country as their permanent place of residence. These "guest workers" travel back and forth between their temporary agricultural work in the United States and their homes and families abroad. Some will return in subsequent years, but that is not guaranteed, and the non-immigrant visa offers no pathway to permanent status in the U.S. nor any expectation of these workers putting down roots or retiring here, or even working beyond the scope of their current contract.

In recognition of this unique status, other laws already differentiate between U.S. farm workers and H-2A visa workers. For example, H-2A workers are completely exempt from Federal Social Security, Medicare, and unemployment payroll taxes ("FICA" and "FUTA").[1] Which makes sense; H-2A workers would never be able to make use of such retirement-age programs.

The structure and operation of the H-2A temporary visa program make it a particularly poor fit for participation in collective bargaining activities. The general goals behind collective bargaining are either already met by the H-2A program or not appropriate for the program. The wages and working conditions are already set by the Department of Labor for the specific purpose of protecting not only the H-2A and U.S. workers covered by the work contract ***but also*** U.S. workers of non-H-2A employers who are "similarly employed." Further negotiation over the terms of the employment relationship are either not necessary or not possible within the structure of the visa program regulations. The goal of establishing "labor peace" and a stable, years-long relationship between employer and employees is also not appropriate in this context, where the working relationship is limited in duration and the workers voting for representation today will be gone within weeks and may never return, but their decision will bind future employees of the farm.

Including H-2A workers in a potential bargaining unit is, therefore, neither necessary nor appropriate. Amici respectfully urge the Board to exclude such workers from any proposed future bargaining unit under FLFLPA.

BACKGROUND AND OPERATION OF THE H-2A TEMPORARY VISA PROGRAM

Dating back to World War II, the United States government has consistently allowed American employers to hire, on a temporary basis, foreign nationals to perform agricultural labor or services. After the war, when soldiers returned to their jobs on the farm, the United States

[1] https://www.irs.gov/individuals/international-taxpayers/foreign-agricultural-workers

continued to see labor shortages in agriculture, and Congress created the H-2 temporary visa in the Immigration and Nationality Act of 1952 ("INA"). 8 U.S.C. § 1101 et seq. The INA was later amended in 1986, through the Immigration Reform and Control Act ("IRCA"), which separated the H-2 visa into the H-2A temporary agricultural visa and the H-2B temporary non-agricultural visa. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and (b), respectively. As defined in that statute, the H-2A visa is available for an individual:

> having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services, as defined by the Secretary of Labor in regulations and including agricultural labor defined in section 3121(g) of title 26, agriculture as defined in section 203(f) of title 29, and the pressing of apples for cider on a farm, of a temporary or seasonal nature.

Id. Congress delegated the authority to oversee the temporary admission of these agricultural workers to the Secretary of Labor and the Attorney-General (later, re-assigned to the Secretary of Homeland Security and sub-delegated within DHS to the U.S. Citizenship and Immigration Service ("USCIS")).

The INA, as amended, sets certain limits on when an agricultural employer is eligible to petition for H-2A visa workers:

> A petition to import an alien as an H-2A worker (as defined in subsection (i)(2)) may not be approved by the Attorney General [USCIS] unless the petitioner has applied to the Secretary of Labor for a certification 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. § 1188(a)(1). In order to implement that labor certification process, the Department of Labor has issued a series of regulations since 1987 that strictly govern all aspects of the process.[2] In order to qualify for a labor certification, before even applying separately to USCIS for visas, an agricultural employer must test the domestic labor market to determine whether any or enough U.S. workers are "able, willing, and qualified" and available "to perform the labor or services involved in the petition." *Id.*

This "labor market test" involves online advertising of the position through both the U.S. Department of Labor (seasonaljobs.dol.gov) and the applicable State Workforce Agency ("SWA"). 20 C.F.R. § 655.121(f). The job remains posted and active through at least 50% of the work contract period. 20 C.F.R. §§ 655.121(g); 655.135(d). The SWA conducts the initial review of the employer's job order to ensure that the job qualifications and requirements are "consistent with the normal and accepted qualifications" required by non-H-2A employers in that area. 20 C.F.R. § 655.122(b).

The second prong of the Secretary's review, excluding any "adverse effect" on the wages and working conditions of U.S. workers "similarly employed," is met through a series of extensive regulatory requirements, including mandatory wage provisions. The Department of Labor regulations set specific and non-negotiable terms and conditions to H-2A employment. These are explicitly meant to protect not only the H-2A and "corresponding" U.S. workers covered by the Department-approved work contract, itself, but as the INA requires, to preclude any "adverse effect" on non-H-2A workers "similarly employed."[3] The current regulations were issued in a 172-page Federal Register notice in *extremely* small print, with a further 43 pages issued in

[2] The Department of Labor's most recent iteration of the H-2A regulations took effect in October 2022. 87 Fed. Reg. 61660 (October 12, 2022). https://www.govinfo.gov/content/pkg/FR-2022-10-12/pdf/2022-20506.pdf

[3] As compared with collectively-bargained agreements that protect only those groups of workers within the bargaining unit and scope of the agreement negotiated.

