STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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

SUPPLEMENTAL BRIEF OF PARTIES A & J KIRBY FARMS & PORPIGLIA FARMS

A & J Kirby Farms, LLC ("Kirby") and Porpiglia Farms, Inc. ("Porpiglia") (collectively, "Employers"), by and through undersigned counsel, hereby submit this supplemental and amicus brief in support of themselves as parties, pursuant to the invitation of the Public Employment Relations Board ("PERB" or the "Board"). For the reasons set forth below, the Board should answer both certified questions in the negative.

Question 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?

No. H-2A workers should not be included in a certified bargaining unit. Both the Hearing Officer and the UFW have mischaracterized the Employers' position on this issue. With respect to federal preemption, Kirby and Porpiglia do not seek to facially invalidate the FLFLPA or abrogate the intent of the New York legislature to extend workplace protections to the agricultural sector. Rather, the Employers ask PERB to issue a narrow holding that the federal H-2A program—established by Congress and highly regulated by the U.S. Department of Labor—preempts SERA's collective bargaining and showing of interest provisions *as applied* to temporary H-2A visa-holding guestworkers.

All of the traditional subjects of collective bargaining—wages, hours, working conditions—are expressly governed by federally mandated work contracts between H-2A workers and their employers. These work contracts effectively already operate as collective bargaining agreements: they apply to all similarly situated H-2A workers, they require that termination be for cause, and they provide for penalties against noncompliant employers. Indeed, any H-2A worker can bring a breach of contract action against their employer and recover damages in the event of a breach, consistent with contract law principles. Unlike nearly every other nonunionized worker in New York, H-2A workers are not "at will" employees. And given that thousands of agricultural employers nationwide participate in the H-2A program, the workers have a choice of where to apply, which allows them to have bargaining power with employers. Not only do these workers have private contract rights, they also have statutory rights—employers cannot enter into H-2A work contracts to pay less than the prevailing wage as set forth by the DOL. Further, federal law grants H-2A workers a unique and itemized set of benefits that far exceeds the benefits mandated on private employers by New York state law. For instance, employers cannot participate in the H-2A program unless they provide transportation and housing for the entire term of employment. Again, these benefits are memorialized in binding work contracts that can be enforced by any H-2A worker and are diligently policed by the U.S. Department of Labor and various farmworker advocacy groups.

Kirby and Porpiglia's multiple prior briefs to the Hearing Officer, and its prior submissions as parties to this appeal, have comprehensively illustrated how the detailed regulations of the H-2A program are incompatible with collective bargaining. The Employers incorporate these submissions by reference and respectfully ask the Board to carefully consider each of its legal

arguments. The Employers reserve to right to assert additional arguments as part of its forthcoming brief in response to amici.

Question 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?

No. Workers who are no longer employed by the Employer because their temporary work contracts and visas have expired and who have returned to their home country should not be considered employees nor included in the bargaining unit. Likewise, any dues deduction cards signed by prospective or future workers (e.g., cards signed in Mexico before an individual's term of employment began) should be invalidated and not considered as part of a showing of interest.

Even if H-2A workers can be subject to collective bargaining agreements, it does not follow that unions can certify a bargaining unit based on a showing of interest from temporary, term-limited guestworkers. The rules for whether a newly hired worker must join a pre-existing union are different than the rules for whether certain workers are eligible to certify a representative and impose bargaining obligations on an employer. The Hearing Officer overlooked this crucial distinction, and the UFW continues to obfuscate the law to support its unique, self-centered labor organizing strategy.

Under both SERA and the NLRA, an employer only has an obligation to negotiate a CBA once a union has been certified. The showing of interest—a prerequisite to certification—requires that more than 50% of eligible employees from an appropriate bargaining must agree on a bargaining representative. As a matter of black letter labor law, temporary workers on a term-limited contract are not eligible for inclusion in this showing of interest. This logical rule recognizes the core principle of collective bargaining: to bind an employer to a multi-year—or, under current PERB rules, potentially indefinite—agreement with its workers, the bargaining unit

must have a mutual interest in working conditions. Because temporary workers with no expectation of continued employment do not have a sufficient personal stake in the long-term working conditions of the employer's regular workforce, and because they may never reap any benefits from a negotiated agreement, they do not have the power to bind the employer and its permanent and future employees.

These principles apply with particular force here, where the UFW seeks certification on the back of workers that are not only temporary, but that the employer has a legal obligation to *not* rehire. Unlike traditional "seasonal employees," H-2A workers actually are more akin to independent contractors, who are hired for a specific project under specific terms, and who may or may not ever work for the employer again. Even if the employer wanted to hire them on a permanent basis or guarantee them year-to-year employment, federal law prohibits such promises or agreements. Moreover, these H-2A workers do not live in New York state—they are permanent residents of foreign countries, and they have no legal authorization to work in the United States outside of their definite employment term. Whether a union even has standing to bring a representation petition on behalf of such workers remains uncertain.

