

**STATE OF NEW YORK PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of: United Farm Workers of America, Petitioner. And Porpiglia Farms, Inc.,  
Employer, Petition Case No.: CU-6695

In the Matter of: United Farm Workers of America, Petitioner. And A & J Kirby Farms, LLC,  
Employer, Petition Case No.: CU-6696

In the Matter of: United Farm Workers of America, Petitioner. And Lynn-Ette & Sons, Inc.,  
Employer, Petition Case No.: CU-6699

**BRIEF OF AMICI CURIAE**

Global Labor Justice-International Law Rights Forum (GLJ-ILRF)  
International Commission for Labor Rights (ICLR)  
International Lawyers Assisting Workers (ILAW) Network

**TABLE OF CONTENTS**

Table of Authorities .....2  
Interest of *Amici Curiae*.....5  
Questions Presented.....5  
Introduction and Summary of the Argument.....5  
Argument.....6  
I. Freedom of association is a customary international law norm that supports the  
Public Employee Relations Board (PERB) Acting Director’s decision to apply the  
New York State Employment Relations Act (SERA), as amended by the Farm  
Laborers Fair Labor Practices Act (FLFLPA), to seasonal agricultural guest workers  
with H-2A visas.....6  
A. The right to freedom of association is a norm of customary international law.....7  
B. Customary international law norms uphold the right to freedom of  
association without distinction, and regardless of migration status.....9  
II. While international labor law recognizes the special context of the agricultural  
workplace, it requires the same standards regarding freedom of association, union  
organizing, and collective bargaining, including for seasonal and temporary  
agricultural employees, be applied.....11  
A. International standards and the rights of seasonal and temporary agricultural workers...11  
B. The ILO Committee of Experts has emphasized the applicability of rights afforded by  
ILO instruments to migrant workers and seasonal workers.....12  
III. Comparative international law also supports the application of trade union rights  
equally to H-2A workers under the FLFLPA.....13  
Conclusion .....15

**TABLE OF AUTHORITIES**

| <b><u>Cases</u></b>  | <b><u>Page(s)</u></b> |
|--|-----------------------|
| <b><u>U.S.</u></b>   |                       |
| <i>The Paquete Habana</i> ,<br>175 U.S. 677 (1900).....  | 7                     |
| <b><u>Americas</u></b>   |                       |
| Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion<br>OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, Opinion, ¶9 (Sept. 17, 2003)..... | 10                    |
| Undocumented Workers v. United States of America, IACHR, Report No. 50/16,<br>OEA/Ser.L/V/II.159, doc. 59 (Nov. 30, 2016).....                               | 10                    |
| <b><u>Europe</u></b>   |                       |
| <i>Demir and Baykara v. Turkey</i> ,<br>European Court of Human Rights, Application no. 34503/97 (2008).....   | 9                     |
| <b><u>Canada</u></b>   |                       |
| <i>Dunmore v. Ontario (Attorney General)</i> ,<br>[2001] 3 S.C.R. 1016.....  | 14                    |
| <i>Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia</i> ,<br>2007 SCC 27, June 8, 2007.....                           | 8                     |
| <i>L'Écuyer v. Côté</i> ,<br>2012 QCCS 973.....  | 14                    |
| <b><u>Treaties, Declarations and Statutes</u></b>  | <b><u>Page(s)</u></b> |
| <b><u>New York</u></b>   |                       |
| New York State Employment Relations Act, as amended by the Farm Laborers<br>Fair Labor Practices Act, N.Y. Lab. Law § 701.....                               | 6, 11                 |
| <b><u>United Nations</u></b>   |                       |
| <i>Universal Declaration of Human Rights</i> , G.A. Res. 217A (III), U.N. Doc. A/810<br>(1948).....  | 7                     |