February 2023 just on the wage-setting process. Some of the key provisions of the H-2A employer-employee relationship are discussed here.

Contract Duration / Visa Limits

By statute and by definition, H-2A visas are available only for work "of a temporary or seasonal nature." 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The Department of Labor fleshes out that definition in its H-2A regulations,

> *Definition of a temporary or seasonal nature*. For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

20 C.F.R. § 655.103(d). Through administrative case law, the Department of Labor's Board of Alien Labor Certification Appeals, which hears employers' appeals from denied applications for temporary employment certifications, has determined that needs of longer than 10 months are presumptively non-seasonal. *Matter of Grand View Dairy*, 2009-TLC-00002 (Nov. 3, 2008).[4] The decision in *Grand View Dairy* technically states that requested needs of long than 10 months trigger additional scrutiny by the Department's Certifying Officers, but a review of the Department's certifications and denials shows that the 10-month limit is essentially absolute.[5]

While H-2A workers may change employers to pursue further agricultural work in the United States: (1) employers will not receive labor certifications for the same work in back-to-back periods extending beyond 10 months in that area; and (2) visa holders accrue a combined

[4] Available online here: https://www.oalj.dol.gov/DECISIONS/ALJ/TLC/2009/In_re_GRAND_VIEW_DAIRY_FAR_2009TLC00002_(NOV_03_2008)_082808_CADEC_SD.PDF

[5] https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2022_Q4.pdf

period of stay that is strictly capped at 3 years, after which they must remain outside the United States for a period of time. 8 CFR 214.2(h)(5)(viii)(C).

The H-2A regulations require that employers seeking to employ H-2A workers in an upcoming season must contact U.S. workers in that job during the previous year (unless they were terminated for cause or abandoned the job) to invite them to return in the coming year. There is no equivalent requirement with respect to H-2A workers and no assumption of recurring temporary employment.[6] Thus, allowing an employer's current H-2A workers to certify union representation and enter into an agreement that will remain in effect year-round for several years at a time would make no sense. It is the same reason that we do not allow tourists to vote in our elections; they would be making a decision that would apply to those living here long after they had left the country they visited behind.

1. Wages

The cornerstone of the Department of Labor's efforts to guard against "adverse effect" on U.S. workers "similarly employed" is the requirement to pay at least the Department-set minimum wage for H-2A employment, the Adverse Effect Wage Rate ("AEWR"). 20 C.F.R. §§ 655.120, 655.122(l). As the Department, itself, has stated, the AEWR "is one of the primary ways the Department meets its statutory obligation to certify that the employment of H-2A workers will not have an adverse effect on the wages of agricultural workers in the United States similarly employed." 88 Fed. Reg. 12760, 12761 (Feb. 28, 2023). The AEWR "is designed to prevent the potential wage-depressive impact of foreign workers on the domestic agricultural workforce." 75 Fed. Reg. 6884, 6891 (Feb. 12, 2010).

[6] Employers, of course, may not "blacklist" former employees as retaliation for making complaints or asserting their rights (29 C.F.R. § 501.4), but outside of that, there is no requirement to re-hire any particular former H-2A employee.

The Department sets the AEWR based on Department of Agriculture survey data combining field and livestock workers in the region, covering all farm wages – from the new-hire pulling weeds in the field to the seasoned farmworker operating state-of-the-art technology. That average then becomes the floor for future H-2A employment. 20 C.F.R. § 655.120. If the State or Federal minimum wage is higher than the AEWR, or if a collectively-bargained wage is higher than the AEWR, than that higher rate would apply. 20 C.F.R. § 655.122(l). If those rates are lower than the AEWR, of course, then the AEWR would apply and the bargained-for rate would be of no effect.[7] Thus, to the extent that a bargaining unit made the economic decision to negotiate for a slightly-lower hourly wage rate in exchange for more robust health insurance coverage, or more annual leave, or some other agreement deemed to be sufficiently valuable to the covered workers, that wage rate would not be the "applicable rate" during any H-2A work contract for that employer.

Notably, the opposite result would arise in the H-2B non-agricultural setting. The Department of Labor's regulations for that parallel program specifically provide that:

> if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms' length between the union and the employer, the wage rate set forth in the CBA is considered as not adversely affecting the wages of U.S. workers, that is, it is considered the "prevailing wage" for labor certification purposes.

20 C.F.R. § 655.10(b)(1). Even the United States Department of Labor, champion of organized labor in all forms, does not appear to support the idea of H-2A workers collectively bargaining for their own wage rates.

[7] At least during the H-2A contract period; it would only apply when the H-2A workers were not there. This further supports not letting H-2A workers bargain for a wage that would only apply when they are not employed by that farm!