PERB has never asserted jurisdiction over workers who no longer work for a New York employer, live outside the country, and may not even have legal authorization to work in the United States at the time of certification or during bargaining negotiations. UFW exploits these limitations to circumvent the traditional organizing process and instead attempt to "negotiate" a CBA on behalf of a non-existent bargaining unit.

I. A bargaining unit can only include *employees*.

The Board asks whether individuals "who have returned to their home countries" should be considered "employees" and therefore be eligible for inclusion in a bargaining unit. The Board's

question answers itself. By definition, individuals who neither reside nor work in New York are not "employees" covered by New York law. Consistent with longstanding black letter law principles of labor law, the plain text of SERA answers the Board's question as "no."

A. The SERA definition of "employees" does not include former employees.

The SERA defines "employees" through a series of clarifications and illustrative examples, rather than through a direct definition. See SERA § 701(3)(a) ("The term 'employees' includes but is not restricted to any individual employed by a labor organization . . ."). Among other provisions, the SERA definition of "employees" expressly includes individuals "engaged in the performing arts" and individuals "employed in a charitable non-profit rehabilitation facility." Id § 701(3)(a)–(b). The definition also provides carefully crafted exclusions. For instance, "any individual employed his parent or spouse" is not an "employee" under the Act.

In light of this definitional structure, standard statutory interpretation rules compel that the plain reading of "employees" should govern with respect to any category of individuals not expressly contemplated by the statutory text. Therefore, the Board may consider dictionary definitions, all of which define the term "employee" by reference to an individual's current relationship with an employer. See, e.g. Mariam-Webster ("one employed by another usually for wages or salary and in a position below the executive level"); Black's Law Dictionary ("Someone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance."); Cambridge English Dictionary ("someone who is paid to work for someone else").

Of course, SERA also provides that employees shall include "farm laborers," which the statute defines as "any individual engaged or permitted by an employer to work on a farm." SERA

§ 701(3)(c). This definition mirrors the dictionary definitions of "employee" with the additional requirement that the individual must work "on a farm."

Given that SERA only covers employees and employers within the state of New York, individuals who live in their home countries (not in the United States) and no longer receive any wages from a New York employer plainly do not meet any of these definitions of "employee" or "farm laborer." They are not employed or performing services for any New York employer. They certainly are not performing any work "on a farm" in New York while they are thousands of miles away in their home countries. Nor are they "engaged or permitted" to work at a New York farm. In fact, federal law expressly provides that nonimmigrant aliens such as former H-2A workers are not "permitted" to work on a New York farm—or anywhere in the United States—after their contractually limited term of employment ends.

Consequently, individuals who have no legal authorization to work in the United States and who have in fact left the country do not qualify as employees. The Board itself already reached this uncontroversial conclusion when it promulgated the February 15, 2023 PERB Rule Amendments. PERB's published responses to public comments regarding proposed Rule Amendments expressly answered the Board's current question without equivocation: "PERB notes that employees who are no longer employed by the employer will not be included in the unit." See Exhibit 1, attached herewith. This published agency guidance has been relied upon by New York employers, consistent with administrative law notice-and-comment procedures.

B. The Legislature did not intend SERA to cover former employees.

PERB must adhere the Legislature's highly specific definition of employee and cannot expand that definition to cover individuals who are not employed, such as former employees or prospective employees. In enacting SERA and the FLFLPA, the Legislature contemplated whether

"any individual whose employment has ceased" may nonetheless qualify as an "employee." See SERA § 701(3)(a). SERA provides that such individuals are "employees" only under a unique set of dual circumstances: 1) when the employment relationship terminated "as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice," ***and*** 2) when that terminated employee "has not obtained any other regular and substantially equivalent employment." Id.

In the instant cases, the parties do not dispute that the employment of H-2A workers ceased because their term of employment ended, and they returned to their home countries—no party alleges that that the bargaining unit employees were terminated because of a labor dispute or unfair labor practice. Nothing in the record indicates whether or not these workers have obtained employment elsewhere, but some of them may in fact have jobs in rural Mexico or Jamaica (although it would be difficult to confirm). In any event, because the two statutory conditions are not satisfied, PERB cannot assert jurisdiction over these nonemployees. See Colon v. Martin, 35 N.Y.3d 75, 78, 149 N.E.3d 39, 42 (2020) ("The maxim *expressio unius est exclusio alterius* applies in the construction of the statutes, so that where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded" (quoting McKinney's Cons Laws of NY, Book 1, Statutes § 240)).

