

# HUMBERTO IN THE FIELD: THE RACIALIZATION OF H-2A MIGRANT FARMWORKERS AND A DUAL SOLUTION TO ITS RESULTING ABUSES

CAMIL A. SANCHEZ-PALUMBO\*

*“That Mexican’s probably off right now in some bar, laughing at us.” Humberto Casarrubias-Sánchez, thirty-six, was a husband, father of three, and first-time beneficiary of the United States’ H-2A temporary agricultural worker visa. Hailing from Morelos, Mexico, he had just begun his first day of detasseling corn in Illinois when, by day’s end, Humberto was nowhere to be found. Presuming he had fled, crew leaders shrugged their shoulders, ending the search for him early. His body was found fifty days later in the middle of that same cornfield. Using Humberto’s story and the crew leader’s words as evidence, this Note argues that historic racialization of Latina/o immigrants has transcended into the H-2A agricultural worker visa program, and that burgeoning migrant farmworker coalitions are rewriting these racialized narratives through political action that may create the cultural groundswell for government change. Racialization, or the way in which society places nonwhites within a racial hierarchy, has resulted in a system of abuses of H-2A workers, including wage theft, sexual harassment, and human trafficking. Through direct appeals to top food purchasers, coalitions of migrant farmworkers have subverted their racialized identities via political empowerment, perhaps ultimately attaining a “dual solution” to this racialization that would include necessary government support.*

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\* Copyright © 2019 by Camil A. Sanchez-Palumbo. J.D., 2019, New York University School of Law; B.A., 2015, Washington University in St. Louis. This Note reads of my family. Within it appear my mother and father, Lisa and Leovigildo—their education through example, infinite love, and support. Reminders of my brothers are riddled throughout the text: Diriangén and Sandino, you are my encouragement and humility. To my friends and loved ones, thank you for soul-expanding conversations and your belief in me. Thank you to the many individuals who contributed to this Note through their teachings and guidance. Most of all, this Note is a marker of the lives of Humberto Casarrubias-Sánchez, his family, and migrant farmworkers worldwide. Thank you to the many who have shared their stories with me. *Luchamos juntos para un futuro mejor.*

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### INTRODUCTION: HUMBERTO IN THE FIELD

“A father of three daughters doesn’t just run away.”<sup>1</sup> Workers and family members repeated this like a prayer, with each day that passed, each hour lost not searching for Humberto.

Summer months in Illinois are no Texas, but they are no laughing matter either. Temperatures in the rural parts of the state can climb to over one hundred degrees, and good luck hiding from the sun in this region’s wide open spaces of farmland.<sup>2</sup> In these months, the flatlands are golden beds, and the main crop of the season is corn.<sup>3</sup>

With much work to be done, the United States’ H-2A temporary agricultural worker program serves as an important labor source for the production of these crops. The H-2A Program invites agricultural guest workers to the country upon two conditions: (1) that no U.S. workers are available for the job,<sup>4</sup> and (2) that these foreign guest workers will not harm the wages and working conditions of U.S. laborers.<sup>5</sup> Though predominantly Mexican,<sup>6</sup> H-2A migrant

<sup>1</sup> E-mail from Miguel C. Keberlein, Exec. Dir., Legal Aid Soc’y of Metro. Family Servs., to author (July 8, 2019, 12:45 PM) [hereinafter July 8 E-mail from Miguel C. Keberlein to author] (on file with author).

<sup>2</sup> See, e.g., *Illinois Record High and Low Temperatures Map*, PLANTMAPS, <https://www.plantmaps.com/illinois-record-high-and-low-temperature-map.php> (last visited Aug. 21, 2019) (listing record high temperatures above one hundred degrees throughout Illinois); see also *Illinois Extreme Heat*, STATES AT RISK, <http://statesatrisk.org/illinois/extreme-heat> (last visited Apr. 7, 2019) (indicating that, by 2050, Illinois will experience a ten-fold increase in the number of dangerous heat days in a year).

<sup>3</sup> *Facts About Illinois Agriculture*, ILL. DEP’T OF AGRIC., <https://www2.illinois.gov/sites/agr/About/Pages/Facts-About-Illinois-Agriculture.aspx> (last visited Apr. 9, 2019) (reporting that corn makes up fifty-four percent of the state’s agricultural commodities).

<sup>4</sup> See 8 U.S.C. § 1188(a)(1)(A) (2012); 20 C.F.R. § 655.0 (2018).

<sup>5</sup> See 8 U.S.C. § 1188(a)(1)(B); 20 C.F.R. § 655.0.

farmworkers arrive from various countries in Central America and the Caribbean.<sup>7</sup> In 2017, 161,583 visas were issued to H-2A workers alone, increasing by tens of thousands over the past four years.<sup>8</sup>

Importantly for these workers, one of the most crucial stages of the corn crop lasts three weeks in total, a period known as “detasseling.”<sup>9</sup> Just after the July 4 holiday,<sup>10</sup> small towns spanning the Midwest fill with Latina/o women and men.<sup>11</sup> Farm labor contractors across rural America place this group of workers—whether H-2A visa beneficiaries or undocumented—in vacant motels,<sup>12</sup> trailers,<sup>13</sup> aban-

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<sup>6</sup> See U.S. DEP’T OF STATE, FY 2017 NONIMMIGRANT VISAS ISSUED (2017), <https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY17NIVDetailTable.pdf> (tracking the number of individuals from each country who receive each specific type of employment-based nonimmigrant visa).

<sup>7</sup> See Bryce W. Ashby, *Indentured Guests—How the H-2A and H-2B Temporary Guest Worker Programs Create the Conditions for Indentured Servitude and Why Upfront Reimbursement for Guest Workers’ Transportation, Visa, and Recruitment Costs Is the Solution*, 38 U. MEM. L. REV. 893, 905 (2008) (reporting that the majority of H-2A and H-2B visa beneficiaries are from Mexico, Central America, and the Caribbean).

<sup>8</sup> See U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2017 tbl.XVI(B) (2017), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXVIB.pdf> (demonstrating an increase in H-2A visa issuances in recent years).

<sup>9</sup> Detasseling refers to the stage of corn crop production when workers remove the male flower, or tassel, at the top of a corn stalk in alternating rows, in order for crops to cross-pollinate and become a stronger hybrid strain of corn. *Why Do They Do That?—Detasseling Corn*, IOWA AGRIC. LITERACY FOUND. (July 27, 2015), <https://iowaagliteracy.wordpress.com/2015/07/27/why-do-they-do-that-detasseling-corn-2>.

<sup>10</sup> See, e.g., *Seasonal Detasseling Program*, MUNSON HYBRIDS, <https://www.munsonhybrids.com/detasseling-program> (last visited Apr. 7, 2019) (noting in a seasonal detasseling application for crewmembers that detasseling typically begins around July 4).

<sup>11</sup> Agricultural workers in the United States are predominantly undocumented. Philip Martin & Daniel Costa, *Agricultural Guestworkers: The Challenge of the Expanding H-2A Program*, ECON. POL’Y INST.: WORKING ECON. BLOG (Aug. 1, 2017), <https://www.epi.org/blog/agricultural-guestworkers-expanding-h-2a-program> (“[M]ost of these Mexican-born workers are not authorized to be employed in the United States.”). Employers have supplemented this population of undocumented workers with H-2A temporary migrant farmworkers at increasing rates in recent years. *Id.* (describing an increase in hiring of H-2A visa beneficiaries as among the “main strategies” agricultural employers have used to adjust to a reduction in unauthorized immigration).

<sup>12</sup> See, e.g., Geoffrey Mohan, *Desired for Their Labor, Rejected as Neighbors. Farmworkers in California Face Hostile Communities*, L.A. TIMES (June 2, 2017), <http://www.latimes.com/projects/la-fi-farmworker-housing> (describing certain housing as “seedy roadside hotels”).