|   |            |
|---|------------|
| <i>International Covenant on Civil and Political Rights</i> , Dec. 16, 1966, 999 U.N.T.S. 171.....  | 7          |
| <i>International Covenant on Economic, Social and Cultural Rights</i> , Dec. 16, 1966,<br>993 U.N.T.S. 3.....   | 7          |
| <i>International Convention on Protection of the Rights of All Migrant Workers and<br/>Members of Their Families</i> , U.N. GAOR, 45th Sess., 69th plen. mtg. at 261,<br>U.N. Doc. A/45/49 (Dec. 18, 1990)..... | 7          |
| International Convention on the Elimination of All Forms of Racial Discrimination<br>(ICERD), 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) (ratified by the U.S. on<br>June 24, 1994).....                             | 9, 10      |
| ILO, <i>Right of Association (Agriculture) Convention</i> , 1921 (No. 11).....  | 11, 12     |
| ILO, <i>Freedom of Association and Protection of the Right to Organise Convention</i> , 1948<br>(No. 87).....   | 8          |
| ILO, <i>Convention Concerning Migration for Employment (ILO No. 97)</i> , July 1, 1949, 120<br>U.N.T.S.....   | 11         |
| ILO, <i>Right to Organise and Collective Bargaining Convention</i> , 1949 (No. 98).....   | 8, 9       |
| ILO, <i>Rural Workers' Organizations Convention</i> , 1975 (No. 141).....   | 11, 12, 13 |
| ILO, <i>Convention Concerning Migrations in Abusive Conditions and the Promotion<br/>of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143)</i> ,<br>June 24, 1975, 1120 U.N.T.S. 323.....   | 11         |
| ILO, <i>Migrant Workers (Supplementary Provisions) Convention</i> , 1975 (No. 143),<br>June 24, 1975, 1120 U.N.T.S. 323.....  | 11         |
| ILO <i>Declaration on Fundamental Principles and Rights at Work</i> , International Labor<br>Conference, 86 <sup>th</sup> Session, Geneva, June, 1998.....  | 7, 8       |
| <br><u>Americas</u>   |            |
| <i>American Declaration of the Rights and Duties of Man (1948)</i> .....  | 9, 10, 11  |

Europe

*European Convention on Human Rights* (1950).....7, 9

DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE  
COUNCIL of 26 February 2014.....15

**Secondary Sources**

**Page(s)**

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF  
THE UNITED STATES §102 (AM. LAW. INST. 1987).....7

ILO, *Compilation of Decisions of the Committee on Freedom of Association* (2018).....12

ILO, *NATLEX Database of national labour, social security and related  
human rights legislation*, at [https://www.ilo.org/dyn/natlex/natlex4.home?p\\_lang=en](https://www.ilo.org/dyn/natlex/natlex4.home?p_lang=en).....8

ILO, *Giving a Voice to Rural Workers: General Survey concerning the right of  
association and rural workers' organizations instruments*, Report of the  
Committee of Experts on the Application of Conventions and Recommendations  
International Labour Conference, 104<sup>th</sup> session (2015).....13

ILO, *Freedom of Association cases by country, United States*, at  
<https://www.ilo.org/dyn/normlex/en/f?p=1000:20060::NO:20060>.....8

ILO Committee of Experts, “Application of International Labour Standards 2022,  
Report of the Committee of Experts on the Application of Conventions and  
Recommendations, International Labour Conference, 110th Session, 2022.....12

*Fact Finding and Conciliation Commission on Chile*, (ILO, 1975).....8

James J. Brudney, “Hiding in Plain Sight: An ILO Convention on Labor Standards in Global  
Supply Chains,” 23 *Chicago Journal of International Law* No. 2 (Winter 2023).....12

Fay Faraday, Judy Fudge and Eric Tucker eds. *Constitutional Labour Rights in  
Canada: Farm Workers and the Fraser Case* (2012).....14

Leah Vosko, *Disrupting Deportability: Transnational Workers Organize* (2019).....14

## **INTEREST OF AMICI CURIAE**

Global Labor Justice-International Law Rights Forum (GLJ-ILRF) is a nonprofit organization that advances a labor rights approach across global supply chains and labor migration corridors including for farmworkers.

The International Commission for Labor Rights (ICLR) coordinates the pro bono work of a global network of lawyers and labor experts committed to advancing workers' rights through legal research, advocacy, cross-border collaboration, and use of international and domestic legal mechanisms. ICLR's legal network also responds to urgent appeals for independent reporting on labor rights violations.