This Board adopted this exact reasoning when it held that a prior version of the Taylor Law could not apply to former lifeguards. See Byrne v. Long Island State Park Commission, 4 PERB ¶ 8031 (July 22, 1971).[1] At the time, the Taylor Law defined "public employee" as "a person holding a position with a governmental unit." Id. When a union petitioned to represent a unit of

[1] Byrne was decided by the New York Supreme Court, and its holding on this issue was adopted by PERB. The Legislature later amended the Taylor Law's definition of "public employee."

seasonal lifeguards "whose jobs have expired," the petition was dismissed because "the former lifeguards do not hold positions." Id. Although the lifeguards "worked for the government in the past" and could "reapply for employment," they were not covered because "[t]he Taylor Law is highly specific and the failure to refer to former or prospective employees of seasonal or temporary status must be accorded significance." Id. Likewise, here, SERA's definitions of "employee" and "farm laborer" are "highly specific." Although the Legislature acknowledged the seasonal nature of agriculture in its statement of purpose, the FLFLPA did not amend SERA to encompass former employees. Until and unless the Legislature chooses to do so, the Board should reach the same result as it did in Byrne—even if "this represents a defect" in the law, the Board should not "trespass on the legislative wisdom in this respect." Id.

II. Employee status cannot simply be determined at the time the petition was filed.

In each of the Decisions below, the Hearing Officer recognizes "the fact that H-2A workers have returned to their home countries and are not employed by [the Employer] at this time." A & J Kirby Farms, LLC, 56 PERB ¶ 4402 (Mar. 16, 2023); Porpiglia Farms, Inc., 56 PERB ¶ 4406 (April 12, 2023). Nonetheless, the Hearing Officer concludes that certification must be issued with no further consultation of the employer's current payroll because a purported bargaining representative's showing of interest must be based on the employment status of workers "at the time the petition for certification was filed." Id. The Hearing Officer provides no citations for this rule, which contradicts both PERB's published guidance and the text of SERA.

SERA contemplates that the Board shall designate an employee representative only "when such representative demonstrates a showing of majority interest by employees in the unit." SERA § 705(1). The statute thus contemplates a two-part process: 1) determination of "the appropriate unit for purposes of collective bargaining;" and 2) determination that the union has satisfied "a

showing of majority interest," which may require "employees voting in an election conducted pursuant to this section." Id.

Section 705 further itemizes these steps in this same sequential order. First, the Board "shall decide in each case whether . . . 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." Id. § 705(2). Then, the Board "shall have power to determine who may participate in the election." Id. § 705(4). Only eligible "employees" within the appropriate unit may vote in elections.

To be sure, PERB's new procedural rules provide that the union's initial evidence in support of a showing of interest "shall be submitted with the petition," PERB Rule § 263.22, but the Rules do not—and legally cannot—abrogate the plain statutory text. The Rules do not allow the union's petition to determine the appropriate unit; the Board must make that decision. Nowhere do the Rules or the statute require that employee status remains fixed in time on the date the union chooses to file its petition.

Indeed, certification only remains effective until "the certified representative does not represent a majority of ***employees*** within an appropriate unit." PERB Rule § 263.30 (emphasis added). In other words, the issuance of certification is premised on a finding that employees in fact exist within an appropriate unit, and that a majority of such employees in fact chose their bargaining representative.

In the Kirby Farms and Porpiglia Farms matters, the parties disputed the appropriate unit and exchanged briefs with legal arguments regarding the community of interest factors. The Hearing Officer then determined the appropriate unit—but she neglected the final prerequisite to certification: counting the "votes" of current employees within the unit found to be appropriate. SERA requires that a showing of interest be based on "a showing of majority interest by ***employees***

in the unit." SERA § 705(1) (emphasis added). Here, the parties did not know the appropriate unit until the Hearing Officer made that determination. Once the unit was decided, the union's evidence of majority interest must have been checked to ensure that only unit "employees" were considered—not individuals "no longer employed."

In future cases, if the Board orders an election, only "employees" would be eligible to vote in the election. SERA contemplates that the Board "may conduct an election by secret ballot of ***employees***." SERA § 705(3) (emphasis added). This two-fold limitation on voting eligibility—inclusion in an appropriate unit and employee status—necessarily requires a determination of "who may participate in elections," as contemplated by the statute. Id. § 705(4). In circumstances where the Board certifies a representative without an election, the dues deduction cards "serve as the functional equivalent of a vote." Kirby Farms, 56 PERB ¶ 4402. Because former employees, prospective employees, and individuals not working on a farm in New York are not "employees," they are not eligible to "vote," and their dues deduction cards therefore do not count towards a showing of majority employee interest.