<sup>13</sup> See, e.g., Alejandro Lazo, *U.S. Lawsuit over Farmworkers Shines Light on Visa Program*, WALL ST. J. (Aug. 12, 2017), <https://www.wsj.com/articles/u-s-lawsuit-over-arizona-farmworkers-shines-light-on-visa-program-1502535605> (describing inhumane living conditions for migrant farmworkers, stating, “sometimes it is a trailer, sometimes they are just living in cars”).

doned hospitals,<sup>14</sup> and whatever else will suffice as temporary housing, making these workers all but invisible to nearby residents.<sup>15</sup>

Humberto Casarrubias-Sánchez arrived for this evanescent stage in Illinois during the summer of 2011.<sup>16</sup> He traveled from Morelos, Mexico, to northwest Illinois on an H-2A agricultural work visa, leaving his wife and three daughters behind.<sup>17</sup> Humberto, thirty-six, had never received the visa before,<sup>18</sup> never been to the United States,<sup>19</sup> and surely spoke no English.<sup>20</sup> He arrived with the simple wish to provide for his family.<sup>21</sup>

Humberto's first day of work was the hottest recorded day of the year.<sup>22</sup> Heat pulsated in waves from the tops of plant tassels and, by 9:00 a.m., Humberto had already fainted twice.<sup>23</sup> But "crew leaders," or agents of the employer, commanded a weak and dehydrated Humberto onward.<sup>24</sup> Humberto never made it out of the field.<sup>25</sup> At the end of the workday, he was nowhere to be found. A town crew gathered to search for the disappeared man, but disbanded due to the extreme heat.<sup>26</sup> "That Mexican's probably off right now in some bar, laughing at us," joked a crew leader.<sup>27</sup> Humberto was found fifty days

<sup>14</sup> See, e.g., Alexia Elejalde-Ruiz, *For Migrant Workers on Illinois Farms, the Job Is Hot, Risky*, CHI. TRIB. (Aug. 6, 2016), <http://www.chicagotribune.com/business/ct-migrant-farm-workers-corn-detassling-0807-biz-20160805-story.html> (describing a migrant farmworker family's stay at "a hulking old hospital converted into the state's largest migrant labor camp . . . sleeping on mattresses on gray concrete floors").

<sup>15</sup> See Susan Reed & Ilene J. Jacobs, *Serving Farmworkers*, 38 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 367, 369 (2004) ("Geographic isolation and migrants' transience create serious barriers to farmworker access to legal and other essential services. . . . [L]abor housing 'camps' . . . in addition to being rural, are often located far-off public roads, deep in the employer's private property.").

<sup>16</sup> *Investigating Work Visas: H-1B, H-2A, and H-2B*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (Apr. 23, 2015), <http://investigatamidwest.org/2015/04/23/investigating-work-visas-h-1b-h-2a-and-h-2b>; see also E-mail from Miguel C. Keberlein, Exec. Dir., Legal Aid Soc'y of Metro. Family Servs., to author (Oct. 18, 2018, 1:29 PM) [hereinafter Oct. 18 E-mail from Miguel C. Keberlein to author] (on file with author).

<sup>17</sup> Tara Becker, *Heat Killed Migrant Worker Who Was Detasseling Last July*, OGLE COUNTY NEWS (Mar. 22, 2012), <http://www.oglecountynews.com/2012/03/22/heat-killed-migrant-worker-who-was-detasseling-last-july/akt2k8s>; see also Oct. 18 E-mail from Miguel C. Keberlein to author, *supra* note 16.

<sup>18</sup> Oct. 18 E-mail from Miguel C. Keberlein to author, *supra* note 16.

<sup>19</sup> July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1.

<sup>20</sup> *Investigating Work Visas*, *supra* note 16.

<sup>21</sup> July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1.

<sup>22</sup> *Migrant Project Introduces New Fellowship*, LAF ENEWSLETTER (LAF, Chicago, Ill.), Mar. 2017, <https://www.lafchicago.org/about-us/media-room/enewsletter-march2017> (last visited Apr. 7, 2019).

<sup>23</sup> *Id.*

<sup>24</sup> July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1.

<sup>25</sup> Oct. 18 E-mail from Miguel C. Keberlein to author, *supra* note 16.

<sup>26</sup> See July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1.

<sup>27</sup> *Id.*

later in the middle of the field, his body virtually unrecognizable.<sup>28</sup> His story is one of the many untold realities of H-2A migrant farmworkers.

This Note makes the novel argument that American society racializes H-2A migrant farmworkers much like Latina/o immigrants have been historically racialized, and that a “dual solution” to this racialization may exist in migrant farmworker coalitions that rewrite their own racialized narratives and create a cultural groundswell for government change. Critical race theorists describe racialization, or the act of being “raced,”<sup>29</sup> as the way in which society places non-whites who fall outside the black-white paradigm<sup>30</sup> low within the racial hierarchy.<sup>31</sup> In this way, nonwhiteness informs one’s livelihood and relegates racialized groups to a lesser status. Practically speaking, racialization involves negative stereotypes, biased media depictions, and weakened political power,<sup>32</sup> all of which can be witnessed in the H-2A community. The crew leader’s statement that Humberto was probably off drinking and laughing at them evidences an ever-present racialized rhetoric of migrant farmworkers that has bred nominal enforcement of their minimal rights.<sup>33</sup> Though the government has failed thus far to protect this vulnerable population, burgeoning coalitions of migrant farmworkers have increasingly succeeded in advancing their rights by appealing directly to top food purchasers and corporations.<sup>34</sup> These coalitions counter racialization by rewriting stories of their racial identity through political action. While the need

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<sup>28</sup> Oct. 18 E-mail from Miguel C. Keberlein to author, *supra* note 16.

<sup>29</sup> See Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4, 6 n.9 (1995) (explaining that “[t]o underscore race as an activity rather than an objective category,” the term “race-ing” is used to describe “specific acts that have the intent or effect of reinforcing racial relationships”).

<sup>30</sup> See Juan F. Perea, *The Black/White Binary Paradigm of Race: The ‘Normal Science’ of American Racial Thought*, 85 CALIF. L. REV. 1213, 1219 (1997) (defining the paradigm as “the conception that race in America consists, either exclusively or primarily, of only two constituent racial groups, the Black and the White”).

<sup>31</sup> See Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 153 (1998) (“The social construction of the ‘Latino race’ was inevitable in a society that (mis)perceives non-whites as ‘others.’ Historically, the political rhetoric of racial inferiority and multitudes of social myths and images identical to the political message have portrayed Anglo-Americans as superior beings and Latinos as inferior . . .”).

<sup>32</sup> See generally Sahar F. Aziz, *Sticks and Stones, the Words that Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 N.Y. CITY L. REV. 33, 36–43 (2009) (describing the racialization of Arabs, Muslims, and South Asians after the September 11 attacks, which involved negative stereotypes and epithets, harmful media depictions of terrorists, and decreased political power in the form of racial profiling and diminished legal protections).

<sup>33</sup> See *infra* Part II.

<sup>34</sup> See *infra* Section III.A.

for an H-2A Program remains uncertain, the current political movement of migrant farmworkers reclaims racial identity formation and may ultimately force the hand of government.

Part I of this Note navigates the racialization of Latina/o immigrants in the United States, linking a history of racialized narratives and harmful immigration policy with the racialization of today's H-2A migrant farmworkers. Part II breaks down how this racialization has affected the H-2A visa program, leading to insufficient legal protections, nominal enforcement, and abuse of H-2A workers by employers. Without assuming the necessity of the H-2A Program, Part III of this Note identifies a solution to these migrant farmworkers' problematic racialization: In rewriting their own racialized stories, migrant farmworker coalitions can create the cultural groundswell for future government change.

## I

### HISTORICAL-CULTURAL RACIALIZATION OF LATINA/O IMMIGRANTS IN U.S. SOCIETY

Rather than viewing race through a biological or genetic lens, legal scholars view race predominantly as a social construct, perceiving the concept as malleable and changing over time.<sup>35</sup> Race responds to political and societal needs,<sup>36</sup> and U.S. society has typically framed race within a black-white paradigm.<sup>37</sup> The concept of race becomes inculcated through a continuous dialogue between socio-cultural depictions and understandings, and political forces.<sup>38</sup> For example, media portrayals speak to racial meaning, and often cause shifts in political—and legal—power, and vice versa.<sup>39</sup> By expanding our understanding of race to the “process” of racialization,<sup>40</sup> we may fill in gaps of the racial spectrum, recognizing how other nonwhites

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<sup>35</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 61–62 (1st ed. 1986) (disposing of the biological approach to race and replacing it with the concept of “racial formation,” the process by which “social, economic and political forces determine the content and importance of racial categories, and by which they are in turn shaped by racial meanings”).

<sup>36</sup> See *id.* at 68–69 (understanding race as an “unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle” (emphasis omitted)).

<sup>37</sup> See Perea, *supra* note 30, at 1219 (noting a historic compulsion of society and legal scholars to act as if “only the Black and the White races matter”).

<sup>38</sup> See OMI & WINANT, *supra* note 35, at 61, 63 (describing race as an evolving concept that is formed and re-formed through “social, economic and political forces,” and acknowledging the role of media “not only in their capacity to reflect the dominant racial ideology, but [also] in their ability to shape that ideology in the first place”).