2. Other Benefits and Worker Protections

The H-2A regulations convey a number of other benefits and worker protections, in support the Department of Labor's mandate to avoid adverse effect. Employers are strictly required to offer U.S. workers "no less than the same benefits, wages, and working conditions that the employer is offering to, intends to offer, or will provide to H-2A workers." 20 C.F.R.§ 655.122(a). Workers (H-2A or U.S.) "who are not reasonably able to return to their residence within the same" must be provided free housing. 20 C.F.R.§ 655.122(d). And "free" is enforced by the Department to mean free – no rent, no security deposit, free cooking utensils and bedding. Each housing unit is inspected by the State Workforce Agency before the Department will even consider approving an H-2A labor certification. Employers likewise must provide free transportation between that free housing and the worksite. 20 C.F.R.§ 655.122(h)(3).[8]

Any qualified U.S. applicant for a position covered by an H-2A contract must be hired through the first 50% of a work contract period. 20 C.F.R. § 655.135(d). This fosters domestic hiring, which is an excellent goal in itself, but it also means that non-H-2A employers must raise their wages and benefits to be competitive with H-2A employers, since their U.S. workers can walk down the road to take a guaranteed H-2A position that pays more.

Unlike most U.S. jobs, workers covered by an H-2A contract are guaranteed three-fourths of the hours over the life of the contract, based on the full-time schedule of anticipated hours set forth in the job order. 20 C.F.R.§ 655.122(i).[9] There are limited exceptions where an employee is terminated for cause or voluntarily abandons employment, or where the Department's Certifying Officer finds "contract impossibility" based on flooding or other "Acts of God," but for any

[8] This is in addition to the international travel from the H-2A workers' homes to the worksite in the U.S., which is provided entirely free-of-charge, plus daily subsistence, hotels, and reimbursement of any visa-related expenses.
[9] By regulation, H-2A contracts must involve at least 35 hours of work per week. 20 C.F.R. § 655.135(f).

situation involving lay-offs or other "non-cause" terminations, the employer must pay the terminated workers the difference between their earnings to that point and what they would have earned by working 75% of the hours on the contract. *Id.* Such job security rivals most private-sector CBAs.

As referenced above, U.S. workers employed by an employer holding an approved H-2A labor certification and performing any of the work included in that labor certification are entitled to the AEWR and all other benefits included in that certification. Such employees are defined as "corresponding employees" in the H-2A regulations. 20 C.F.R.§ 655.103(b). The Department's expansive notion of "any" work triggering corresponding employment has been upheld in federal court. *Overdevest Nurseries LP v. Walsh*, 2 F.4th 977 (D.C. Cir. 2021).

Lastly, the contract terms that the Department of Labor requires employers to include and comply with in order to participate in the H-2A program may not be negotiated or changed. The Department's regulations prohibit any "waiver" of the H-2A requirements and both invalidate any attempts to effectuate such a waiver and impose civil money penalties on an employer for proposing such changes. 29 C.F.R. § 501.5. If CBA provisions conflict with an H-2A labor certification, the employer would be put in an impossible and perilous situation.

For context, and some sense of the extent of the requirements already enforced by the Department of Labor as to H-2A employers, the following pages are an excerpt from the Department's job order including the attestations that an H-2A employer must make under penalty of perjury in order to even apply for temporary workers through this program. The print size is extremely small, the entire form is available here: https://foreignlaborcert.doleta.gov/pdfs/ETA-790-instructions-addendums.pdf

I. Conditions of Employment and Assurances for H-2A Agricultural Clearance Orders

By virtue of my signature below, I **HEREBY CERTIFY** my knowledge of and compliance with applicable Federal, State, and local employment-related laws and regulations, including employment-related health and safety laws, and certify the following conditions of employment:

1. **JOB OPPORTUNITY**: Employer assures that the job opportunity identified in this clearance order (hereinafter also referred to as the "job order") is a full-time temporary position being placed with the SWA in connection with an H-2A *Application for Temporary Employment Certification* for H-2A workers and this clearance order satisfies the requirements for agricultural clearance orders in 20 CFR 653, subpart F and the requirements set forth in 20 CFR 655.122. This job opportunity offers U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers and complies with the requirements at 20 CFR 655, Subpart B. The job opportunity is open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship.

2. **NO STRIKE, LOCKOUT, OR WORK STOPPAGE**: Employer assures that this job opportunity, including all worksites for which the employer is requesting H-2A labor certification does not currently have workers on strike or being locked out in the course of a labor dispute. 20 CFR 655.135(b).

3. **HOUSING FOR WORKERS**: Employer agrees to provide for or secure housing for H-2A workers and those workers in corresponding employment who are not reasonably able to return to their residence at the end of the work day. That housing complies with the applicable local, State, or Federal standards and is sufficient to house the specified number of workers requested through the clearance system. The employer will provide the housing without charge to the worker. Any charges for rental housing will be paid directly by the employer to the owner or operator of the housing. If public accommodations are provided to workers, the employer agrees to pay all housing-related charges directly to the housing's management. The employer agrees that charges in the form of deposits for bedding or other similar incidentals related to housing (e.g., utilities) must not be levied upon workers. However, the employer may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage which is not the result of normal wear and tear related to habitation. When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, the employer agrees to provide family housing at no cost to workers with families who request it. 20 CFR 655.122(d), 653.501(c)(3)(vi).

   Request for Conditional Access to Intrastate or Interstate Clearance System: Employer assures that the housing disclosed on this clearance order will be in full compliance with all applicable local, State, or Federal standards at least 20 calendar days before the housing is to be occupied. 20 CFR 653.502(a)(3). The Certifying Officer will not certify the application until the housing has been inspected and approved.