The NLRB and labor boards in other states have long adhered to these common-sense principles by requiring a determination of voting eligibility after an election has been set. See, e.g, NLRB v. Kolkka, 170 F.3d 937, 943 (9th Cir. 1999) ("Persons employed in a bargaining unit during the eligibility period and on the date of the election are eligible to vote"); NLRB v. Maryland Ambulance Servs., Inc., 192 F.3d 430, 433 (4th Cir. 1999) ("The Board has long required that, in order to be eligible to vote in a representation election, an employee must be both hired and working on the eligibility date." (citations omitted)); NLRB v. Family Heritage Home-Beaver Dam, 491 F.2d 347, 350 (7th Cir. 1974) ("the status of such individuals as employees with a stake in the outcome of the election is established . . . by application of the same standard, whether

they were both 'hired and working'"); Bd. of Regents v. Ill. Ed. Labor Rel. Bd., 166 Ill. App. 3d 730, 735 (Ill. App. Ct. 1988) ("In order to be eligible to vote in an election regarding selection of an exclusive bargaining representative, IELRB rules require an employee to not only be in an eligible position for the payroll period immediately prior to the election but also to have been in an eligible position during the payroll period immediately prior to the order directing the holding of the election").

Because SERA does not specify a specific relevant time for determining voting eligibility, PERB should follow the NLRB rule that has been consistently upheld by courts around the country. This rule would simply require that "shortly after the scheduling of an election, the employer must furnish a list of the names and addresses of all employees eligible to vote." NLRB v. WFMT, 997 F.2d 269, 276 (7th Cir. 1993) (recognizing this rule as consistent with longstanding NLRB precedent). Such a rule applies and has worked well even in largely seasonal industries covered by the NLRA.

Determining employee status at the time of certification (as opposed to the time the petition was filed) furthers the collective bargaining rights of employees. And requiring "actual performance of bargaining unit work" during the time period immediately prior to an election in order for an employee to be eligible to vote serves "to effectuate the meaning of the term 'employed'" Maryland Ambulance, 192 F.3d at 434. This type of practical rule also "prevents the employer from manipulating the election process by hiring employees favorable to its position just prior to the election" and provides clear guidance to employers and "administrative convenience" for the agency. Id. See also N.L.R.B. v. New England Lithographic Co., 589 F.2d 29, 34-35 (1st Cir. 1978) ("Consistent application of the date certain standard will foster these goals of promoting

industrial peace and the free flow of commerce promptly, since the application of the test is relatively simple, requiring minimal investigation.").

Under a card check system with no election, "it makes sense to require presence at the workplace as of the date a majority status determination is made." N.L.R.B. v. Magnesium Casting Co., Inc., 668 F.2d 13, 19 (1st Cir. 1981). The First Circuit accurately characterized this rule as protective of employee rights:

> Such a determination serves as a rough substitute for a union election — a sort of second-best mechanism for assessing the extent of union support among a company's employees. Employees who have not submitted union cards by the critical date are, in some sense, treated as though they had voted against the union. The negative inference is plausible in the case of *working* employees, for such employees have presumably been exposed to the arguments for and against unionization. A *nonworking* employee, however, is less likely to have been exposed to these arguments, and his failure to submit a union card might well reflect nothing more than the lack of a chance to consider the matter. Accordingly, we see nothing wrong with excluding hired but nonworking employees from a majority status count as the Board did here.

Id.

These principles have been consistently applied in the card check context, even in the absence of disputed temporary or seasonal employees. See N.L.R.B. v. Vemco, Inc., 989 F.2d 1468, 1488 (6th Cir. 1993) ("Authorization cards signed by employees who were legally terminated do not count in the determination of a card majority."); Novelis Corp. v. Nat'l Labor Relations Bd., 885 F.3d 100, 110 (2d Cir. 2018) ("a 'substantial lapse of time casts doubt on whether the employee preference for the union expressed . . . through authorization cards, still reflect[s the] majority will'" (quoting N.L.R.B. v. Knogo Corp., 727 F.2d 55, 60 (2d Cir. 1984)).

III. Even if covered by SERA, temporary employees are not eligible to "vote."

In each of her FLFLPA decisions, the Hearing Officer reasons that "under the SERA, there is no requirement of a continuity of employment from year to year in order for seasonal employees to be included in the bargaining unit." Porpiglia Farms, 56 PERB ¶ 4406. From there, the Hearing

Officer holds that "the seasonal nature of their employment" allows the unit to be certified while the individuals in the unit are not actually employed. This line of reasoning is deeply flawed and fails to appropriately follow PERB precedent.