<sup>39</sup> See *infra* Sections I.A–I.D.

<sup>40</sup> Neil Gotanda, *Comparative Racialization: Racialization and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1692 (2000) (describing racialization as a process).

are marginalized and deemed inferior in society, perhaps in different ways from Blacks in America.<sup>41</sup> The act of “race-ing” a community typically involves negative stereotypes, biased media depictions, and loss of political and economic power.<sup>42</sup> On the other hand, contesting racialization requires a group to create its own racial identity formation through political movement.<sup>43</sup>

This Note focuses on the racialization of Latina/o immigrants due to their multiplicative subordination based on ethnicity and perceptions of being “foreign,” “Other non-[w]hites.”<sup>44</sup> Foreignness forms the subscript for how groups such as Latina/o immigrants are treated in the law, “leading to unfair and often shocking consequences.”<sup>45</sup> Furthermore, Latina/o immigrants comprise the majority of agricultural workers, and eighty-three percent identify as “Hispanic.”<sup>46</sup> The media’s crime-sex-drug narrative of Latina/o immigrants<sup>47</sup> and correlated U.S. immigration policy reveal this population’s racialization. Sexualized narratives often align with immigration-friendly policies, while criminal and drug-related tropes match restrictionist ones. The

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<sup>41</sup> See Perea, *supra* note 30, at 1253–54 (noting that understanding Latinas/os through the black-white paradigm accounts only limitedly for this community’s experience of racism, failing to account for elements of language abilities, and arguing that the binary paradigm “operates to silence and render invisible Latinos/as . . . reproduc[ing] a serious harm”).

<sup>42</sup> See generally Aziz, *supra* note 32, at 36–43 (arguing that the racialization of Arabs, Muslims, and South Asians after the September 11 attacks included negative stereotypes and epithets, harmful media depictions of terrorists, and decreased political power in the form of racial profiling and diminished legal protections).

<sup>43</sup> See Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 50 (1997) (“[U]nless racial identity continues to be a conscious and explicit rejection of white supremacist ideology manifesting through specific political positions, it will be coopted by the very forces that seek to maintain the present racial status quo.”).

<sup>44</sup> Neil Gotanda, “*Other Non-Whites*” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (reviewing PETER IRONS, *JUSTICE AT WAR* (1983)) (noting that “[o]ne of the critical features of legal treatment of Other non-Whites has been the inclusion of a notion of ‘foreignness’ in considering their racial identity and legal status”). These terms refer to populations treated differently legally and socially based on their racial identity and legal status.

<sup>45</sup> *Id.*

<sup>46</sup> See TRISH HERNANDEZ & SUSAN GABBARD, *JBS INT’L, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 2* (2018) [hereinafter *NAWS*], [https://wdr.doleta.gov/research/FullText\\_Documents/ETAOP\\_2019-01\\_NAWS\\_Research\\_Report\\_13.pdf](https://wdr.doleta.gov/research/FullText_Documents/ETAOP_2019-01_NAWS_Research_Report_13.pdf). This analysis of the racialization of Latinas/os should not be read to exclude or erase the important history of racialization of other communities in the United States, in particular African, Afro-Caribbean, and Asian populations whose racialization and participation in temporary worker programs overlap in significant ways with Latina/o immigrants.

<sup>47</sup> See *infra* Sections I.A–I.C.

symbiotic relationship between media and immigration law continues today in politics and media, extending racialized narratives and hostile government treatment to the H-2A population.

### A. *Crime Narratives: Fear of the “Greaser” and Temporary Worker Programs*

While this era by no means marked the first period of temporary or permanent immigration, the Immigration Act of 1917<sup>48</sup> signified an early experiment for the United States with guest worker programs.<sup>49</sup> Through inadmissibility waivers,<sup>50</sup> the United States permitted temporary laborers to perform needed agricultural work and railroad construction during World War I,<sup>51</sup> commencing one of the first major waves of Latina/o migration to the United States and the group’s first interaction with Americans.

At the same time, the introduction of Hollywood cinema<sup>52</sup> delivered one of the first depictions of Latinas/os through the criminal narrative—the “greaser,” “one of the screen’s most despicable characters.”<sup>53</sup> Arising predominantly in silent films, greasers demonstrated extreme violence and danger. Greasers robbed, assaulted, kidnapped, and murdered; their characters were both lustful and greedy.<sup>54</sup> Though these depictions began with Mexican men, “greaser” soon applied to Latina/o immigrants of all backgrounds.<sup>55</sup> These portrayals of vile, murderous Latino men incited shock and fear in American audiences<sup>56</sup> at a time when the temporary worker program for Latina/o agricultural and railroad workers was causing political and

<sup>48</sup> An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, ch. 29, 39 Stat. 874 (1917).

<sup>49</sup> *See id.* § 3, 39 Stat. at 877–78 (establishing guest worker program).

<sup>50</sup> *See id.*

<sup>51</sup> *See* Leticia M. Saucedo, *The Impact of 1965 Immigration and Nationality Act on the Evolution of Temporary Guest Worker Programs, or How the 1965 Act Punted on Creating a Rightful Place for Mexican Worker Migration*, in *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 292, 294 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).

<sup>52</sup> *See History of the Motion Picture*, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/art/history-of-the-motion-picture/The-silent-years-1910-27> (last visited Apr. 7, 2019) (noting the growth boom in Hollywood cinema by 1915).

<sup>53</sup> ALLEN L. WOLL, *THE LATIN IMAGE IN AMERICAN FILM* 7–8 (rev. ed. 1980).

<sup>54</sup> *See* ARTHUR G. PETTIT, *IMAGES OF THE MEXICAN AMERICAN IN FICTION AND FILM* 132–33 (Dennis E. Showalter ed., 1980).

<sup>55</sup> *See* Sandrino-Glasser, *supra* note 31, at 117 (detailing how, after Latinas/os from countries other than Mexico arrived in the United States, they too took on the term “greaser” which had initially been given to Mexicans).

<sup>56</sup> *See* WOLL, *supra* note 53, at 7 (“These new films at last introduced American audiences to their nearby Mexican neighbors, and no doubt they were shocked by what they saw.”).



societal unease.<sup>57</sup> Eighty thousand Mexican nationals entered under the program's waivers<sup>58</sup>, but this exemption formally ended in 1918 because of the American Federation of Labor's restrictionist immigration appeals.<sup>59</sup> A decade later during the Great Depression, America's apprehension toward Latina/o immigrants produced a mass removal of these immigrants to their countries of birth, with Latina/o workers blamed for the country's poor state.<sup>60</sup>

### *B. Sex Narratives: The Allure of "Sexy Señoritas" and the Bracero Program*

However, after the Great Depression, the United States established another guest worker program, once again connected to cultural depictions of Latina/o immigrants. Developed in response to World War II, the Bracero Program, established in 1942, was a bilateral agreement that allowed approximately four million migrant

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<sup>57</sup> See, e.g., CONG. RESEARCH SERV., TEMPORARY WORKER PROGRAMS: BACKGROUND AND ISSUES 6 (Comm. Print, Select Comm'n on Immigration & Refugee Policy, S. Comm. on the Judiciary 1980) (recounting that "[u]nder pressure from organized labor, led by Samuel Gompers' American Federation of Labor, this segment of the program was at least officially brought to a close with the end of the war in 1918," though waivers for agricultural workers were extended through 1921 based on pleas from U.S. farmers); Robert Lazo, *Latinos and the AFL-CIO: The California Immigrant Workers Association as an Important New Development*, 4 BERKELEY LA RAZA L.J. 22, 25 (1991) ("Samuel Gompers was concerned that the thousands of Mexicans being admitted would enter the semi-skilled and skilled trades where they would become entrenched. Other labor leaders began to characterize the massive influx of Mexicans as 'detrimental to the best interest of the nation.'").

<sup>58</sup> See Saucedo, *supra* note 51, at 294.

<sup>59</sup> See MARK WYMAN, ROUND-TRIP TO AMERICA: THE IMMIGRANTS RETURN TO EUROPE, 1880–1930, at 107–08 (1993) (reporting that the American Federation of Labor (AFL) actively "attack[ed] . . . foreigners" and advocated for initial literacy tests that attempted to decrease the number of immigrants entering the United States).