The International Lawyers Assisting Workers (ILAW) Network brings together over 1,000 legal practitioners and scholars in 88 countries around the world in an exchange of ideas and information in order to best represent the rights and interests of workers and their organizations, including farmworker organizations.

## **QUESTIONS PRESENTED**

- 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?

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Amici ILAW and GLJ-ILRF are not-for-profit organizations with a strong interest in protecting the rights of migrant workers, including migrant agricultural workers, and promoting the relevance of international labor rights and standards in national labor law systems. Amici are joined in a common goal to promote customary international law regarding freedom of association, the right to organize, and the right to collective bargaining for all workers without distinction, including seasonal and temporary agricultural workers. The right to freedom of association is a core fundamental right in and of itself, the denial of which is symptomatic of other grave workplace rights violations and the protection of which is core to the preservation of the right to non-discrimination and equality, just and equitable remuneration, freedom from forced labor and indentured servitude, and other workplace rights.

Amici respectfully submit that international law and the law of other countries is an appropriate consideration for the PERB, in light of Labor Law 700, which emphasizes “the public policy of

the state to encourage the practice and procedure of collective bargaining, and to protect employees in the exercise of full freedom of association, self-organization and designation of representatives of their own choosing for the purposes of collective bargaining, or other mutual aid and protection, free from the interference, restraint or coercion of their employers.” Labor Law 700 further states: “[a]ll the provisions of this article shall be liberally construed for the accomplishment of this purpose.” As described in detail below, both international and comparative law recognize the protection of the labor rights of all immigrant workers and agricultural workers, irrespective of status as temporary visa holders or post-return migrants, as fundamental rights.

### **ARGUMENT**

States must ensure full and equal access to all workplace rights and remedies for migrants without discrimination, and regardless of their migration status. ILO Convention C111 Discrimination (Employment and Occupation) Convention (1958) defines discrimination as:

any distinction, exclusion or preference made on the basis of race, colour, sex, ... national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

ILO C111, Art. 1.1.(a) (emphasis added).

With regard to H-2A workers specifically, the International Labour Organization (ILO), the UN Committee on the Elimination of Racial Discrimination, the UN Committee on the Rights of Migrant Workers, the Inter-American Court on Human Rights, and the Inter-American Commission on Human Rights have all held that immigration status should never be a factor in determining who is entitled to the full rights and protections of freedom of association, including the right to form and join trade unions, and to collective bargaining.

### **I. Freedom of association is a customary international law norm that supports the Public Employee Relations Board (PERB) Acting Director’s decision to apply the New York State Employment Relations Act (SERA), as amended by the Farm Laborers Fair Labor Practices Act (FLFLPA), to seasonal agricultural guest workers with H-2A visas**

Amici urge the Board to look to the established principles of customary international law, which support a decision that fully protects the rights of H-2A workers in New York State under the State Employee Relations Act, as amended by the Farm Laborers’ Fair Labor Practices Act (“FLFLPA”).

Customary international law is derived from the widespread and consistent practice of states following norms and principles to which they comply out of a sense of legal obligation.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (AM. LAW. INST. 1987). In *The Paquete Habana*, the Court held, “International law is part of our law, and must be ascertained and administered by the courts of justice.” Under the federal system in the United States, incorporating international guarantees into law is generally the preserve of Congress and/or state legislatures. However, U.S. courts have often used international law as an interpretive lens to guide and develop constitutional law principles. As stated in *The Paquete Habana*: “International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.” See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

### **A. The right to freedom of association is a norm of customary international law**

Freedom of association is recognized as a fundamental right under all relevant international and regional human rights instruments, from the Universal Declaration of Human Rights and related international covenants to regional human rights charters and governing documents of international organizations. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), at Article 23(4) (“Everyone has the right to form and to join trade unions for the protection of his interests”); *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171, at Article 22 (1) (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”); *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3., at Article 8 (1) (a) (“The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests”); *American Declaration of the Rights and Duties of Man* (1948), at Article XXII (“Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature”); *European Convention on Human Rights* (1950), at Article 11 (1) (“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”). The United Nations’ migrant worker convention also enshrines freedom of association. See UN *International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families*, U.N. GAOR, 45th Sess., 69th plen. mtg. at 261, U.N. Doc. A/45/49 (Dec. 18, 1990), at Article 26 (1) (“the right of migrant workers...to take part in meetings and activities of trade unions... to join freely any trade union...to seek the aid and assistance of any trade union”).