First, as thoroughly discussed above, the Board must determine an appropriate bargaining unit before considering whether the union has majority support. Although later-hired seasonal employees could hypothetically fall within the bargaining unit, and the Board could hold that an appropriate unit indeed includes such seasonal employees, that does not allow the union to obtain certification absent majority support of current employees at the time of certification, i.e., at the time of the "vote." Dues deduction cards, just like election votes, from nonemployees cannot be considered.

Second, and relatedly, the Hearing Officer conflated the issues of unit placement and voting eligibility. Determination of an appropriate bargaining unit involves considering whether various job titles and workers share a sufficient community of interest. A vacant job position with working conditions similar to the Employer's current workforce can be included in the unit certification, but former employees who formerly held that position are not eligible to submit union cards.

In one of the only FLFLPA decisions to address the issue, PERB held that an appropriate unit could include part-time employees even though it was undisputed that "there are currently no employees working part-time" for the employer. See Paumanok Vineyards and Palmer Vineyards, 55 PERB ¶ 3401 (Aug. 9, 2022). The Board then noted that even if the employer in fact employed part-time workers when the petition was filed, "whether an individual employee had a continuing interest in terms and conditions of employment was not a matter of unit inclusion, but a separate matter to be determined when addressing employee's eligibility to vote." Id. (quoting Wyckoff Heights Hospital, 35 SLRB 313, 316-317 (1972)).

As part of its unique organizing strategy, and unlike the unions in the Board's prior FLFLPA decisions, UFW apparently filed petitions based on a showing of interest of exclusively temporary H-2A workers. Cf. School Dept. v. LRB, No. PC-03-3809, at *1 n.2 (R.I. Super. June 20, 2005) ("This court has neither found nor been presented with a case wherein the proposed bargaining unit was to be comprised entirely of temporary employees."). Even if these workers are eligible for collective bargaining under SERA, and even if a bargaining unit can be certified to include only H-2A workers and seasonal domestic workers, UFW must still show "whether an individual employee had a continuing interest in terms and conditions of employment" such that the employee retains "eligibility to vote." Therein lies the flaw in the Hearing Officer's reasoning—even if she correctly determined "unit inclusion," she cannot conclude that individuals not currently employed are eligible to have their dues deduction cards counted as part of the Union's showing of majority support.

In all the decisions, the Hearing Officer cites to Funtastic Carnival Supplies, Inc, 46 SLRB at 462 (1985) for the contention that "seasonal employees" should be included in the bargaining unit regardless of whether they have "continuity of employment."[2] As explained in Maker Stables, however, that rule was derived from "the transition in caselaw in the public sector." 54 PERB ¶ 4401 (Dec. 28, 2021). The public sector cases include a different definition of employee and, in the wake of the Byrne decision, the Taylor Law statute now covers temporary and seasonal employees. Moreover, "earlier SLRB caselaw held that, in order to include [seasonal employees] in an appropriate unit, it must be demonstrated that there was a reasonable probability that the

[2] Counsel notes that the Funtastic Carnival Supplies decision is in SLRB Volume 46. Notwithstanding the requirements of the 2022 PERB Modernization Act, PERB has only made SLRB volumes 48, 49, and 50 available electronically. Funtastic Carnival Supplies is likewise not available on Westlaw or other electronic databases. The Hearing Officer cites this case in at least three separate decisions, but the parties and amici in this matter do not have access to the full text of this decision.

employees would return for more than one season." Maker Stables, 54 PERB ¶ 4401. Although the SLRB apparently reached a different conclusion in Funtastic Carnival Supplies, "the SLRB reiterated that its policy was to include in a unit all regularly employed employees who perform the same work, and 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. (citing Funtastic Carnival Supplies, 46 SLRB 460, 461-462 (1985)).

Consistent with that reasoning, Hearing Officer Blassman, in Maker Stables, went on to hold that an appropriate unit should include the seasonal employees. Crucially, the decision then makes a separate determination regarding voting eligibility—using the procedures contemplated by SERA § 705**:** "I find that a unit of backstretch employees, including Grooms, Hotwalkers, and Exercise Riders, constitutes an appropriate unit for representation. I further order that, unless Local 1922 files 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, that an election be held." 54 PERB ¶ 4401.[3]

In the instant cases, the Hearing Officer should have followed the same procedure of first deciding the appropriate unit and then directing that the union must either "file[] with PERB indications of employee support sufficient" to avoid an election, or direct an election. All prior employee "votes" (cards) should be counted at that time—but only if the card signatories remain employed and eligible to vote.

[3] To the extent this procedure was only available under former PERB Rule § 251.15, that Rule should apply with equal force in the Kirby Farms and Porpiglia matters because both petitions were filed prior to the February 15, 2023 Rule Amendments.