<sup>60</sup> See Jason Steinhauer, *The History of Mexican Immigration to the U.S. in the Early 20th Century*, LIBR. CONGRESS: INSIGHTS (Mar. 11, 2015), <https://blogs.loc.gov/kluge/2015/03/the-history-of-mexican-immigration-to-the-u-s-in-the-early-20th-century> (commenting on the Depression's destruction of businesses and decrease of the need for immigrant labor, thus relegating Mexican laborers to lives of poverty and often forcing them to return to Mexico). Mexican Repatriation severely impacted the Latina/o community in Los Angeles where many immigrant laborers resided. *America's Forgotten History of Mexican-American 'Repatriation'*, NPR: FRESH AIR (Sept. 10, 2015, 1:11 PM), <https://www.npr.org/2015/09/10/439114563/americas-forgotten-history-of-mexican-american-repatriation> (describing, as an example of the hardships faced by the Latina/o community of Los Angeles, the Placita raid, in which Mexican immigrant laborers were indiscriminately swept up with American citizens of Mexican descent). More than one million individuals were forced out of the United States and across the border into Mexico, approximately sixty percent of the group comprised of U.S. citizens of Mexican descent. *Id.* While "repatriation" connotes voluntary departure, the federal government conducted numerous raids and instructed individuals—both implicitly and explicitly—to leave. *Id.*

farmworkers from Mexico to fill labor gaps in the United States.<sup>61</sup> These temporary workers became part of the largest foreign worker program in U.S. history.<sup>62</sup> Though the Program ultimately ended in 1964,<sup>63</sup> the initial urgency of admission evidenced a desire for Latina/o immigrants and their labor.

This period of immigrant desirability aligned with the emergence of enticing cultural images of hypersexualized Latinas such as the “sexy señoritas.”<sup>64</sup> Carmen Miranda, the “Brazilian Bombshell,”<sup>65</sup> showcased music and melodies of Latin countries, yet the dances and costumes also hypersexualized Latinas. For example, in the popular film *The Gang’s All Here*, Miranda performs “Lady in the Tutti-Frutti Hat” in a sensual song-and-dance scene where she sports a bare midriff and is flanked by bare-legged dancers.<sup>66</sup> Her entire persona demonstrates a cultural shift in Hollywood that emphasized Latina sexuality and objectification.

At the same time, Miranda and other “sexy señoritas” were made comical and endowed with stereotyped traits such as thick accents, a weak grasp on the English language, and sexually manipulative personalities.<sup>67</sup> Miranda’s famous quote, “[b]est I know ten English werds

<sup>61</sup> See Laura C. Oliveira, Comment, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153, 157–61 (2002) (covering the history of the Bracero Program, “Los Braceros,” and the evolution of guest worker programs in the United States).

<sup>62</sup> *About*, BRACERO HIST. ARCHIVE, <http://braceroarchive.org/about> (last visited Apr. 8, 2019).

<sup>63</sup> Shannon Leigh Vivian, Note, *Be Our Guest: A Review of the Legal and Regulatory History of the U.S. Immigration Policy Towards Mexico and Recommendations for Combatting Employer Exploitation of Nonimmigrant and Undocumented Workers*, 30 SETON HALL LEGIS. J. 189, 197–200 (2005) (noting the end of the Bracero Program along with the terms of the agreement spanning its duration).

<sup>64</sup> See GARY D. KELLER, *HISPANICS AND UNITED STATES FILM: AN OVERVIEW AND HANDBOOK* 40 (1994) (discussing the character types of the “Cantina Girl,” whose role usually involved sexually alluring dancing which was “heavily looked forward to,” and the “Vamp” or “Temptress,” not a “merely physically represented sex object,” but cunning as well); see also *id.* at 44 (“The vamp or temptress was the most common female Hispanic type during the first decades of American film production.”); cf. *id.* at 73–74, 75–77 (discussing plot types like “Anglo dallies with Señorita” and “Anglo marries Señorita”).

<sup>65</sup> While Miranda herself was Lisbon-born and scouted in Brazil, see *Carmen Miranda Is Dead at 41; Movie Comedienne and Dancer*, N.Y. TIMES, Aug. 6, 1955, at 15, her character represented Latinas/os more broadly. See KELLER, *supra* note 64, at 124.

<sup>66</sup> *THE GANG’S ALL HERE* (Twentieth Century Fox 1943); see also *The Lady in the Tutti Frutti Hat by Carmen Miranda*, SONGFACTS, <http://www.songfacts.com/detail.php?lyrics=13537> (last visited Apr. 9, 2019) (singing, “Americanos tell me that my hat is high / Because I will not take it off to kiss a guy / But if I ever start to take it off, ay, ay! / Ay, Ay! / I do that once for Johnny Smith / And he is very happy with / The lady in the tutti-frutti hat”).

<sup>67</sup> See KELLER, *supra* note 64, at 125; Debra Merskin, *Three Faces of Eva: Perpetuation of the Hot-Latina Stereotype in Desperate Housewives*, in GAIL DINES & JEAN M. HUMEZ, *GENDER, RACE, AND CLASS IN MEDIA: A CRITICAL READER* 327, 328 (3d ed. 2011) (“Sex,

[sic]: *men, men, men, men, and monee, monee, monee, monee, monee, monee* [sic],” highlights the comical nature of her language proficiency, sexual aura, and cunningness in using eroticism for monetary gain.<sup>68</sup>

The “sexy señorita” trope showed the allure of Latina/o immigrants during the Bracero Program at the same time that the trope’s negative traits portrayed Latina/o immigrants as “Others.”<sup>69</sup> This Latina depiction functioned like a two-sided coin—half-positive and half-negative—and, though causation cannot be attributed to the “sexy señorita” trope, the negative stereotypes this image exuded transitioned seamlessly with the United States’ ultimate shift back to restrictionist immigration policies.<sup>70</sup> The Bracero Program produced large numbers of undocumented immigrants,<sup>71</sup> causing the government to feel inundated. As a result, “Operation Wetback,” an INS search-and-seizure policy of unauthorized workers, began in 1954,<sup>72</sup> and Congress let the Bracero Program expire in 1964.<sup>73</sup> Workers’ stay

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passion, manipulation, and physical beauty are common to each [Latina character type].”); see also Kathryn Bishop Sanchez, *Creating Carmen Miranda*, LITERAL MAG., <http://literalmagazine.com/creating-carmen-miranda> (last visited Apr. 9, 2019) (describing Miranda as “impish, . . . mischievously sensual, . . . and funny,” while denoting themes that her success brings to mind, including “ethnicity, exoticism, comedy, racial difference, and excessive femininity”).

<sup>68</sup> See Shari Roberts, “*The Lady in the Tutti-Frutti Hat*”: *Carmen Miranda, a Spectacle of Ethnicity*, 32 CINEMA J., Spring 1993, at 8, 11.

<sup>69</sup> See Sanchez, *supra* note 67 (noting that Miranda “consistently represented notions of the exotic and otherness”); cf. Keith Aoki, “*Foreign-ness*” & *Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PACIFIC AM. L.J. 1, 6 (1996) (speaking to the idea of racialized “Others,” or foreigners diametrically opposed to the American national identity).

<sup>70</sup> Miranda and the “sexy señorita” trope arose at the time of the Good Neighbor Policy—a foreign relations policy of non-intervention and trade between the United States and Latin America that also initiated more positive portrayals of Latina/o populations in U.S. media. See *Carmen Miranda*, SMITHSONIAN, <https://music.si.edu/spotlight/latin-music-legends-stamps/carmen-miranda> (last visited Apr. 9, 2019); see also Roberts, *supra* note 68, at 4–5 (discussing the Good Neighbor Policy advocated by President Roosevelt, and Miranda’s role in connection to it). However, the trope’s adverse qualities, including lack of intelligence and (sexual) manipulation, flowed easily into depraved depictions of “wetbacks” initiated through Operation Wetback, leading to the end of the Bracero Program. See Audrey J.S. Carrión & Matthew M. Somers, *A Case for the Undocumented Immigrant*, MD. B.J., July-Aug. 2011, at 34 (“The events of Operation Wetback were sanctioned by U.S. public opinion, which blamed ‘wetbacks’ for the propagation of disease, labor strikes in agriculture, subversive and communist infiltration, border crimes, . . . and adverse effects on domestic labor.” (internal quotation marks omitted)).

<sup>71</sup> Vivian, *supra* note 63, at 198–99.

<sup>72</sup> *Id.* at 199.

