STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
in the Matters of

A&J Kirby Farms, LLC,
56 PERB ¶ 4402 (2023),

Porpiglia Farms, Inc.,
56 PERB ¶ 4406 (2023), and

Lynn-Ette & Sons, Inc.,
56 PERB ¶ 4405 (2023).

WAFLER FARMS INC. AMICUS BRIEF

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QUESTIONS PRESENTED

Question #1: Should seasonal agricultural guest workers present in the Unites 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?

Answer #1: No, H-2A workers should not be included in a bargaining unit certified under the State Employment Relations Act, as amended by the Farm Laborers' Fair Labor Practices Act because federal regulations concerning H-2A workers preempts said state law.

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

Answer#2: No, H-2A workers who have returned to their home country are no longer employees and therefore cannot be part of a bargaining unit under the State Employment Relations Act, as amended by the Farm Laborers' Fair Labor Practices Act.

TABLE OF CONTENTS

I. INTEREST OF AMICI

Wafler Farms, Inc. ("Wafler") is a family owned and operated apple farm and tree nursery located in Wolcott, New York. Like the farms involved in the presented cases, A&J Kirby Farms, LLC, Porpiglia Fars, Inc. and Lynn-Ette & Sons, Inc., Wafler is also involved in a similar matter of their own before the Private Employment Relations Board ("PERB") with the union United Farm Workers of America ("UFW") (see case no. CU-6697). Wafler's matter involves similar legal questions involved in the matters presented here, and for which the Board has requested briefs on. Thus, Wafler has a direct interest in the Board's decisions relating to these cases, as the same may, and likely will, affect Wafler's pending case.

II. THE FARM LABORERS FAIR LABOR PRACTICES ACT

Before directly addressing the questions presented, it is important to discuss relevant background relating to the Farm Laborers Fair Labor Practices Act ("FLFLPA"). The FLFLPA amends the State Employment Relations Act ("SERA"), as codified in labor laws §§ 700-718, by expanding the definition of the term employee therein to include "farm laborers". N.Y. Lab. Law § 701(c). Accordingly, farm laborers, under the FLFLPA, have the ability to collectively bargain and certify as a bargaining unit. N.Y. Lab. Law § 705. Notably however, nowhere in the FLFLPA does it state that the New York Legislature intended to extend such provisions under SERA to non-immigrant foreign agricultural workers in the country pursuant to the federal H-2A program ("H-2A workers"). *See* FLFLPA, 2019 N.Y. AB A8419. In fact, in the comments to the FLFLPA discussing its intent for passing the same, the New York State Legislature recognized that "various federal and state laws, rules and regulations" directly impact farmers "and require a unique balance and application of traditional labor protections". *Id.* Thus, the New York legislature expressly acknowledged that farm laborers are subject to various federal laws, and that farmers require a different application of traditional labor laws. *See Id.*

Notably, unlike the FLFLPA, under the National Labor Relations Act ("NLRA"), agricultural workers are specifically excluded from the definition of employee and therefore, are unable to be part of a collective bargaining unit. 29 U.S.C. § 152(3). Thus, the issues presented here are ones of first impression as they relate to H-2A workers and their ability to collectively bargain under New York's labor laws.

III. ARGUMENT

A. POINT I: FEDERAL LAW PREEMPTS SERA'S APPLICABILITY TO H-2A WORKERS

The representation and collective bargaining provisions of SERA cannot apply to H-2A workers because the rigorous federal contracts and federal law that such workers are subject to preempts the New York State law. "The Supremacy Clause provides a clear rule that federal law 'shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting the US Constitution article VI, cl. 2). "If federal law 'imposes restrictions or confers rights on private actors' and 'a state law confers rights or imposes restrictions that conflict with the federal law,' 'the federal law takes precedence and the state law is preempted.'" *Kansas v. Garcia*, 140 S. Ct. 791 (2020) quoting *Murphy v. National Collegiate Athletic Assn.*, 138 S. Ct. 1461 (2018). The Supreme Court has recognized three different categories of preemption where state law must give way to federal law: express preemption, field preemption and conflict preemption. *Maine Forest Products Council v. Cormier*, 51 F.4th 1 (1st Cir. 2022).

1. The Federal Government has Set Forth a Comprehensive Statutory Scheme Regulating H-2A Workers

For federal law to effectuate field preemption in an area, such law must regulate the entire field to the exclusion of state law. *Arizona v. United States*, 867 U.S. at 398–99. "When the

national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land." *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941). "No State can add to or take from the force and effect of such treaty or statute". *Id.* at 63. Therefore, where a state attempts to regulate in a field in which the federal government has already done so, the federal regulations must preempt the state regulations. *See Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that a Pennsylvania Alien Registration Act was preempted by federal law); *Comm. of Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (holding that federal law relating to sedition preempted state law).