IV. H-2A workers are temporary contractors with a definite term of employment, not "seasonal" employees.

Both the Hearing Officer and the UFW mistakenly use a traditional "seasonal employee" analysis when addressing the ability of H-2A workers to form a collective bargaining unit. Unlike "seasonal" employees, H-2A workers are contracted to work for a finite and pre-determined period of time. As required by federal law, H-2A workers enter into a work contract with the employer. In addition to governing all terms and conditions of their employment, this work contract forbids the employee from continuing to work beyond a fixed date. Their legal authorization to work in the United States expires on that date. Accordingly, under black letter labor law, H-2A workers are temporary contract laborers and cannot be considered as part of a showing of interest.

Courts and agencies have consistently deemed temporary workers with a definite term of employment "ineligible to vote" and thus "ineligible to be included in the bargaining unit." Kinney Drugs, Inc. v. N.L.R.B, 74 F.3d 1419, 1434 (2d Cir. 1996); Rhode Island Hospitality Ass'n v. City of Providence, 667 F.3d 17, 45 (1st Cir. 2011) ("Temporary employees whose departure date is definite are ineligible to vote in representation elections."); Civ. Serv. Emps. Ass'n, Inc. v. Cnty. of Westchester, 219 A.D.2d 651, 651, 631 N.Y.S.2d 385, 386 (1995) ("For the purpose of defining the petitioner's bargaining unit, hourly employees such as the laborers at the Westchester County Center are treated as temporary employees and are therefore excluded from the bargaining unit.").

"Under the most recent Board precedent, this definite date may be fixed either by a calendar date or by reference to the completion of a specific task or project." Kinney Drugs, 74 F.3d 1419, 1434. See also United States Aluminum Corp., 305 N.L.R.B. 719, 719 (1991) ("[A]n employee is ineligible to vote as a 'temporary employee' only if a definite termination date has been established."). In some cases, the NLRB and federal courts have applied a variation of this rule that focuses on the employee's subjective and objective "reasonable expectation" of continued

employment in determining whether to exclude the employee as an ineligible temporary worker. Pursuant to that standard, an otherwise temporary employee may be considered as part of the union's showing of interest if he or she has a "reasonable expectation of permanent employment within the bargaining unit." N.L.R.B. v. S.R.D.C., Inc., 45 F.3d 328, 331 (9th Cir. 1995).

Even if an employee is employed on the date of certification or the date of election, they will not be included in the bargaining unit if they are a temporary employee. See Montgomery Ward Co., Inc. v. N.L.R.B, 668 F.2d 291, 298 (7th Cir. 1981) ("Thus, a person who has no reasonable expectation of future employment as of the date of a union recognition demand cannot be considered to be an 'employee' within the meaning of the National Labor Relations Act for purposes of determining majority status.").

PERB and New York labor law decisions have also applied these principles and properly excluded temporary employees from the definition of eligible employees, and from the bargaining unit. County of Westchester, 22 PERB ¶ 8002 (excluding temporary employees "who at the time of hire have knowledge that their employment does not constitute part of the regular County work force but is limited to a special project with a defined duration"); Hyde Leadership Charter School - Brooklyn, 47 PERB ¶ 8001 ("Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period"); Civ. Serv. Emps. Ass'n, Inc. v. Cnty. of Westchester, 219 A.D.2d 651, 651, 631 N.Y.S.2d 385, 386 (1995) ("For the purpose of defining the petitioner's bargaining unit, hourly employees such as the laborers at the Westchester County Center are treated as temporary employees and are therefore excluded from the bargaining unit."). Under any of these variations of the "temporary employee" standard, H-2A workers are ineligible for inclusion for consideration as part of the union's showing of interest or in the bargaining unit.

V. The Hearing Officer and the UFW's reasoning for including seasonal laborers does not apply to H-2A workers.

In its Brief in Response to Exceptions in Kirby Farms, UFW frames the issue this way: "While Kirby contends that there is no 'guarantee' that any of its H-2A workers will return the following season (see Exceptions at 28-30), that is the case with any seasonal farm laborers – foreign or domestic." UFW Response Brief, p. 19. This framing completely overlooks the fact that H-2A workers—unlike "seasonal" domestic workers—have a definite employment end date and no expectation of permanent or regular employment. Also, unlike their domestic counterparts, H-2A workers are not at-will employees—they can only be terminated for cause. The federal government effectively acts as their bargaining representative with the employer, which results in binding work contract that limits the scope of their work duties to specific tasks and confers guaranteed pay rates and benefits for the length of their contract term.

The Hearing Officer's Decisions include the same oversight. The Decisions hold that former employees who have left the country can be considered employees and included in the bargaining unit because they are "seasonal employees" covered by SERA. In each of the cited PERB decisions, however, the Board's reasoning for inclusion of seasonal employees cannot apply in the context of H-2A contractors with a definite term of employment.