4. **WORKERS' COMPENSATION COVERAGE**: Employer agrees to provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer agrees to provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment. 20 CFR 655.122(e).

5. **EMPLOYER-PROVIDED TOOLS AND EQUIPMENT**: Employer agrees to provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. 20 CFR 655.122(f).

6. **MEALS**: Employer agrees to provide each worker with three meals a day or furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer will state the charge, if any, to the worker for such meals. The amount of meal charges is governed by 20 CFR 655.173. 20 CFR 655.122(g).

   For workers engaged in the herding or production of livestock on the range, the employer agrees to provide each worker, without charge or deposit charge, (1) either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to enable the worker to prepare his own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and (2) adequate potable water, or water that can be easily rendered potable and the means to do so. 20 CFR 655.210(e).

7. **TRANSPORTATION AND DAILY SUBSISTENCE**: Employer agrees to provide the following transportation and daily subsistence benefits to eligible workers.

   A. *Transportation to Place of Employment (Inbound)*

      If the worker completes 50 percent of the work contract period, and the employer did not directly provide such transportation or subsistence or otherwise has not yet paid the worker for such transportation or subsistence costs, the employer agrees to reimburse the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount the employer will pay for daily subsistence expenses are those amounts disclosed in this clearance order, which are at least as much as the employer would charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event will less than the amount permitted under 20 CFR 655.173(a). The employer understands that the Fair Labor Standards Act applies independently of the H-2A requirements and imposes obligations on employers regarding payment of wages. 20 CFR 655.122(h)(1).

   B. *Transportation from Place of Employment (Outbound)*

      If the worker completes the work contract period, or is terminated without cause, and the worker has no immediate subsequent H-2A employment, the employer agrees to provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. Return transportation will not be provided to workers who voluntarily abandon employment before the end of the work contract period, or who are terminated for cause, if the employer follows the notification requirements in 20 CFR 655.122(n).

If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must provide for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses.

The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in sec. 655.135(d) of this subpart with respect to the referrals made after the employer's date of need. 20 CFR 655.122(h)(2).

C. *Daily Transportation*

Employer agrees to provide transportation between housing provided or secured by the employer and the employer's worksite(s) at no cost to the worker. 20 CFR 655.122(h)(3).

D. *Compliance with Transportation Standards*

Employer assures that all employer-provided transportation will comply with all applicable Federal, State, or local laws and regulations. Employer agrees to provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.105 and 29 CFR 500.120 to 500.128. If workers' compensation is used to cover transportation, in lieu of vehicle insurance, the employer will ensure that such workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation. Employer agrees to have property damage insurance. 20 CFR 655.122(h)(4).

8. **THREE-FOURTHS GUARANTEE**: Employer agrees to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any. 20 CFR 655.122(i).

The employer may offer the worker more than the specified hours of work on a single workday. For purposes of meeting the three-fourths guarantee, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. If, during the total work contract period, the employer affords the U.S. or H-2A worker less employment than that required under this guarantee, the employer will pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order. All hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. 20 CFR 655.122(i).

If the worker is paid on a piece rate basis, the employer agrees to use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the three-fourths guarantee. 20 CFR 655.122(i).

If the worker voluntarily abandons employment before the end of the period of employment set forth in the job order, or is terminated for cause, and the employer follows the notification requirements in 20 CFR 655.122(n), the worker is not entitled to the three-fourths guarantee. The employer is not liable for payment of the three-fourths guarantee to an H-2A worker whom the Department of Labor certifies is displaced due to the employer's requirement to hire qualified and available U.S. workers during the recruitment period set out in 20 CPR 655.135(d), which lasts until 50 percent of the period of the work contract has elapsed (50 percent rule). 20 CFR 655.122(i).

Important Note: In circumstances where the work contract is terminated due to contract impossibility under 20 CFR 655.122(o), the three-fourths guarantee period ends on the date of termination.

9. **EARNINGS RECORDS**: Employer agrees to keep accurate and adequate records with respect to the workers' earnings at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Department of Labor or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Department of Labor, or a duly authorized and designated representative, and by the worker and designated representatives. The content of earnings records must meet all regulatory requirements and be retained by the employer for a period of not less than 3 years after the date of certification by the Department of Labor. 20 CFR 655.122(j).

10. **HOURS AND EARNINGS STATEMENTS**: Employer agrees to furnish to the worker on or before each payday in one or more written statements the following information: (1) the worker's total earnings for the pay period; (2) the worker's hourly rate and/or piece rate of pay; (3) the hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in 20 CFR 655.122(i), separate from any hours offered over and above the guarantee); (4) the hours actually worked by the worker; (5) an itemization of all deductions made from the worker's wages; (6) If piece rates are used, the units produced daily; (7) beginning and ending dates of the pay period; and (8) the employer's name, address and FEIN. 20 CFR 655.122(k).