The International Labor Organization (ILO) is a specialized agency of the United Nations with 188 member states, recognized as the authoritative international body on labor rights and labor standards. Freedom of association is enshrined as the first of the four “core labor standards” in

the ILO's 1998 *Declaration on Fundamental Principles and Rights at Work*. See ILO *Declaration on Fundamental Principles and Rights at Work*, International Labor Conference, 86<sup>th</sup> Session, Geneva, June, 1998. The Declaration points to ILO Conventions 87 and 98 on freedom of association, the right to organize, and the right to collective bargaining as the foundation of freedom of association principles. See ILO, *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98). Freedom of association is codified in most countries' constitutions and laws which recognize workers' rights to form and join trade unions and to bargain collectively, as do the laws of the United States and the New York State Constitution's Bill of Rights - rights that in New York State are extended to farmworkers. See ILO NATLEX *Database of national labour, social security and related human rights legislation*.

158 of the ILO's 188 member countries have ratified Convention No. 87 on Freedom of Association and Protection of the Right to Organise (requiring adoption in the national legal system); 168 countries have ratified Convention No. 98 on the Right to Organise and Collective Bargaining (requiring adoption in the national legal system (See "Ratifications of Convention 87"). The United States has not ratified either Convention; however, these two conventions are elevated to constitutional status in the ILO, requiring adherence by all members states by virtue of membership in the organization. This has also been expressed as "customary law above the conventions," that all ILO members must uphold (see *Fact Finding and Conciliation Commission on Chile*, (ILO, 1975), para. 466.). Accordingly, the ILO Committee on Freedom of Association has exercised and the United State has accepted jurisdiction over complaints alleging violations of these conventions by the United States in 45 cases since 1952 (see ILO, Freedom of Association cases by country, United States).

Furthermore, many countries' high courts have confirmed the applicability of ILO standards in their national constitutional and labor law systems. See, for example, the decision of the Canadian Supreme Court applying its constitutional *Charter of Rights and Freedoms*, stating:

Canada's international obligations can assist courts charged with interpreting the *Charter's* guarantees...The sources most important to the understanding of s. 2(d) of the *Charter* are the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, and the International Labour Organization's *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*...This means that these documents reflect not only international consensus, but also principles that Canada has committed itself to uphold.

See *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, June 8, 2007.



The European Court of Human Rights similarly applied ILO standards as customary international law in a case involving the right to collective bargaining under Article 11 of the European Convention on Human Rights. The Court said:

The Court observes that in international law, the right to bargain collectively is protected by ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively... [H]aving regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one’s] interests” set forth in Article 11 of the Convention.

*See* European Court of Human Rights, *Demir and Baykara v. Turkey*, Application no. 34503/97 (2008), para. 147. Particularly significant in the European Court’s decision were its findings that “In determining the meaning of freedom of association, the Court must take into account “relevant rules and principles of international law,” *Id.* para. 67 “relevant international treaties,” *Id.* para. 69, and “the interpretation of such elements by competent organs.” *Id.* para. 85. In doing so, the opinion stated, “the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance.” *Id.* para. 144.

### **B. Customary international law norms uphold the right to freedom of association without distinction, and regardless of migration status**

The principle of equality and non-discrimination is one of customary international law, which requires that all rights contained within international human rights treaty law, international labor law, and all rights under domestic law are implemented without discrimination, regardless of race, nationality, ethnicity, language, or other social status. *See, e.g.*, ICCPR arts. 2(1) and 26; Organization of American States, American Declaration of the Rights and Duties of Man art. II, *adopted* May 2, 1948, 2 U.S.T. 2394 (entered into force Dec. 13, 1951).