In Maker Stables, PERB explained that temporary seasonal employees should be included in the unit because "[m]ost employment is at will, with no guarantee as to how long it will continue," and the unit should include "all regularly employed employees who perform the same work." 54 PERB ¶ 4401 (citing Wyckoff Heights Hospital, 35 SLRB 313). See also Paumanok Vineyards, 55 PERB ¶ 3401 (reciting the same reasoning).[4] These justifications all lead to the

[4] Notably, the Board in Paumanok Vineyards ultimately excluded seasonal, temporary, and H-2A workers from the appropriate unit.

opposite conclusion with respect to H-2A workers. First, the employment of H-2A workers, however, is *not* "at will"—the employer can only discharge an H-2A worker in specific circumstances of which they are notified in the contract, and typically only for cause. Second, H-2A workers have an express contractual "guarantee as to how long [their employment] will continue." They have a set beginning and end date to their term of employment. Third, unlike the unit employees in Maker Stables, some of whom "worked the entire calendar year for several years," H-2A workers are not "regularly employed." Rather, they are permanent residents of a foreign country who are only admitted to the United States and permitted to work for less than one year at a time. They can only return to work for the Employer if the Employer first exhausts all available efforts to hire domestic workers. The terms and conditions of H-2A employment also change year-to-year, due to changes in federal regulations and recalculations of their prevailing wage.

The Hearing Officer also contends that "there is no requirement of a continuity of employment from year to year in order for seasonal employees to be included in the bargaining unit." Porpiglia Farms, 56 PERB ¶ 4406. But the term "seasonal" can only be defined as "every season," i.e., "from year to year." If there is no continuity requirement, then what limitations exist on the inclusion of so-called "seasonal employees"? Under this logic, someone could get hired, work one week, sign a card, quit, move abroad, and never see a New York farm again—but still be considered a "seasonal employee" and thus their card would count (and dilute the votes of regularly employed workers with a stake in the long-term working conditions of the farm). Moreover, the Hearing Officer's rule, loosely imported from the public sector in a few prior SLRB decisions, has never applied when, as here, the petitioned-for unit includes almost exclusively temporary workers who not only have no continuity of employment but also no continuity of legal

ability to live or work in the United States. It runs counter to all NLRB and federal precedent, and the decisions of other states' labor agencies.

As explained above, excluding any temporary worker without a reasonable expectation of continued employment would be consistent with well-established labor law precedent. But the instant circumstances involve a much more extreme scenario. Not only are these workers temporary contractors, but they have left the country, and they have no legal authorization to work for the employer.

VI. PERB has no jurisdiction outside of the United States

All of the above considerations apply to any former temporary employees, but they must be afforded even greater weight given the practical difficulties and jurisdictional limitations involved in dealing with foreign nationals who live and (presumably) work outside of the United States. Simply put, PERB has no jurisdiction over individuals who live abroad. Cf. Rice v. Scudder Kemper Invs., Inc., No. 01 CIV. 7078 (RLC), 2003 WL 21961010, at *5 (S.D.N.Y. Aug. 14, 2003), aff'd sub nom. Rice v. Wartsila NSD Power Dev., Inc., 183 F. App'x 147 (2d Cir. 2006) ("It is well established that the NYHRL applies extraterritorially only to New York residents; nonresidents are not covered, even if those nonresidents are discriminated against by a resident of New York outside of New York").

Even under federal law, where Congress does have the ability to regulate foreign affairs, courts have held that the NLRA cannot extend its reach extraterritoriality:

> Similarly, in enacting the NLRA, Congress included no mechanism for extraterritorial enforcement, and did not provide a method for resolving any conflicts with labor laws of other nations. Given the obvious potential for conflict where United States companies employ workers oversees, this omission strikes us as more than a mere oversight. It is consistent with the Supreme Court's conclusion that broad definitional language is little more than "boilerplate" in the absence of an express manifestation of extraterritorial intent

Asplundh Tree Expert Co. v. N.L.R.B, 365 F.3d 168, 175-76 (3d Cir. 2004).

Even if PERB had jurisdiction, imagine the practical impossibilities and the potential for due process violations of both employers and workers. How can PERB hold an evidentiary hearing when the workers are outside the country? Many of Porpiglia and Kirby's former H-2A workers live in rural Mexico with limited access to the Internet and technology required for remote video hearings. How could an election ever be conducted if half the eligible voters must have ballots shipped to them through international mail that may take weeks to arrive? The potential for exploitation, fraud, and coercion increases exponentially absent PERB oversight.