For workers engaged in the herding or production of livestock on the range, the employer is exempt from recording and furnishing the hours actually worked each day, the time the worker begins and ends each workday, as well as the nature and amount of work performed, but otherwise must comply with the earnings records and hours and earnings statement requirements set out in 20 CFR 655.122(j) and (k). The employer agrees to keep daily records indicating whether the site of the employee's work was on the range or off the range. If the employer prorates a worker's wage because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence. 20 CFR 655.210(f).

11. **RATES OF PAY**: The employer agrees that it will offer, advertise in its recruitment, and pay at least the Adverse Effect Wage Rate (AEWR), the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest. If the worker is paid by the hour, the employer must pay this rate for every hour or portion thereof worked during a pay period. If the offered wage(s) disclosed in this clearance order is/are based on commission, bonuses, or other incentives, the employer guarantees the wage paid on a weekly, semi-monthly, or monthly basis will equal or exceed the AEWR, prevailing hourly wage or piece rate, the legal Federal or State minimum wage, or any agreed-upon collective bargaining rate, whichever is highest.

    If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate of pay, the employer agrees to supplement the worker's pay at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked. 20 CFR 655.120, 655.122(l).

    For workers engaged in the herding or production of livestock on the range, the employer agrees to pay the worker at least the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof. If the offered wage disclosed in this clearance order is based on commissions, bonuses, or other incentives, the employer assures that the wage paid will equal or exceed the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, whichever is highest, and will be paid to each worker free and clear without any unauthorized deductions. The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if an employee is voluntarily unavailable to work for personal reasons. 20 CFR 655.210(g).

12. **FREQUENCY OF PAY**: Employer agrees to pay workers when due based on the frequency disclosed in this clearance order. 20 CFR 655.122(m).

13. **ABANDONMENT OF EMPLOYMENT OR TERMINATION FOR CAUSE**: If a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, employer is not responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker, and that worker is not entitled to the three-fourths guarantee, if the employer notifies the Department of Labor and, if applicable, the Department of Homeland Security, in writing or by any other method specified by the Department of Labor or the Department of Homeland Security in the Federal Register, not later than 2 working days after the abandonment or termination occurs. A worker will be deemed to have abandoned the work contract if the worker fails to show up for work at the regularly scheduled time and place for 5 consecutive work days without the consent of the employer. 20 CFR 655.122(n).

14. **CONTRACT IMPOSSIBILITY**: The work contract may be terminated before the end date of work specified in the work contract if the services of the workers are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes fulfillment of the contract impossible, as determined by the U.S. Department of Labor. In the event that the work contract is terminated, the employer agrees to fulfill the three-fourths guarantee for the time that has elapsed from the start date of work specified in the work contract to the date of termination. The employer also agrees that it will make efforts to transfer the worker to other comparable employment acceptable to the worker and consistent with existing immigration laws. In situations where a transfer is not affected, the employer agrees to return the worker at the employer's expense to the place from which the worker, disregarding intervening employment, came to work for the employer, or transport the worker to his/her next certified H-2A employer, whichever the worker prefers. The employer will also reimburse the worker the full amount of any deductions made by the employer from the worker's pay for transportation and subsistence expenses to the place of employment. The employer will also pay the worker for any transportation and subsistence expenses incurred by the worker to that employer's place of employment. The amounts the employer will pay for subsistence expenses per day are those amounts disclosed in this clearance order. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. 20 CFR 655.122(o).

    The employer is not required to pay for transportation and daily subsistence from the place of employment to a subsequent employer's worksite if the worker has contracted with a subsequent employer who has agreed to provide or pay for the worker's transportation and subsistence expenses from the present employer's worksite to the subsequent employer's worksite. 20 CFR 655.122(h)(2).

15. **DEDUCTIONS FROM WORKER'S PAY**: Employer agrees to make all deductions from the worker's paycheck required by law. This job offer discloses all deductions not required by law which the employer will make from the worker's paycheck and all such deductions are reasonable, in accordance with 20 CFR 655.122(p) and 29 CFR part 531. The wage requirements of 20 CFR 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under 20 CFR part 655, subpart B, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. 20 CFR 655.122(p).

16. **DISCLOSURE OF WORK CONTRACT**: Employer agrees to provide a copy of the work contract to an H-2A worker no later than the time at which the worker applies for the visa, or to a worker in corresponding employment no later than on the day work commences. For an H-2A worker coming to the employer from another H-2A employer, the employer agrees to provide a copy of the work contract no later than the time an offer of employment is made to the H-2A worker. A copy of the work contract will be provided to each worker in a language understood by the worker, as necessary or reasonable. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of this clearance order, including all Addendums, and the certified *H-2A Application for Temporary Employment Certification* will be the work contract. 20 CFR 655.122(q).

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17. **ADDITIONAL ASSURANCES FOR CLEARANCE ORDERS**:

A. Employer agrees to provide to workers referred through the clearance system the number of hours of work disclosed in this clearance order for the week beginning with the anticipated date of need, unless the employer has amended the date of need at least 10 business days before the original date of need by so notifying the Order-Holding Office (OHO) in writing (e.g., e-mail notification). The employer understands that it is the responsibility of the SWA to make a record of all notifications and attempt to inform referred workers of the amended date of need expeditiously. 20 CFR 653.501(c)(3)(i).