<sup>73</sup> Oliveira, *supra* note 61, at 159. Notably, the United Farm Workers (UFW) under leader Cesar Chavez also fought to terminate the Bracero Program, as it was seen as exploitative of domestic farm workers who were often denied work because of the access to cheaper imported labor. *Cesar Chavez and UFW: Longtime Champions of Immigration*

during this time was truly temporary, changing as the process of racialization responded to social, political, and cultural realities.<sup>74</sup>

### C. *Drug Narratives: Scarface and the Marielito Problem*

The 1980s' "immigration emergency" serves as a last key historical illustration of racialization of Latina/o immigrants, in which an alleged mass influx of undocumented persons, refugees, and drugs<sup>75</sup> manifested in anxiety toward Latina/o immigrants. The Cuban port of Mariel opened in 1980, allowing approximately 125,000 Cubans—or "Marielitos"—to flee persecution under Fidel Castro and arrive by boat in Miami.<sup>76</sup> Rumors quickly spread of Castro purposefully sending prisoners and undesirables, creating furor in the United States over alleged Cuban delinquents, criminals, and drug dealers.<sup>77</sup> This sociopolitical unrest<sup>78</sup> coincided with media depictions of Latina/o immigrants and Marielitos as drug lords. Here, the crime-sex-drug narrative comes full circle.

A notable example of the drug lord depiction appears in the 1983 film *Scarface*. *Scarface* follows the life of Antonio "Tony" Montana, a Marielito recently arrived in Miami.<sup>79</sup> The INS detains Montana, a notorious criminal, upon arrival, and Montana only receives a green card after he agrees to murder a former Cuban general for Latino

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*Reform*, UNITED FARM WORKERS (May 11, 2010), <https://ufw.org/Cesar-Chavez-and-UFW-longtime-champions-of-immigration-reform>. Migrant farmworkers who attained work through the Program were often abused by their employers as well. *Id.*

<sup>74</sup> See OMI & WINANT, *supra* note 35, at 61, 63.

<sup>75</sup> See LEAH PERRY, *THE CULTURAL POLITICS OF U.S. IMMIGRATION: GENDER, RACE, AND MEDIA* 34–36, 38 (2016).

<sup>76</sup> Frances Robles, 'Marielitos' Face Long-Delayed Reckoning: Expulsion to Cuba, N.Y. TIMES (Jan. 14, 2017), <https://www.nytimes.com/2017/01/14/us/cuba-us-migrants.html>.

<sup>77</sup> See, e.g., *Cuban Refugee Crime Troubles Police Across U.S.*, N.Y. TIMES (Mar. 31, 1985), <https://mobile.nytimes.com/1985/03/31/us/cuban-refugee-crime-troubles-police-across-u-s.html> (compiling the claims of local law enforcement officials that a substantial minority of Marielitos were engaging in criminal conduct); *Cuban Ties Boatlift to Drug Trade*, N.Y. TIMES (May 1, 1983), <https://www.nytimes.com/1983/05/01/us/cuban-ties-boatlift-to-drug-trade.html> (reporting the testimony of a supposed Cuban agent and convicted drug smuggler that Cuban agents among the Marielitos partially aimed to "create 'chaos' in the event of war"); *Miami Homicide Rate 5 Times Above Usual Among Cuban Exiles*, N.Y. TIMES (June 1, 1981), <https://www.nytimes.com/1981/06/01/us/miami-homicide-rate-5-times-above-usual-among-cuban-exiles.html> (linking the influx of Marielitos in Miami with an increased rate of arrests and homicides in their own population).

<sup>78</sup> See Kristina Shull, "Nobody Wants These People": Reagan's Immigration Crisis and the Containment of Foreign Bodies, in *BODY AND NATION: THE GLOBAL REALM OF U.S. BODY POLITICS IN THE TWENTIETH CENTURY* 241, 254 (Shanon Fitzpatrick & Emily S. Rosenberg eds., 2014) (explaining how former President Ronald Reagan's campaign platform focused on "get[ting] tough with Cuba").

<sup>79</sup> *SCARFACE* (Universal Pictures 1983); PERRY, *supra* note 75, at 43.

drug lord Frank Lopez.<sup>80</sup> Following Montana's release from his refugee camp, the character becomes part of Miami's drug underworld, ultimately rising to the top.<sup>81</sup> *Scarface* increased fear of racialized violence in the context of the Marielitos.<sup>82</sup> The cult classic resonated with American society in that it was similar to prior criminalized tropes of Latinas/os.<sup>83</sup> It also aligned with the era's rhetoric of drug-infested immigrants and refugees overwhelming the country.<sup>84</sup>

Following these images, voters championed President Reagan's "tough on Cuba" platform.<sup>85</sup> The Anti-Drug Abuse Act of 1986<sup>86</sup> soon followed, which expanded drug offenses affecting admissibility and deportability of immigrants to any conviction "relating to a controlled substance."<sup>87</sup> The Marielito situation filled a pre-existing media trope of drug-dealing Latinas/os, and rhetoric surrounding refugees and undocumented immigrants created policy that made one message clear: "Nobody wants these people."<sup>88</sup>

#### D. Racialization of H-2A Workers

Perhaps now more than ever in recent U.S. history, racialization of Latina/o immigrants in the United States manifests itself through media depictions and government policy, permeating into the H-2A migrant farmworker community specifically.

Even before his election, then-candidate Donald Trump had labelled the Mexican "people" (presumably immigrants) as "rapists,"

<sup>80</sup> PERRY, *supra* note 75, at 43.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See WOLL, *supra* note 53, at 6–10 (discussing depictions of Latinas/os in early silent films).

<sup>84</sup> See PERRY, *supra* note 75, at 35–43.

<sup>85</sup> See MARÍA DE LOS ANGELES TORRES, *IN THE LAND OF MIRRORS: CUBAN EXILE POLITICS IN THE UNITED STATES* 105 (1999) ("In November 1980 Reagan was elected president on a platform that included a 'get tough with Cuba' provision as well as the promotion of conservative exiles to government positions."); Shull, *supra* note 78, at 254, 258. Reagan himself wrote in his diary, "What to do with 3,000 jailed Cubans. . . . They are truly violent and were evidently released from prison and hospitals in Cuba just to be dumped on us. . . . The problem—as yet unsolved is how to return them." Shull, *supra* note 78, at 258.

<sup>86</sup> Pub. L. No. 99-570, 100 Stat. 3207 (codified in scattered sections of 8, 12, 16, 21, 23, 31, 42, 49 U.S.C.).

<sup>87</sup> *Id.* § 1751(b). 8 U.S.C. § 1227(a)(2)(B)(i) classifies undocumented immigrants as a "deportable class" for criminal conviction relating to drugs, as defined broadly in the Controlled Substances Act, 21 U.S.C. § 802 (2012). This added huge discretion to who could come into the United States and who must be forced out of the country.

<sup>88</sup> Shull, *supra* note 78, at 254 (quoting a letter from Chief of Staff James Baker to Arkansas Governor Frank White, who had campaigned on expelling 5000 Cubans detained at Fort Chaffee).

claiming that they brought drugs and crime into the United States.<sup>89</sup> In discussing Mexican immigrants, President Trump addresses each topic of crime, sex, and drugs, epitomizing use of the crime-sex-drug narrative in politics. For example, during his 2018 State of the Union address, Trump claimed of his immigration policy, “As we speak tonight, we are removing gang members, drug dealers, and criminals that . . . prey on our very innocent citizens. Bad ones are going out . . . .”<sup>90</sup> These statements incite fear and alienate Latina/o immigrants. When paired with his immigration platform of building a “wall” on the U.S.-Mexico border<sup>91</sup> and decreasing family-sponsored immigration,<sup>92</sup> stereotypical depictions of Latina/o immigrants foster restrictionist policies based on otherizing and foreignness.

Comments made by the crew leader during Humberto’s disappearance—“That Mexican’s probably off right now in some bar, laughing at us”<sup>93</sup>—indicate that racialization appears directly within the confines of H-2A migrant farm work. Humberto becomes “[t]hat Mexican,” conflated with all other Mexicans, his identity “homogeneously . . . ‘foreign’ to the image of ‘being American.’”<sup>94</sup> The statement itself harkens back to the historic crime-sex-drug narrative, alluding to deception and sin.

Humberto’s treatment reflects how racialization of Latina/o immigrants impacts H-2A migrant farmworkers. Just as Latina/o immigrants in general are racialized through media depictions and policy in the United States, H-2A workers experience this racialization through the law as well. As a result, they receive fewer legal protections which, in turn, affects their wages, makes them vulnerable to

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<sup>89</sup> *Here’s Donald Trump’s Presidential Announcement Speech*, TIME (June 16, 2015) [hereinafter *Donald Trump’s Presidential Announcement*], <http://time.com/3923128/donald-trump-announcement-speech>.