The Immigration and Nationality Act ("INA"), as amended by the Immigration Reform and Control Act of 1986 ("IRCA"), sets out the "terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country". *Kansas v. Garcia*, 140 S. Ct. 791, 797 (2020). Thus, state laws regulating migrant workers are prone to preemption because immigration is an area traditionally of federal concern. *Maine Forest Prod. Council v. Cromier*, 51 F.4th 1, 6 (stating that presumption against preemption does not apply "when the State regulates in an area where there has been a history of significant federal presence"). Furthermore, in its regulations, Congress states that its purpose for enacting the regulations relating to H-2A workers is to set "forth the procedures governing the labor certification process for the temporary employment of foreign workers in the H-2A nonimmigrant classification" and to establish "standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H-2A employers must comply, as well as the rights and obligations of H-2A workers". 20 CFR § 655.100(b) (emphasis added). Accordingly, it is clear that Congress intended to fully regulate in the area of H-2A workers. Although the Supreme Court has previously has held that INA left room for States to regulate in certain areas relating to the employment of

aliens, the enactment of IRCA changed that and, regardless, where, like here, federal regulations provide a full set of standards governing a certain area, complementary state regulation is impermissible. *See Kansas v. Garcia*, 140 S. Ct. 791 (2020); *see also Arizona v. U.S.*, 567 U.S. 387, 403-407; *but see DeCanas v. Bica*, 424 U.S. 351 (1976). Thus, the collective bargaining provisions of SERA, as amended by the FLFLPA, cannot apply to H-2A workers because first, it deals directly with the treatment of aliens (H-2A workers), and because Congress has already made it clear in its regulations regarding H-2A workers that its intent was to fully regulate their rights and obligations. *See generally* 20 CFR § 655.100(b).

i. Federal Law Regulates All Aspect of an H-2A Worker Temporarily in the Unites States

Congress created the H-2A Worker program, as set forth in INA and as amended by the IRCA to address temporary shortages of agricultural labor in the United States. *See* 8 U.S.C. § 1188; *Garcia v. Acosta*, 393 F. Supp. 3d. 93 (D.C. Cir. 2019). In doing so, Congress authorized the Secretary of Labor to take actions to "assure employer compliance with terms and conditions of employment". 8 U.S.C. § 1188(g)(2). Furthermore, it authorized the Department of Labor to "take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment" under the H-2A visa program. *Id.*

"[A]n employer seeking to hire an H-2A worker must jump through hoops." *Maine Forest Prod. Council v. Cormier*, 51 F.4th 1 (1st Cir. 2022). In fact, "the Secretary has issued comprehensive regulations governing the H-2A certification process," including preconditions to hiring and requirements that govern the terms and conditions of the H-2A workers employment. *Id.* at 7. Regulations implementing, in detail, the H-2A program along with the requirements for the contracts are set forth at 20 C.F.R. §§ 655.100–185 and 29 C.F.R. §§ 501.0–501.47.

Significantly, with respect to collective bargaining, federal law already expressly governs and sets forth specific standards for all aspects of an H-2A workers' employment relationship with their employer. *See* 20 CFR § 655.122(b) (job qualifications and requirements); 20 CFR § 655.122(d) (housing); 20 CFR § 655.122(e) (workers compensation); 20 CFR § 655.122(f) (employer-provided items including tools, supplies and equipment); 20 CFR § 655.122(g) (meals); 20 CFR § 655.122(h) (transportation); 20 CFR § 655.122(i) (guaranteed hours); 20 CFR § 655.122(j) (recordkeeping); 20 CFR § 655.122(k) (hours and earnings statements); 20 CFR § 655.122(l) (rates of pay); 20 CFR 655.122(m) (frequency of pay); 20 CFR § 655.122(n) (termination for cause); 20 CFR § 655.122(p) (paycheck deductions). Accordingly, by regulating all aspects of the H-2A worker's employment relationship, the federal government has regulated what an H-2A worker would otherwise negotiate for in collective bargaining. Said differently, the collective bargaining provisions of SERA cannot apply to H-2A workers because the federal government has already put in place a fully detailed regulatory framework governing the relationship, obligations, and terms of the temporary employment between the H-2A workers and the employers participating in the H-2A program.

Based on all of the foregoing, the only conclusion that can be drawn from such extensive federal regulations regarding H-2A workers and their rights and obligations as well as the standards and obligations of employers who participate in the H-2A program is that Congress intended to preclude States from enacting and/or enforcing their own regulations complementing the federal law.