If there is a change to the anticipated date of need, and the employer fails to notify the OHO at least 10 business days before the original date of need, the employer agrees that it will pay eligible workers referred through the clearance system the specified rate of pay disclosed in this clearance order for the first week starting with the originally anticipated date of need or will provide alternative work if such alternative work is stated on the clearance order. 20 CFR 653.501(c)(5).

B. Employer agrees that no extension of employment beyond the period of employment specified in the clearance order will relieve it from paying the wages already earned, or if specified in the clearance order as a term of employment, providing transportation from the place of employment, as described in paragraph 7.B above. 20 CFR 653.501(c)(3)(ii).

C. Employer assures that all working conditions comply with applicable Federal and State minimum wage, child labor, social security, health and safety, farm labor contractor registration, and other employment-related laws. 20 CFR 653.501(c)(3)(iii).

D. Employer agrees to expeditiously notify the OHO or SWA by emailing and telephoning immediately upon learning that a crop is maturing earlier or later, or that weather conditions, over-recruitment, or other factors have changed the terms and conditions of employment. 20 CFR 653.501(c)(3)(iv).

E. If acting as a farm labor contractor (FLC) or farm labor contractor employee (FLCE) on this clearance order, the employer assures that it has a valid Federal FLC certificate or Federal FLCE identification card and when appropriate, any required State FLC certificate. 20 CFR 653.501(c)(3)(v).

F. Employer assures that outreach workers will have reasonable access to the workers in the conduct of outreach activities pursuant to 20 CFR 653.107. 20 CFR 653.501(c)(3)(vii).

*I **declare** under penalty of perjury that I have read and reviewed this clearance order, including every page of this Form ETA-790A and all supporting addendums, and that to the best of my knowledge, the information contained therein is true and accurate. This clearance order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job. 20 CFR 653.501(c)(3)(viii). I understand that to knowingly furnish materially false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by fines, imprisonment, or both. 18 U.S.C. 2, 1001.*

1. Last (family) name *	2. First (given) name *	3. Middle initial §
4. Title *		
5. Signature (or digital signature) *		6. Date signed *

Employment Service Statement

In view of the statutorily established basic function of the Employment Service (ES) as a no-fee labor exchange, that is, as a forum for bringing together employers and job seekers, neither the Department of Labor's Employment and Training Administration (ETA) nor the SWAs are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor does any job order accepted or recruited upon by the ES constitute a contractual job offer to which the ETA or a SWA is in any way a party. 20 CFR 653.501(c)(1)(i).

Public Burden Statement *(1205-0466)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Public reporting burden for this collection of information is estimated to average .63 hours per response for all information collection requirements, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing, reviewing, and submitting the collection of information. The obligation to respond to this data collection is required to obtain/retain benefits (44 U.S.C. 3501, Immigration and Nationality Act, 8 U.S.C. 1101, et seq.). Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 200 Constitution Ave., NW, Suite PPII 12-200, Washington, DC, 20210. (Paperwork Reduction Project OMB 1205-0466). DO NOT send the completed application to this address.

I. H-2A Workers Should Not Be Part of a Proposed Bargaining Unit

The overlapping and/or competing operations of the H-2A regulatory scheme and the collective bargaining process make it unnecessary and unworkable to include H-2A workers in a proposed bargaining unit. The discussion above highlights the two main aspects of the H-2A program that make it an inappropriate fit for bargaining under FLFLPA: (1) the temporary nature of the work and repeated departures of the H-2A workers; and (2) the high degree of Department of Labor regulation already in place, with respect to all elements of the employer-employee relationship.

It is understandable why groups like the United Farm Workers want to include H-2A workers in potential bargaining units. First of all, they have demonstrated a pattern of inappropriate conduct, including an incident involving their representatives strong-arming incoming H-2A workers to sign dues cards while still in Mexico that amici raised to the Board in our September 26, 2022 comments on proposed SERA amendments under FLFLPA. Even assuming, for some reason, that the unions would follow the rules, the second reason why they might prefer to have H-2A workers in the bargaining unit is that it might artificially boost numbers within the unit while guaranteeing that, as a practical matter, they would have virtually no input into the actual negotiations after they leave the country, let alone in the governance of the union.

Moreover, and perhaps more practically important, including H-2A workers would mean that they would be subject to any forced-unionism clause negotiated (without them) by the union. This would boost union dues, at the H-2A workers' expense, without any corresponding input into union governance. This naked economic self-interest by the unions is little more than taxation without representation for the temporary foreign guest workers. The union's argument for including workers in a bargaining unit ***who have left the country entirely*** (and predictably, since

the law requires their departure) demonstrates this economic self-interest. The H-2A workers in that scenario would be seen by the unions as nothing more than a signature to add to their total, exploited by the unions without any possibility of benefit.