<sup>90</sup> Donald J. Trump, President of the United States, Remarks by President Trump in Joint Address to Congress (Feb. 8, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-address-congress>.

<sup>91</sup> Dara Lind, *No, Seriously, the Trump Administration Is Building a Wall*, VOX (Mar. 13, 2018, 9:20 AM), <https://www.vox.com/policy-and-politics/2018/3/13/17107034/trump-border-wall-mexico>.

<sup>92</sup> See Philip Bump, *How ‘Chain Migration’ Brought Us the Trump White House*, WASH. POST (Jan. 29, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/01/29/how-chain-migration-brought-us-the-trump-white-house> (describing the family-sponsored immigration policy in the United States and Trump’s reframing of this policy as “chain migration,” seeking to limit the types of family members who can sponsor a noncitizen).

<sup>93</sup> July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1.

<sup>94</sup> SUZANNE OBOLER, *ETHNIC LABELS, LATINO LIVES: IDENTITY AND THE POLITICS OF (RE)PRESENTATION IN THE UNITED STATES* 18 (1st ed. 1995); see also Sandrino-Glasser, *supra* note 31, at 92–93 (“While Latinos’ commonalities are emphasized by [racist] stereotypes, their internal diversity shaped by historical differences and diverse experiences of incorporation are rarely acknowledged.”).

sexual harassment and assault, and increases their susceptibility to human trafficking.<sup>95</sup>

## II

### EFFECTS OF RACIALIZATION IN THE H-2A PROGRAM

The H-2A guest worker program invites temporary agricultural workers to the United States upon two conditions: (1) that no U.S. workers are available for the job, and (2) that these foreign guest workers will not harm the wages and working conditions of U.S. laborers.<sup>96</sup>

A critical look at the program and its provisions for H-2A migrant farmworkers reveals the major gaps in protections for this community, symptomatic of the racialization that has influenced immigration policy for temporary workers. The program appears to support H-2A workers on paper. However, in reality, migrant farmworkers possess minimal protections, and the Department of Labor's (DOL) deficient enforcement results in labor and human rights violations such as wage theft, sexual harassment, and human trafficking.<sup>97</sup> Part II of this Note examines the H-2A Program and its minimal protections, the DOL's lackluster enforcement, and vulnerabilities that stem from the racialization that Latina/o migrant farmworkers face.

#### A. *The H-2A Program and Its Minimal Protections*

Emblematic of the impact of historic immigration policy in the United States on Latina/o immigrants, the H-2A Program illustrates how racialization weakens the political power and legal rights of this community, resulting in minimal protections for migrant farmworkers.

The H-2A Program falls into the larger category of nonimmigrant visas.<sup>98</sup> An employment-related nonimmigrant visa, the H-2A visa

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<sup>95</sup> See *infra* Section II.C.

<sup>96</sup> 8 U.S.C. § 1188(a)(1)(A)–(B) (2012); 20 C.F.R. § 655.0(a) (2019).

<sup>97</sup> See S. POVERTY LAW CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 2, 18–21, 33, 35–36 (2013) [hereinafter *CLOSE TO SLAVERY*], [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf).

<sup>98</sup> See *Directory of Visa Categories*, U.S. DEP'T ST., <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/all-visa-categories.html> (last visited Apr. 5, 2019). Nonimmigrant visas are for individuals residing outside of the United States who seek temporary admission, as opposed to those seeking lawful permanent resident (LPR) status or citizenship. *What Is the Difference Between an Immigrant Visa vs. Nonimmigrant Visa?*, U.S. CUSTOMS & BORDER PROTECTION, [https://help.cbp.gov/app/answers/detail/a\\_id/72/~/what-is-the-difference-between-an-immigrant-visa-vs.-nonimmigrant-visa-%3F](https://help.cbp.gov/app/answers/detail/a_id/72/~/what-is-the-difference-between-an-immigrant-visa-vs.-nonimmigrant-visa-%3F) (last updated July 10, 2018).

requires employers to follow a series of steps in order to be certified: These requirements include a job order,<sup>99</sup> a temporary labor certification,<sup>100</sup> and a Petition for Nonimmigrant Worker (Form I-129).<sup>101</sup> An H-2A beneficiary's main entitlements under the program include, but are not limited to, the following: (1) employer-provided housing; (2) employer-provided food; (3) employer-provided transportation to and from the place of employment (meaning native residence to the job site); (4) employer-provided transportation between living quarters and the worksite; (5) a three-fourths guarantee (guaranteeing workers compensation for three-quarters of the contract's stated work period); (6) documentation of earnings, hours, and earnings statements; and (7) a rate of pay equivalent to the Adverse Effect Wage Rate (AEWR), prevailing hourly wage rate, prevailing piece rate, or minimum wage rate, whichever is highest.<sup>102</sup>

H-2A migrant farmworkers are not protected by some of the safeguards provided by the Fair Labor Standards Act (FLSA),<sup>103</sup> nor are they protected under the National Labor Relations Act

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<sup>99</sup> First, an employer—whether an individual, labor contractor, or association—must submit a job order, ETA Form 790, to the appropriate State Workforce Agency (SWA). 20 C.F.R. § 655.121(a)(1). Employers must attest that the job offer meets a series of minimum requirements for, among other things, wages, meals, and housing conditions. *Id.* § 655.122(c)–(q). See *infra* note 102 and accompanying text for a partial list of these minimum requirements.

<sup>100</sup> The petitioning employer certifies that (1) not enough U.S. workers are able, willing, and qualified to work in the area of intended employment when needed by the employer, and that (2) the employment of foreign temporary workers will not adversely affect the wages and working conditions of U.S. laborers similarly employed. 20 C.F.R. § 655.103(a). Once the initial job order and temporary employment certification are approved, the SWA circulates this job information to states with U.S. workers who could fill these positions, and posts the ETA-790 on the DOL's electronic job registry to find U.S. workers. *Id.* § 655.144.

<sup>101</sup> The employer submits the temporary employment certification along with a Petition for Nonimmigrant Worker (Form I-129) to Department of Homeland Security's U.S. Citizenship and Immigration Services (USCIS), including the total number of workers needed as well as the filing fee. 8 C.F.R. §§ 214(h)(2)(i)(A), (5)(i)(A). Once USCIS approves this application, the employer tells H-2A workers to complete the in-person interview at the consulate and pay fees (which, by law, must be reimbursed). See generally 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL: VISAS: UNCLASSIFIED 35 (2011), <http://www.kidambi.com/resources/9FAM4153.pdf> (stating the requirement for worker reimbursement). At the end of this process, H-2A workers can travel to the U.S. employment site for the period of work, though certified employers must continue to recruit U.S. workers until the H-2A workers have departed for the work destination. *H-2A Temporary Agricultural Program Details*, U.S. DEP'T LAB., [https://www.foreignlaborcert.doleta.gov/h-2a\\_details.cfm](https://www.foreignlaborcert.doleta.gov/h-2a_details.cfm) (last updated July 31, 2018).

<sup>102</sup> 20 C.F.R. § 655.122(d)–(q).

<sup>103</sup> See 29 U.S.C. § 213(b)(12) (2012) (excluding “any employee employed in agriculture” from maximum hour protection of section 207 of the Act); *Id.* § 213(a)(6) (excluding, from the minimum wage protections of the Act, a limited range of agricultural workers which may be read broadly to include migrant workers).



(NLRA),<sup>104</sup> nor the Migrant and Seasonal Agricultural Worker Protection Act (AWPA).<sup>105</sup> This creates serious vulnerabilities for H-2A migrant farmworkers.<sup>106</sup> Furthermore, though the H-2A Program appears adequate on paper, it lacks the portability provision—a mechanism allowing visa beneficiaries to change employers—and pathway to citizenship typical of other employment-related non-immigrant visas. This Section analyzes each of these statutes and provisions in turn. Just as public perception has historically aligned with political policy for Latina/o immigrants, racialization infiltrates the H-2A Program by allotting minimal protections under these key labor laws to migrant farmworkers, the Latina/o migrant community deemed inferior and disposable.