2. The Collective Bargaining Provisions of SERA Conflicts with Federal Law with Respect to H-2A Workers

Federal law preempts state law when state law would stand as an obstacle to the accomplishment of the full purposes and objectives enacted by Congress. *Dandamudi v. Tisch*, 686

F. 3d. 66, 80 (2d Cir. 2012). Where a state law concerning H-2A workers would render federal law advisory, federal law preempts state law. *Maine Forest Products v. Comier*, 51 F.4th 1 (1st Cir. 2022) (holding that a Maine law seeking to regulate farm workers is preempted by the federal regulations for H-2A workers). Even if a state law and federal law attempt to achieve the same goals, state law may be preempted when, in the execution of the same, it conflicts with federal law. *Id.* at 11. Said differently, "a significant conflict exists between an identifiable federal policy or interest and the operation of state law" requiring the state law to be preempted. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) quoting *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Under the current federal statutory framework, certifying a bargaining unit of H-2A workers and forcing farmers in New York to bargain and negotiate agreements with H-2A workers under the SERA provisions conflicts with the farmers' obligations under such federal law.

i. H-2A Workers Cannot Collectively Bargain Without Violating the Federal Regulations

Farmers who engage in the H-2A program annually have to show that domestic workers are unavailable before they can move forward with bringing any H-2A workers on their farm. *See* 20 CFR 655.135(c)(3) ("[t]he employer must accept and hire all applicants who are qualified and who will be available for the job opportunity"). If there is no domestic worker option, then the employer can move forward with submitting new H-2A Clearance Orders. *See* 8 U.S.C. § 1188(a)(1) (as a condition for approval of an H-2A application, an employer has to obtain a certificate that states that "there are not sufficient workers who are able, willing, and qualified" to fulfill the employer's needs). The Clearance Orders that employers obtain through their applications, where no other work contract is provided by the employer, become the binding work contracts with the H-2A workers. *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276 (11th Cir. 2016) ("If the employer does not provide a separate written work contract, the clearance order,

which the employer submits to apply for certification to hire H-2A workers, serves as the work contract"); 20 C.F.R § 655.102(b)(14).

"The clearance order must contain the terms and conditions of employment as dictated by the H-2A regulations". *Garcia-Celestino* at 1285. Such contracts are not subject to further negotiation. *See* 20 C.F.R. § 655.122(q) (stating that the "employer must provide to an H-2A worker...a copy of the work contract between the employer and the worker...the work contract must contain all of the provisions required by this section.); 20 C.F.R. § 655.103(b) (defining a work contract as "all material terms and conditions of employment relating to wages, hours, working conditions, and other benefits"); 20 C.F.R. § 655.132(d) (requiring employers to provide copies of all fully-executed work contracts). Such work contracts also cannot be changed as federal regulations only allow for amendments to the clearance orders to 1) increase the number of workers needed or 2) allow for minor changes to the period of temporary employment – not to change the material terms of the contract. *See* 20 C.F.R § 655.145 (emphasis added).

Being part of a bargaining unit would require changes to an H-2A worker's work contract, which is prohibited, as described above. Thus, an H-2A worker cannot collectively bargain and also be in compliance with federal law. PERB has also already recognized that contracts play a significant role when determining whether parties can collectively bargain and held that parties are unable to file petitions for certification in situations where the parties thereto are already subject to an existing employment contract. *See County of Schenectady*, 26 PERB ¶ 3044 (1993).

ii. The Collective Bargaining Provisions of SERA and Federal Law Regarding H-2A workers are Fundamentally Incompatible with Each Other

The purpose of the collective bargaining provisions of SERA is to allow workers to negotiate for their wages, benefits, etc., all of which are already contractually set forth for H-2A workers. Such contracts are already in place, and not subject to further negotiation. *See* 20 C.F.R.