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), 660 U.N.T.S. 195, 5 I.L.M. 352 (1966) (ratified by the U.S. on June 24, 1994), employs a definition of discrimination similar to that of ILO Convention C111 and the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, defining as prohibited racial discrimination, “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” ICERD,

Art. 1.1. ICERD, Art. 5(e)(i) specifically recognizes among those “the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration,” and Art. 5(e)(ii) “*the right to form and join trade unions.*” (emphasis added).

Inter-American Court on Human Rights’ holding in its Advisory Opinion the Juridical Condition and Rights of Undocumented Migrants, OC-18-03:

That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, Opinion, ¶9 (Sept. 17, 2003).

The Inter-American Commission applied this norm in ruling on a Petition involving migrant workers in the United States, in which it held: “As with all fundamental rights and freedoms, ... States are not only obligated to provide for equal protection of the law, but they must also adopt the legislative, policy, and other measures necessary to guarantee the effective enjoyment of the rights protected under Article II of the American Declaration.” *Undocumented Workers v. United States of America*, IACHR, Report No. 50/16, OEA/Ser.L/V/II.159, doc. 59 (Nov. 30, 2016). The Commission further elaborated:

States have the obligation to adopt the measures necessary to recognize and guarantee the effective equality of all persons before the law; to abstain from introducing in their legal framework regulations that are discriminatory towards certain groups either on their face or in practice; and to combat discriminatory practices.

*Id.* at para. 72.

The principles of equality and non-discrimination are similarly found in ILO Conventions. ILO Convention 87 states that “Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” ILO Convention 87, at Article 2 (emphasis added to note that distinctions based on type of work such as farm labor or economic sector such as agriculture are not permitted). Convention 98, which must be interpreted consistent with the right to non-discrimination included in the ILO Declaration on

Fundamental Principles and Rights at Work to apply to all workers regardless of migration status or other distinction, says that “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.” ILO Convention 98, at Article 1.

### C. The right to freedom of association as applied specifically to migrant workers

The ILO has also adopted two specialized conventions on migrant workers’ rights that further support Amici’s arguments herein: Conventions 97 and 143. See ILO Convention Concerning Migration for Employment (ILO No. 97), July 1, 1949, 120 U.N.T.S.; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (ILO No. 143), June 24, 1975, 1120 U.N.T.S. 323. Convention 97 calls for states to apply law and policies “no less favorable than that which it applies to its own nationals in respect of the following matters: . . . membership of trade unions and enjoyment of the benefits of collective bargaining . . .” See *ILO Convention Concerning Migration for Employment* (ILO No. 97), July 1, 1949, 120 U.N.T.S., at Article 6. Convention 143 calls for “national policies . . . to guarantee trade union rights . . .” See *ILO Migrant Workers (Supplementary Provisions) Convention*, 1975 (No. 143), June 24, 1975, 1120 U.N.T.S. 323, at Article 10.

With regard to the enforceability of these rights, Art. 14 of the ICCPR that “All persons shall be equal before the courts and tribunals.” The American Declaration goes further, providing: “Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.” AmDecl., Art. XVII. Thus excluding H-2A workers from the New York State Employment Relations Act (SERA), as amended by the Farm Laborers Fair Labor Practices Act (FLFLPA), would violate the right to freedom of association and collective bargaining, consistent with customary international law and treaty law.

## **II. While international labor law recognizes the special context of the agricultural workplace, it requires the same standards regarding freedom of association, union organizing, and collective bargaining, including for seasonal and temporary agricultural employees, be applied**

### **A. International standards and the rights of seasonal and temporary agricultural workers**

One of the earliest conventions adopted by the ILO went directly to the question of protecting agricultural workers’ freedom of association. Convention 11 says, in Article 1:

Each Member of the International Labour Organization which ratifies this Convention undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in

agriculture. See ILO, *Right of Association (Agriculture) Convention*, 1921 (No. 11), at Article 1.

ILO Convention 141, adopted in 1975, gave more content to the freedom of association rights of farmworkers:

All categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations, of their own choosing without previous authorization...The principles of freedom of association shall be fully respected; rural workers' organizations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression...See ILO *Rural Workers' Organizations Convention*, 1975 (No. 141), at Article 3.