Enacted in 1938, the FLSA initially exempted agricultural workers from minimum wage, overtime, and child labor regulations.<sup>107</sup> Only in 1966 did an amendment to the FLSA first phase in minimum wage and child labor requirements for agricultural workers.<sup>108</sup> However, despite extending the minimum wage to H-2A migrant farmworkers, the FLSA still does not allow these farmworkers overtime compensation.<sup>109</sup> The impact that the overtime exemption has on migrant farmworkers cannot be overstated: Farm work requires extremely long hours, and is one of the most dangerous occupations in the United States. Twenty-three out of every 100,000 laborers die in a work-related incident.<sup>110</sup> Evidently, deceased H-2A worker Humberto Casarrubias-Sánchez was one of many. The National Agricultural Workers Survey (NAWS) indicates that

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<sup>104</sup> *Id.* § 152(3) (excluding agricultural laborers from the definition of “employee” under the Act).

<sup>105</sup> *Id.* § 1802(8)(B)(ii) (excluding those authorized to work under the H-2A program, defined at 8 U.S.C. §§ 1101(a)(15)(H)(ii)(A), 1184(c), from the Act’s definition of “migrant agricultural worker”).

<sup>106</sup> See Christopher Ryon, Comment, *H-2A Workers Should Not Be Excluded from the Migrant and Seasonal Agricultural Worker Protection Act*, 2 MARGINS 137, 140–43, 148–50 (2002).

<sup>107</sup> Fair Labor Standards Act of 1938, ch. 676, § 13(a)(6), 13(c), 52 Stat. 1060, 1067–68 (1938) (codified as amended at 29 U.S.C. § 213(a)(6), (c)) (exempting agricultural employers from paying minimum wage and overtime and allowing child labor).

<sup>108</sup> Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 203, 80 Stat. 830, 832–34 (codified as amended at 29 U.S.C. § 203) (current version at 29 U.S.C. § 203).

<sup>109</sup> *Id.*

<sup>110</sup> U.S. DEP’T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2017 (2017), <https://www.bls.gov/news.release/pdf/choi.pdf>. The Center for Disease Control found that farming injury rates are around 58,000 per year. See CTR. FOR DISEASE CONTROL AND PREVENTION, TABLE AI-1: NATIONAL ESTIMATES OF AGRICULTURAL WORK-RELATED INJURIES TO ADULTS (20 YEARS AND OLDER) ON US FARMS BY TYPE OF ADULT WORKER (2014), <https://www.cdc.gov/niosh/topics/aginjury/oispa/pdfs/AI-1-508.pdf>.

farmworkers work more than 190 days in thirty-five weeks, averaging out to more than five days of work per week.<sup>111</sup> Meanwhile, personal accounts paint a picture of many more hours worked, like farmworkers in New York who report working fourteen hours a day, six days a week, with an hour of lunch.<sup>112</sup> As one dairy farmworker stated, “Sometimes we don’t get a day of rest. Two weeks ago[,] we had off on a Wednesday[;] last week off on a Thursday. This week my boss told me I don’t have a day off.”<sup>113</sup> Statements like this underscore the brutal nature of this labor.<sup>114</sup> Agricultural industry lobbying groups argue that they must retain the exemption from FLSA overtime requirements because farmworkers’ overtime earnings could impose high costs on consumers and employers.<sup>115</sup> But this argument lacks salience when considering the arduousness and amount of work conducted by migrant farmworkers. Moreover, the FLSA’s overtime exemption for migrant farmworkers is compounded by issues of wage

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<sup>111</sup> *NAWS: V-Shape Trends*, RURAL MIGRATION NEWS, <https://migration.ucdavis.edu/rmn/more.php?id=2041> (last visited Apr. 5, 2019) (reporting results based on interviews of between two and four thousand non-H-2A workers employed on crop farms).

<sup>112</sup> See Joseph Berger, *Long Days in the Fields, Without Earning Overtime*, N.Y. TIMES (Aug. 7, 2014), <https://www.nytimes.com/2014/08/08/nyregion/in-harvest-season-endless-hours-with-no-overtime-for-new-york-farmworkers.html>.

<sup>113</sup> *Id.*

<sup>114</sup> Because of the arduousness of this labor, agricultural producers have difficulty filling farm work positions with anyone other than immigrants, H-2A migrant farmworkers, or undocumented persons. “We have American workers that are not coming out to the farms to do the work. And we’re kind of stuck between a rock and a hard place,” says Kristi Boswell of the American Farm Bureau. Lauren Rosenthal, *Farmers Wait, and Wait, for Guest Workers Amid H-2A Visa Delays*, NPR: THE SALT (May 28, 2016, 7:26 AM), <https://www.npr.org/sections/thesalt/2016/05/28/479633481/farmers-wait-and-wait-for-guest-workers-amid-h-2a-visa-delays>. Mimicking these sentiments, a large agricultural producer remarked that taking the foreign workforce away from this industry would “decimate agriculture.” Betsy Jibben, *Need for Migrant Farm Workers on Operations*, FARM J. (Jan. 30, 2017, 9:59 AM), <https://www.agweb.com/article/need-for-migrant-farm-workers-on-operations—naa-betsy-jibben>. Even when farm employers in California raised wages significantly, they attracted few U.S. workers. See Natalie Kitroeff & Geoffrey Mohan, *Wages Rise on California Farms. Americans Still Don’t Want the Job*, L.A. TIMES (Mar. 17, 2017), <http://www.latimes.com/projects/la-fi-farms-immigration> (finding that despite substantial wage increases and benefits, nine out of ten agriculture workers in California are foreign born).

<sup>115</sup> See Mary Alameda, *For the Love of Labor*, AM. FARM BUREAU FED’N (July 19, 2017), <https://www.fb.org/viewpoints/for-the-love-of-labor> (claiming that increasing farm worker wages may have perverse effects, with one producer claiming that “California farmers and ranchers cannot sustain the rising costs, and many may be forced to cut back production or employ more crews to absorb the cost”); Berger, *supra* note 112 (reporting industry claims that requiring overtime pay will raise prices for consumers and will make products from some states less competitive); Ed Maixner, *Pay Hikes, New Overtime Requirements Could Swell Ag Payrolls*, AGRI-PULSE (Nov. 2, 2016), <https://www.agri-pulse.com/articles/7953-pay-hikes-new-overtime-requirements-could-swell-ag-payrolls> (noting that labor accounts for forty to sixty percent of farm production costs, so increased wages could likely be passed on to consumers).

theft and poor documentation of hours, allowing employers to capitalize on the system's existing faults.<sup>116</sup>

Migrant farmworkers are also exempted from the NLRA's right to unionize.<sup>117</sup> Under the NLRA, most employees possess "the right to self-organization,"<sup>118</sup> but H-2A workers do not receive this important labor protection. This means that migrant farmworkers are unable to advocate for better wages and working conditions as a union,<sup>119</sup> and that they are also more individually vulnerable to employer retaliation for voicing concerns.<sup>120</sup> An NLRA provision granting H-2A migrant farmworkers the right to unionize would ameliorate migrant farmworker issues of isolation and fear, which restrain H-2A migrant farmworkers from complaining individually to an employer.<sup>121</sup> While the H-2A Program requires employers not to blacklist, threaten, coerce, or intimidate workers,<sup>122</sup> these abuses persist,<sup>123</sup> creating barriers to justice without the right to unionize.

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<sup>116</sup> In a 2009 survey conducted by Piñeros y Campesinos Unidos del Noroeste (PCUN) of almost two hundred Oregon farmworkers paid on a "piece-rate" basis, ninety percent of workers reported earnings consistently below the minimum wage. See *The Wage Theft Crisis*, OR. CTR. FOR PUB. POLICY, <https://www.ocpp.org/2011/Wage%20theft%20fact%20sheet%203.17.11.pdf> (last visited Apr. 21, 2018). Furthermore, though payment is required for migrant farmworkers' waiting time, for example on buses and in transportation between fields, ninety-five percent of workers were never paid for this labor. See FARMWORKER JUSTICE, U.S. DEPARTMENT OF LABOR ENFORCEMENT: MORE MUST BE DONE TO PROTECT FARMWORKERS DESPITE RECENT IMPROVEMENTS 6 (2015) [hereinafter MORE MUST BE DONE], <https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport2015%20%281%29.pdf>.

<sup>117</sup> See 29 U.S.C. § 152(3) (2012) (withholding this collective bargaining right from "any individual employed as an agricultural laborer").

<sup>118</sup> 29 U.S.C. § 157 (2012).

<sup>119</sup> See, e.g., *Legislative Memo: Farm Workers' Labor Rights*, NYCLU (May 1, 2007), <https://www.nyclu.org/en/legislation/legislative-memo-farm-workers-labor-rights-0> (advocating amending the New York labor law to include a right for farm laborers to organize and collective bargain, as these are important aspects of freedom of association).