§ 655.122(q) (stating that the "employer must provide to an H-2A worker...a copy of the work contract between the employer and the worker...the work contract must contain all of the provisions required by this section.); 20 C.F.R. § 655.103(b) (defining a work contract as "all material terms and conditions of employment relating to wages, hours, working conditions, and other benefits"); 20 C.F.R. § 655.132(d) (requiring employers to provide copies of all fully-executed work contracts). The H-2A worker program is specifically designed to impose comprehensive regulations governing the terms and conditions of the employment of such workers. *See* 20 C.F.R. § 655.100 (stating that the scope of the regulations for H-2A workers is to establish "the rights and obligations of H-2A workers"). Accordingly, allowing H-2A workers to engage in collective bargaining would undermine the purpose of such federal regulations. Further to point out the incompatibility, as mentioned above, because H-2A workers are temporary in nature and required to return to their home country once their contract expires with no expectation of returning, the H-2A workers who purportedly voted to be part of a collective bargaining unit whose federal contract has terminated wouldn't even be at the negotiation table between the union and employer. *See generally* 8 U.S.C. § 188(a)(1). Said differently, because an H-2A worker's federal contract terminates as of a specific date each year, with no expectation of a new contact, any negotiation that may take place as part of collective bargaining would be without the input of any H-2A Worker who may, or may not, obtain a federal contract to work on employer's farm in any following years. This undermines the entire purpose of any H-2A worker being part of a collective bargaining unit in the first place.

Moreover, compelling farms to negotiate in collective bargaining agreements over the working terms and conditions of their H-2A workers will render it impossible for them to then meet the federal deadlines to submit the required clearance orders. *See* 20 C.F.R § 655.130(b) ("A

completed Application for Temporary Employment Certification must be filed no less than 45 calendar days before the employer's first date of need."). Accordingly, if farms, like Wafler, had to engage in collective bargaining with H-2A workers, they would be unable to accurately and timely meet the federal requirements that allow them to temporarily hire H-2A workers in the first place. Said another way, allowing H-2A workers to collectively bargain would result in an employer's inability to actually hire the temporary H-2A workers because the employer would not be able to comply with the federal requirements to do the same. *See* 20 C.F.R. § 655.141 (stating that if "the Application for Temporary Employment Certification or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart" a notice of deficiency is issued and the employer faces a denial of its application for Temporary Employment Certification). Thus, the collective bargaining provisions of SERA, as applied to H-2A workers, directly conflicts with the purpose of the federal H-2A program regulations and could negate its purpose of addressing temporary agricultural work shortages in the United States altogether. *See* 8 U.S.C. § 1188.

iii. Employers Face Violating Federal Law With Respect to Hiring Domestic Workers if H-2A Workers Can Collectively Bargain Under SERA

Employers, like the farms in the present cases and Wafler, before they can bring any temporary workers on their farm pursuant to the H-2A program, under the federal regulations, must certify that there are no domestic workers that are sufficient, able, and willing to perform the work needed. 8 U.S.C. § 1188(a)(1)(A). Said differently, under federal regulations, employers have a duty to first hire domestic workers and then, if no such workers are sufficient, able, and willing, then the employer can make an application for H-2A workers. *Id.* Thus, the federal law imposes a direct mandate on employers to hire domestic workers before participating in the H-2A program. In Wafler's case, under the guise of the SERA collective bargaining provisions, UFW has

threatened legal action relating to retaliation for Wafler performing their federal mandate by seeking the employment of domestic workers. Accordingly, if H-2A workers are able to be part of a collective bargaining unit, employers, like Wafler, will be in a situation where they are either in violation of federal law, or defending a legal action from the union for retaliation. Thus, it is inappropriate to allow collective bargaining provisions of SERA to apply to H-2A workers where, doing the same, would force employers either to be in violation of federal law, or facing retaliation and/or other legal action from unions.

Based on all of the foregoing, SERA's collective bargaining provisions, as applicable to H-2A workers, are in direct conflict with federal law.

3. Congress Specifically Did Not Provide H-2A Workers with the Ability to Collectively Bargain

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983) quoting *United States v. Wong Kim Bo*, 472 F.2d 720 (5th Cir. 1972). This becomes important in light of H-2A workers' ability to collectively bargain when reviewed in comparison to the regulatory scheme set forth for H-2B workers. The IRCA amended INA in that it "divided the H-2 program to provide either H2-A visas for agricultural work, [8 U.S.C.] at § 1101(a)(15)(H)(ii)(a), or H-2B visas for non-agricultural work, *Id.* at § 1101(a)(15)(H)(ii)(b)". *Cuellar-Aguilar v. Deggeller Attraction, Inc.*, 812 F.3d 614 (8th Cir. 2015). The regulations for H-2A workers and H-2B workers are similar in that they are designed to protect domestic workers from alien workers when possible and distinguish between agricultural workers and non-agricultural labor workers. *See* 20 C.F.R. § 655.1; 20 C.F.R. § 655.100. In fact, both programs set forth assurances and obligations of the

employers, including what deductions can be made from each workers paycheck. 20 C.F.R. § 655.20; 20 C.F.R. § 655.135.