The Committee on Freedom of Association<sup>1</sup> has confirmed that temporary workers, including agricultural workers, are protected by freedom of association standards, stating that agricultural workers should enjoy the right to organize. See ILO *Compilation of Decisions of the Committee on Freedom of Association* (2018), paras. 1277 (temporary workers) and 374 (agricultural workers). The Committee has held, “all workers, without distinction whatsoever, whether they are employed on a permanent basis, for a fixed term or as contract employees, should have the right to establish and join organizations of their own choosing.” *Id.* para. 390. Specifically, the Committee concluded that temporary workers should be able to negotiate collectively. *Id.* para. 1277.

---

<sup>1</sup> The International Labor Organization (ILO) and its specialized oversight organs, the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR), are authoritative sources for determining international labor standards, particularly with respect to freedom of association, the right to organize and the right to collective bargaining. See, for example, ILO Committee of Experts, “Application of International Labour Standards 2022, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 110th Session, 2022, (noting the “authoritative supervisory system” of the Committee of Experts and Committee on Freedom of Association, at p. 44); James J. Brudney, “Hiding in Plain Sight: An ILO Convention on Labor Standards in Global Supply Chains,” 23 *Chicago Journal of International Law* No. 2 (Winter 2023), (noting “the CEACR [Committee of Experts] determine[s] the legal scope, content and meaning of the provisions of the Conventions, [through]opinions and recommendations [that are] intended to guide the actions of national authorities. . . In addition, there is an established jurisprudence on freedom of association and collective bargaining, developed by the tripartite Committee on Freedom of Association (CFA).”)

## **B. The ILO Committee of Experts has emphasized the applicability of rights afforded by ILO instruments to migrant workers and seasonal workers**

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is a group of 20 eminent jurists appointed by the Governing Body for renewable three-year terms. In annual general reports to the ILO conference, the Committee makes observations on countries' application of selected ratified Conventions. In a 2015 report, the Committee of Experts noted that Convention No. 141 equally covers rural workers employed on a regular or a seasonal basis "*irrespective of legal status.*" See ILO, *Giving a Voice to Rural Workers: General Survey concerning the right of association and rural workers' organizations instruments*, Report of the Committee of Experts on the Application of Conventions and Recommendations International Labour Conference, 104<sup>th</sup> session (2015), para. 97 (emphasis in original). The Committee also stated, "it is paramount that all categories of agricultural and rural workers, including...seasonal workers..., enjoy the rights afforded by the instruments [ILO conventions and recommendations]." *Id.* para. 111.

## **III. Comparative international law also supports the equal application of trade union rights to H-2A workers under the FLFLPA**

The international standards related to freedom of association on farms, as the ILO supervisory bodies have described, and as laid out above, are highly attentive to the particular vulnerability of agricultural workers, and the need for special measures to enable them to organize and exercise a voice at work. In addition, the countries whose law we reviewed have enacted or applied legislation, regulation and judiciary rulings to afford union organizing and collective bargaining rights to seasonal agricultural workers such as H-2A visa holders in New York State consistent with ILO standards and rulings of the ILO Committee on Freedom of Association noted above. 127 ILO member states have ratified Convention No. 11 and/or Convention No. 141 (requiring adoption in the national legal system). Convention No. 11 requires ratifying countries to "secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture." See ILO Convention No. 11 art. 1. Convention No. 141 states that "All categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations, of their own choosing without previous authorization." ILO 141 art. 3.1. "The principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression" See ILO Convention 141 art. 3(2).

These frameworks, in general, provide for cooperation among governments, trade unions, and employers. They typically balance different public interests – assuring farmworkers' rights,

ensuring uninterrupted production of agricultural commodities critical from the perspective of food supply, and protecting property rights and business operations. New York's new statutory regime for farmworkers' organizing and bargaining rights should be interpreted consistently with international law and the practice of most countries, striking an appropriate balancing of international obligations, workers' rights, public interest and public policy goals.

The obligation to ensure freedom of association for farmworkers is described in detail above. Below, we set forth a range of ways in which jurisdictions around the world have met their obligation and advanced public interest in strong worker voice on farms, without imperiling other interests or undermining competing rights.