Typically, collective bargaining focuses on certain key components of the employment relationship: wages, benefits, grievance procedures, and job security. ***None of those would work in the H-2A context***. As discussed above, wages are already set at a premium rate by the Department of Labor, and any discussion of trading a few cents an hour in exchange for more robust health or pension benefits would be completely prohibited by the Department. H-2A workers already receive free housing and local transportation, which amounts to a 25% to 35% bonus over the take-home pay of U.S. workers who use the first third of their paycheck to pay rent or mortgage plus car and commuting costs. The H-2A regulations require employers to carry workers' compensation insurance, and when H-2A workers experience non-work-related illnesses, they often want to return home to recuperate under their family's care. For this reason, the participation rate in employer-provided health plans among H-2A workers is nearly nonexistent.

As far as protecting their rights or instituting grievance procedures, H-2A workers already have a $15-billion-a-year federal agency with the might of the hundreds of Wage and Hour Division investigators just a phone call away to enforce the rights and requirements of the H-2A program. Employers found to have violated these requirements are subject to paying back wages and/or civil money penalties and face debarment from the program for serious offenses. H-2A workers are far more protected than the average U.S. worker, including those covered by CBAs. And any negotiations limiting an employer's ability to terminate seasonal workers or requiring certain staffing levels or a right to return are categorically at odds with the operation of the H-2A

program. The work is temporary or seasonal, as required by federal statute, and H-2A workers are legally forbidden to stay beyond the limits of their specific visa or visas.

A policy treating H-2A workers differently than their U.S. counterparts is not based on their nationality or race, but based on the complex set of statutes and regulations that provide the mechanism for them to travel to the United States to engage in this work. The value of collective bargaining is at its apex when local workers have no advocate in setting the terms and conditions of their work and arrive at the worksite to accept whatever is offered. In the H-2A context, the opposite is true. H-2A workers have the 800-pound gorilla of the Department of Labor acting as the gatekeeper and their advocate in setting those terms and conditions and then in enforcing them. By law, prospective H-2A workers are required to receive the full job order – setting forth the wages, housing, transportation, three-fourths guarantee, exact nature and timing of the work to be performed, and so forth – before they ever apply for their visa. 20 C.F.R. § 655.122(q). The contract must be in a language that they understand. *Id.* Before they ever receive that contract, the employer has had to attest under penalty of perjury that it will comply with all of the terms that the Department of Labor has set for that job. When H-2A workers complete the all-expenses-paid trip from their home to their U.S. worksite, the Department has created a contract to protect them and their employer has provided all of the information about the employment to them weeks or months earlier.

Fundamentally, however, H-2A workers are defined as much by performing this crucial agricultural labor in the United States as they are by having to leave the United States when that work is done for the season. That ephemeral nature weighs heavily against finding a "mutual interest" with year-round local workers. *Warner Nursery*, 55 PERB ¶ 4403 (2022). These workers have substantively different interests and goals than their U.S. counterparts and using them to

achieve certification that would benefit only the U.S. workers is cynical by the unions and would be inappropriate for the Board to permit.

II. Arguments by UFCW Do Not Support Including H-2A Workers

In their brief filed today, UFCW points to provisions in the H-2B regulations expressly contemplating union involvement in recruiting. In making that argument, however, that brief incorrectly points to 20 C.F.R. § 655.731, which is part of the H-1B regulations for highly-skilled long-term workers; a completely different visa with its own set of regulations. UFCW also fails to note the H-2B regulation cited *supra* in this brief, where the Department of Labor allows for the possibility of CBA wages below the usual prevailing wage determination for H-2B work in the case of arms' length negotiated agreements. H-2A actually requires the opposite; a CBA wage below the AEWR could never be paid. UFCW also omits that H-2B workers do not receive the free housing and local transportation benefits that come with H-2A employment. So, comparing H-2A to H-2B is not so much apples to oranges as apples to hammers.

As far as UFCW's implied preemption argument, Congress' lack of comment on the possibility of collective bargaining in the H-2B context might be meaningful, since those occupations have a long history of union activity. But when Congress last enacted H-2A reforms, in 1986, there was no equivalent federal right to collective bargaining and the only state with agricultural bargaining was California. In 1986 (indeed, until the past decade or so), there was essentially zero H-2A participation in California. So the idea that Congress would have spoken up in 1986 about the interaction of H-2A and agricultural collective bargaining ignores the history of both parts of our country's agricultural labor history.

The unions' reference to *Maker Stables, LLC*, 54 PERB ¶ 4401 (2021) actually cuts against their argument. The Board referred to its practice and policy of including in a unit all "regularly

employed employees" performing the same work. H-2A employment is time-limited by definition. As soon as H-2A workers arrive, the clock is ticking, and they know that they will be leaving New York and returning to their home country at a specific time. This is not regular, ongoing employment like in other settings, but a sharply delimited temporary position only.

UFCW's brief goes so far as to cite Board decisions acknowledging that seasonal workers do not belong in a bargaining unit with year-round workers. UFCW Brief at 11-12, citing *Maker Stables, supra*, and *Funtastic Carnival Supplies, Inc.*, 46 SLRB 460, 462-463 (1985). This raises entirely new problems with including H-2As in even a separate bargaining unit than year-round counterparts – H-2A contracts through the Department of Labor expire in 10 months or less and must be re-applied for by the employer and re-certified by the Department each year. CBAs remain in effect for years at a time. Would an H-2A seasonal bargaining unit need to re-certify a union or renegotiate a contract each year?