In fact, questions linger about the validity of UFW dues authorization cards that were presented to workers in Mexico and during the border crossing process. As the Board may be aware, employers in related matters have proffered credible evidence that UFW organizers visited a hotel in Matamoros, Mexico where prospective H-2A workers were waiting to cross the border for their transportation to New York. Instead of making good faith efforts to further the interests of New York employees, this out-of-state union targeted H-2A workers with lies and threats, even allegedly telling them that the UFW authorization cards were part of the immigration paperwork, and a signature was mandatory. Aside from the dubious ethics of these practices, the signing of Union cards abroad may require PERB to consider promulgating rules about when and how a card can be signed. Many of these cards—held to be the "functional equivalent of a vote"—were purportedly signed under duress but also before these workers actually began their term of employment. Certainly, a showing of interest cannot be based on submission of "votes" by individuals who are not yet employed, much less in the country.

VII. PERB should not overreach beyond its statutory mandate.

If New York remains concerned about "mak[ing] it difficult to certify employees in a largely seasonal environment," the Legislature could provide for expedited procedures that preserve employee choice and prevent unscrupulous unions like UFW from strategically timing their showing of interest submissions. For example, under California's agricultural labor code, a union can only obtain certification without an election upon a showing of interest "not less than 50 percent of the employer's peak agricultural employment for the current calendar year." Cal. Lab. Code § 1156.3. California also provides that any elections should be held "within 48 hours of the filing of the petition," id., which allows the same employee list to be used for purposes of both the petition and the election. To further avoid lengthy delays involving determinations of the appropriate bargaining unit, California mandates that "[t]he bargaining unit shall be all the agricultural employees of an employer." Cal. Lab. Code § 1156.2.

These sorts of statutory provisions would lessen the Hearing Officer's concern that "it takes time to investigate the legal and factual issues raised by employers in their response to the petition." Porpiglia Farms, 56 PERB ¶ 4406. Until and unless the New York Legislature implements similar requirements, however, PERB should not craft new and inconsistent rules out of whole cloth through adjudicatory proceedings, contrary to its published guidance, and with no notice to the public and agricultural employers.

Certainly, PERB should not bend over backwards to accommodate the out-of-state UFW organizers who—unlike other labor unions—have exclusively sought to organize H-2A workers in a thinly veiled attempt to extract dues from worker paychecks while providing no considerable benefit to the workers. Unsurprisingly, in a recent large-scale election, rank-and-file farm laborers overwhelmingly opposed UFW representation. United Farm Workers of Am. v. Agric. Lab. Rels.

Bd., No. F080469, 2022 WL 496927, at *1 (Cal. Ct. App. Feb. 18, 2022) ("On remand, the Board tallied the votes, which were overwhelming against the UFW.").

CONCLUSION

For the foregoing reasons, the Employers respectfully request the Board rule in the negative with respect to both of the relevant questions. Temporary guestworkers present in the United States on nonimmigrant H-2A visas are ineligible for consideration as part of a union's showing of interest and ineligible for inclusion in a bargaining unit. H-2A guestworkers who no longer work for the employer and have returned to their countries of residence are not employees or farm laborers under SERA and therefore should not be included in any proposed bargaining unit.

Respectfully submitted this 28th day of June, 2023,

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2023, I served a copy of the foregoing document upon all parties via email submission to sera@perb.ny.gov, and copying the following:

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EXHIBIT 1

PERB Assessment of Public Comment on Proposed Rules, page 14

37. COMMENT: All evidence submitted as part of a showing of interest pursuant to Section 263.22 (e) should have to be signed and dated within *three months* of submission rather than one year, due to turnover of seasonal workers.

RESPONSE: PERB believes that the provided time frame appropriately balances the rights of the parties and effectuates the purposes of the FLFLPA and the SERA. No revisions are required in response to this comment. PERB notes that employees who are no longer employed by the employer will not be included in the unit.

38. COMMENT: Regarding a hearing officer's investigation into the veracity of the showing of interest under Section 263.22(g), the parties should be permitted 10 days to file exceptions to the hearing officer's decision. The proposed two days is "unreasonable and unrealistic," especially given the fact that a majority of the SERA case law is not accessible online and research must be conducted in person at a PERB office.

RESPONSE: PERB considered accessibility to SERA caselaw in setting time frames and believes that the provided time frame appropriately balances the rights of the parties and effectuates the purposes of the FLFLPA and the SERA. No revisions are required in response to this comment. PERB also notes that it is in the process of digitizing and making all prior SERA Board decisions available online at no cost.

39. COMMENT: The requirement in Section 263.23 that PERB begin to process a petition for certification within one working day is unrealistic.

RESPONSE: PERB is confident that it has the resources to adhere to this Rule. Setting forth an explicit requirement that processing of the petition for certification will begin within one working day of receipt helps to inform the parties of the priority given to petitions for certification.