### Canadian Supreme Court

In 2001, the Canadian Supreme Court found that a 1995 provincial law excluding agricultural workers from the Ontario statutory labor relations scheme violated the Charter of Rights and Freedoms, saying "the total exclusion of agricultural workers from the LRA [Labor Relations Act] substantially interferes with their fundamental freedom to organize." See *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016. Temporary and seasonal agricultural workers were not specifically excluded from collective bargaining, but rather were covered by the general exclusion. The Supreme Court did not specifically require that farm workers be included in the general labour relations statute, but required that their freedom of association be protected in specified ways. The Ontario government then enacted the *Agricultural Employees Protection Act* that was subsequently held to comply with the constitutional requirements set out by the court in *Dunmore*. As such, in this province, temporary and migrant farmworkers' freedom of association is protected to the same extent as other farmworkers. Moreover, in most other provinces in Canada, agricultural workers, regardless of their immigration status, are covered by the applicable general private sector collective law and thus have access to fully protected rights to organize and bargain collectively. See Fay Faraday, Judy Fudge and Eric Tucker eds. (2012) *Constitutional Labour rights in Canada: Farm Workers and the Fraser Case*; Leah F. Vosko, *Disrupting Deportability: Transnational Workers Organize* 125 n. 29 (2019). Moreover, in provinces such as British Columbia, many agricultural workers participating in the Seasonal Agricultural Workers Program (SAWP) who have returned to their countries of origin during a certification process (in which a list of employees is submitted to the Labour Relations Board) or who are members of a certified bargaining unit that have returned to countries of origin annually as required under the SAWP Contract, remain members of the said unit, retaining their seniority season to season, where a collective agreement is ratified and includes provisions for season-to-season seniority. See Vosko, *supra* at 62-65, 89-90.

## Quebec Superior Court

In March 2013, the Quebec Superior Court ruled that seasonal agricultural workers have the same rights to unionization as all other workers in Quebec, declaring restrictions on the access of such workers to organizing and bargaining protections was unconstitutional and giving the government one year to rectify the situation. See *L'Écuyer v. Côté*, 2012 QCCS 973. When the Parti-Québécois came to power later in the spring of 2013, it decided not to appeal the decision and instead acted to revise the current law within the year allotted.

## European Union

In 2014 the EU adopted its Directive “on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.” See DIRECTIVE 2014/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014. Article 23 of the Directive says:

“Seasonal workers shall be entitled to equal treatment with nationals of the host Member State at least with regard to:

- (a) terms of employment...
- (b) ...freedom of association and affiliation and membership of an organization representing workers...including the right to negotiate and conclude collective agreements.”

## CONCLUSION

Freedom of association, the right to organize and the right to collective bargaining have achieved the status of customary international law. Decisions of the ILO Committee on Freedom of Association and Committee of Experts have established workers’ right to form trade unions and bargain collectively, with no exclusion of seasonal and temporary agricultural workers such as H-2A workers in New York State from these protections. Comparative international law and practice also confirm the right of seasonal and temporary agricultural workers to organize and bargain collectively.

Applying the protections of the New York statute to H-2A workers fits squarely in the mainstream of international and comparative law and practice. Amici urge the Board to affirm the decisions made by the Acting Director, both with respect to allowing H-2A workers to engage in collective bargaining, and also in allowing them and other seasonal workers to be included in bargaining units, even if their seasonal employment has ended at the time the certification issues.

Respectfully submitted this 28th day of June, 2023.

Lance Compa, Senior Lecturer Emeritus  
Cornell University\*  
School of Industrial and Labor Relations

Sarah Paoletti, Director  
Transnational Legal Clinic  
University of Pennsylvania Carey Law School\*  
(admitted to practice in Pennsylvania, New Jersey,  
and Washington, D.C.)

\*Institutional affiliation listed for identification  
purposes only

Beth Lyon, Counsel of Record  
New York State Atty. #2707412  
Cornell Law School  
Farmworker Legal Assistance Clinic  
133 Hughes Hall  
Ithaca, NY 14853  
[mb1235@cornell.edu](mailto:mb1235@cornell.edu)  
607-255-4196