The argument that excluding H-2A workers from bargaining units "would pose a threat to domestic workers" is completely specious. UFCW Br. at 12. The Department of Labor, through the Department of Agriculture, conducts semi-annual surveys of farmworker wages. If the result of domestic workers engaging in collective bargaining meant higher wages than currently in place, then H-2A workers would have to be paid that higher average rate through the AEWR minimum. There could not possibly be the "downward pressure" on <u>any</u> domestic worker's wages, and certainly not on wages set by an existing CBA. This "cheap foreign labor" argument has been a xenophobic stalking horse for the far left and far right for generations. The increasing rate of farms participating in H-2A over the past 20 years has resulted in quite the opposite result – the growth in farm worker wages has substantially <u>outpaced</u> that of non-farm wages in the United States.

The Department of Labor is always quick to point out that Congress did not mandate any specific method by which to guard against "adverse effect" in wages. The method that the Department uses – and has successfully defended time and again in court – is to require payment of wages above the surveyed-average of wages. There is no requirement that ***every*** H-2A worker be paid more than ***every*** U.S. worker, obviously, so the possibility raised that some New York farmworkers will have higher wages than average as a result of collective bargaining does not mean that the Department has failed in its Congressionally-mandated requirement to avoid adverse effect. This is not a good-faith argument by the unions.

The discussion of "employment at will" is likewise inapt in the H-2A context. As described above, the work period always has a defined end-date, and employers are required by the Department of Labor to offer at least three-fourths of the hours during that defined period, or else pay the workers for the missing hours. This is the exact opposite of at-will employment. There is no possibility to lay off workers early, nor for work to continue beyond the end of the contract (and the workers' visas, which are tied to that end-date). This is temporary employment for a starkly delineated contract period, nothing more. The reference at page 15 of the UFCW brief to *Town of Brookhaven*, 30 PERB ¶ 3040 (1997) does not make any sense here. Some turnover in personnel is to be expected in any business, but the Town of Brookhaven's workforce does not decamp to another country indefinitely, with no guarantee of ever returning to the United States. H-2A employment is temporary in a way that none of the Board's previous cases have involved.

CONCLUSION

For the foregoing reasons, and those asserted by the farms defending themselves individually, the Board should reverse the Acting Director's decision in these cases and should hold that H-2A workers are ineligible for inclusion in bargaining units certified under SERA,

whether while they are still present in the United States or certainly after they have departed to return to their home countries by the time of certification. Including H-2A workers, based on the nature of their work and how the terms of their employment are set by the Department of Labor, is entirely unnecessary and completely inappropriate. Thank you for the opportunity to share our members' perspective on this important issue for New York agriculture.

Dated: June 28, 2023

Respectfully submitted,

SMITH, GAMBRELL & RUSSELL, LLP
Attorneys for Grow NY Farms, New York State Vegetable Growers Association, New York State Wine Grape Growers, New York State Horticultural Society, and Northeast Dairy Producers Association, amici curiae

By: /s/ *Christopher J. Schulte*
Christopher J. Schulte
1055 Thomas Jefferson St., NW, Suite 400
Washington, DC 20007
Tel: (516) 375-3220
cschulte@sgrlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 28, 2023, I electronically filed the foregoing AMICI CURIAE BRIEF REGARDING QUESTIONS RAISED BY THE BOARD AS TO H-2A EMPLOYEES with the Board via email at sera@perb.ny.gov and to the following parties/attorneys in these actions at the email addresses indicated below, which email addresses have been designated by such parties for purposes of electronic mail delivery.

/s/ *Christopher J. Schulte*
Christopher J. Schulte
Counsel for Amici Curiae

John Wirenius, Chairperson
Public Employment Relations Board
PO Box 2074
ESP Agency Building 2, FLS 18 & 20
Albany, NY 12220
jwirenius@perb.ny.gov

Sarah Coleman, Acting Director
Private Employment Practices & Representation
Public Employment Relations Board
PO Box 2074
ESP Agency Building 2, FLS 18 & 20
Albany, NY 12220
scoleman@perb.ny.gov

Martio Martinez, Esq.
Brenda Rizo, Esq.
Martinez Aguilasocho Law, Inc.
Counsel for Petitions, UFWA
PO Box 1998
Bakersfield, CA 93303
mmartinez@farmworkerlaw.com

Armando Elenes, Secretary Treasurer
United Farm Workers of America
PO Box 62
Keene, CA 93531
aelenes@ufw.org

Joshua H. Viau, Esq.
Boris W. Gautier, Esq.
Fisher & Phillips, LLP
Counsel for A & J Kirby Farms, LLC & Porpiglia Farms, Inc.
1230 Peachtree Street, N.E.
Suite 3300
Atlanta, GA 30309
jviau@fisherphillips.com
bgautier@fisherphillips.com

Hilary L. Moreira, Esq.
Bong, Schoeneck & King, PLLC
Counsel for Lynn-Ette & Sons, Inc.
1010 Franklin Avenue, Suite 200
Garden City, NY 11530
moreirh@bsk.com