Notably, under the H-2B program, employers are able to deduct from a H-2B worker's paycheck "amounts which are authorized to be paid to third persons for the worker's account and benefit through his or her voluntary assignment or order or which are authorized by a collective bargaining agreement with bona fide representatives of workers which covers the employer." 20 C.F.R § 655.20(c). There is no such provision included in the H-2A regulations. Congress and the Department of Labor clearly knew how to provide for union dues by way of doing so for H-2B workers but failed to do so for H-2A workers. *See Id.* Thus, the only presumption that can arise is that the omission of the ability to deduct dues as authorized by a collective bargaining agreement for H-2A workers was intentional, because H-2A workers cannot be part of a collective bargaining unit.

B. POINT II: H-2A WORKERS WHO HAVE RETURNED TO THEIR HOME COUNTRY ARE NO LONGER EMPLOYEES AND CANNOT BE PART OF A BARGAINING UNIT

1. H-2A Workers Who Have Returned to their Home Country Are Not Employees Within the Definition of SERA

The relevant New York Labor Law, § 701(3)(c) was revised by the FLFLPA expanding the definition of an "employee" to include farm laborers. The express definition states that "farm laborers shall mean any individual engaged or permitted by an employer to work on a farm." N.Y. Lab. Law § 701(3)(c). The definition was not expanded to include farm workers who were previously employed on a farm nor farm workers who are no longer working on a farm. *See Id.* (emphasis added). In fact, New York labor laws expressly address persons whose employment has ended but are still considered an employee within the definition, and thereby receive protections under the labor laws. *Id.* at 3(a) (stating that the term employee means "any individual whose

employment has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice"). Nowhere does it include a provision for a worker who previously worked on a farm. *Id.* Where a law specifically mentions the thing or person to which it applies, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." N.Y. Stat. Law § 240.

In the present cases, and in Wafler's case, H-2A workers whose contracts have terminated have no guarantee of ever returning to the United States or New York State, let alone back on the employer's farm. *See* 8 C.F.R. § 214.2(h)(5). When the H-2A contract terminates, the H-2A worker is no longer an employee, and no longer falls under the definition of an employee under SERA. N.Y. Lab. Law § 701(3). Clearly, when defining the term "employee", the legislature thought out scenarios when an employee who is no longer employed should still receive rights under New York law. N.Y. Lab. Law § 701(3)(a). Consequently, because the legislature omitted defining the term employee to mean an H-2A worker whose employment has ended, such definition cannot be expanded to include the same. As a result, all H-2A workers that were previously employed should be excluded from the bargaining unit.

Also, while PERB has previously held in the *Matter of Maker Stables, LLC*, that seasonal employees may have a right to be included in an appropriate bargaining unit, such holding does not extend such right to foreign H-2A workers, or former foreign workers, who have no expectation of being rehired and who have returned to their home country. *54 PERB ¶ 4401 (2021).*[1]

[1] Notwithstanding the issue of certification, PERB in this case also stated that if seasonal domestic employees were not employees at the time when the election took place, they would not be eligible to vote. *Matter of Maker Stables LLC*, 54 ¶ 4401 (2021).

2. The New York Legislature did not intend for the FLFLPA and thereby SERA Provisions to Apply to H-2A Workers

No where in the FLFLPA nor SERA, as amended by the FLFLPA, does it state that such collective bargaining laws apply to foreign H-2A workers. In fact, the only place in the FLFLPA referencing migrant workers relates to amending the public health law relating to farm and food processing labor camps. FLFLPA, 2019 N.Y. AB A8419. Certainly New York law makers are aware of H-2A workers, the federal regulations that are imposed, and the effects such H-2A workers have on the farming industry. *See Id.* By intentionally omitting the applicability of the FLFLPA, with respect to collective bargaining to H-2A workers, the legislature made it clear that such provisions should not apply. Thus, the Board cannot expand such laws to include foreign H-2A workers when the legislature is silent with respect to the issue. N.Y. Stat. Law § 240; *Haar v. Nationwide Mutual Fire Ins. Co.*, 37 N.Y.3d 224 (2019) (holding that a private right of action did not exist when examining the language of a statute and stating that courts cannot rely on legislative silence when interpretating a statute for risk of undermining the purpose of the same). As a result SERA, as amended by the FLFLPA dos not apply to H-2A Workers.

IV. CONCLUSION

For the reasons stated herein, the Board should find that H-2A workers do not have the right to collectively bargain under SERA, as amended by the FLFLPA. Furthermore, pursuant to the above, the Board should find that Employer's H-2A workers whose employment has ended, and have left Employer's Farm are not employees as defined by SERA at §701(3).

Dated: Rochester, New York
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