<sup>120</sup> See, e.g., *Reyes-Fuentes v. Shannon Produce Farm, Inc.*, 671 F. Supp. 2d 1365 (S.D. Ga. 2009) (retaliation suit against agricultural employer who refused to rehire H-2A migrant farmworkers after workers filed a previous lawsuit against employer); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128 (W.D.N.Y. 2003) (retaliation suit against agricultural employer who falsely claimed to INS and federal government officials that H-2A workers were terrorists and part of a sleeper cell after workers filed suit regarding FLSA and AWPA violations); *Flores v. Fulwood Farms of Fla., Inc.*, 450 F. Supp. 1046 (M.D. Fla. 1978) (retaliation suit against agricultural employer and crew leaders who evicted migrant farmworkers and turned off gas and electricity in employer-provided housing after workers complained about housing conditions).

<sup>121</sup> See Reed & Jacobs, *supra* note 15, at 368–69 (finding barriers to advocacy, including geographic and cultural isolation, the transient nature of farm work, workers' dependency on employers for their livelihood, and distrust of American law).

<sup>122</sup> 20 C.F.R. § 655.135(h) (2012).

<sup>123</sup> See CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., *RECRUITMENT REVEALED: FUNDAMENTAL FLAWS IN THE H-2 TEMPORARY WORKER PROGRAM AND RECOMMENDATIONS FOR CHANGE 22* (2013), <https://cdmigrante.org/wp-content/uploads/>

Even the AWPAs, designed to enhance rights for undocumented migrant farmworkers, does not extend its labor protections to H-2A workers.<sup>124</sup> The AWPAs focus on farm labor contractor certification, employer recordkeeping requirements, employment conditions, and compliance with federal safety standards,<sup>125</sup> essentially providing a buffer for documented and undocumented migrant farmworkers. For example, if an H-2A migrant farmworker possessed AWPAs rights, they could utilize the Act's private right of action in federal court, regardless of amount in controversy, for violations regarding housing and transportation safety requirements, as opposed to having to resort to the laborious administrative process that currently exists for H-2A workers.<sup>126</sup> Alongside its private right of action, the AWPAs also provides criminal sanctions and steeper penalties for employers.<sup>127</sup> While legislative history suggests that H-2A migrant farmworkers were exempted from the AWPAs because legislators believed that the H-2A Program already thoroughly protected workers, enforcement mechanisms within the AWPAs are stronger,<sup>128</sup> and an anti-retaliation provision explicitly contained within the AWPAs makes its protections substantively distinct.<sup>129</sup> Allowing H-2A workers this structure of protections would deter employers from exploiting visa recipients, and would also offer remedies to H-2A farmworkers.

Finally, the H-2A Program does not bestow upon migrant farmworkers all the rights granted to other temporary workers, such as a portability provision or a pathway to lawful permanent residency or citizenship.<sup>130</sup> The H-2A visa binds migrant farmworkers directly to

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2018/02/Recruitment\_Revealed.pdf (“Reporting abuses . . . could endanger [H-2A workers'] chances of being rehired . . . . Although retaliation against workers for filing a complaint or inquiring into their workplace rights is illegal, it is common practice among H-2 employers and their agents. Recruiters have been known to maintain ‘blacklists’ of workers who are outspoken against mistreatment.”).

<sup>124</sup> See 29 U.S.C. § 1802(8)(B)(ii) (2012).

<sup>125</sup> See 29 U.S.C. § 1801 *et seq.* (2012).

<sup>126</sup> See 29 U.S.C. § 1854 (2012); see also Ryon, *supra* note 106, at 147, 153–54, 156–58; *Work Authorization for Non-U.S. Citizens: Temporary Agricultural Workers (H-2A Visas)*, U.S. DEPT OF LABOR, <https://webapps.dol.gov/elaws/elg/taw.htm> (last updated Dec. 2016) (“Workers who believe that their rights under the H-2A regulations were violated may file their complaints through the Job Service Complaint System, as described in 20 CFR part 658, Subpart E.”).

<sup>127</sup> 29 U.S.C. §§ 1851–1853 (2012).

<sup>128</sup> See Ryon, *supra* note 106, at 149, 156.

<sup>129</sup> *Id.* at 157 (stating that the AWPAs “provides that ‘[n]o person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker’ if the worker has filed a complaint under the AWPAs with just cause. . . . This type of retaliation provision, however, is not provided under the H-2A regulations”).

<sup>130</sup> See, e.g., 8 U.S.C. § 1101(a)(15)(H)(i)(B) (2012) (detailing the criteria for obtaining an H-1B visa); 8 U.S.C. § 1184(n) (2012) (enabling H-1B workers to accept new

an employer;<sup>131</sup> in contrast, visas like the H-1B visa give an individual engaged in a “specialty occupation”<sup>132</sup> the “portability” to transfer to another employer.<sup>133</sup> Thus, unlike H-1B workers, H-2A visa holders cannot switch to another U.S. employer; in other words, “they’re stuck.”<sup>134</sup> The Southern Poverty Law Center notes the H-2A visa’s potential for exploitation resulting from this lack of portability, citing “numerous incidents where employers destroyed passports or visas,” as well as other instances in which “employers have quite explicitly used the threat of calling [Immigration and Customs Enforcement] as a means of asserting control over workers . . . . Such threats are common and are made possible by a system under which visas are used solely for employment with the petitioning employer.”<sup>135</sup> Additionally, while the H-2A visa is limited to temporary stays, the H-1B visa allows potential sponsorship for permanent legal status by an employer.<sup>136</sup> A pathway to citizenship would protect H-2A workers from employer threats to immigration status,<sup>137</sup> demonstrate respect for individuals who are integral to U.S. society and the agricultural industry, and acknowledge their return to the United States year after year.<sup>138</sup> While extending either portability or a pathway to citizenship

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employment); 8 U.S.C. § 1184(h) (2012) (specifying that an H-1B worker’s application for permanent residence should not be considered evidence of intent to abandon that worker’s foreign residence and thus should not block that worker from maintaining a nonimmigrant H-1B visa).

<sup>131</sup> See 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (2012) (detailing the criteria for obtaining an H-2A visa). The statutory provision for H-2A workers explicitly reads that an H-2A worker must “hav[e] a residence in a foreign country which he has no intention of abandoning . . . .” *Id.*

<sup>132</sup> 8 U.S.C. § 1101(a)(15)(H)(i)(B) (2012); see also *id.* § 1184(h). These are essentially occupations requiring a bachelor’s degree or higher. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (Mar. 19, 2019), <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models>.

<sup>133</sup> 8 U.S.C. § 1184(n) (2012).

<sup>134</sup> Dan Charles, *Guest Workers, Legal Yet Not Quite Free, Pick Florida’s Oranges*, NPR: THE SALT (Jan. 28, 2016, 4:59 AM), <https://www.npr.org/sections/thesalt/2016/01/28/464453958/guest-workers-legal-yet-not-quite-free-pick-floridas-oranges>.

<sup>135</sup> CLOSE TO SLAVERY, *supra* note 97, at 15.

<sup>136</sup> See 8 U.S.C. § 1184(h) (2012). More specifically, an H-1B “special occupation” visa may be the beneficiary of an application for a preference status or seek permanent residence in the United States without demonstrating that the individual intends to abandon a foreign residence. *Id.*

<sup>137</sup> See CLOSE TO SLAVERY, *supra* note 97, at 14 (“Many abuses . . . flow from the fact that the employer literally holds the deportation card. One of the most chronic abuses reported by guestworkers concerns the seizure of identity documents—in particular passports and Social Security cards.”).

<sup>138</sup> See Leslie Green, Comment, *H-2A Guest Worker Program: Employer Certification Process in Need of Change*, 73 TENN. L. REV. 81, 83–84 (2006) (“In fact, H-2A workers never have the chance to become immigrants under the current H-2A guest worker

to H-2A workers would improve conditions, the two entitlements work best in tandem, as each fosters flexibility and agency to counter an increasingly oppressive system.

However, the government is unlikely to change the H-2A Program of its own volition. First, ever since the initial Bracero Program,<sup>139</sup> the agriculture lobby has strongly influenced temporary worker programs in immigration. While the agriculture industry has recently faced mounting anxiety regarding Trump's restrictionist immigration policies<sup>140</sup> that decrease their labor force, history reveals the close connection between the government and this powerful industry. For example, responding to the industry's purported need for migrant labor,<sup>141</sup> the Trump administration in 2018 certified upwards of 240,000 H-2A visas,<sup>142</sup> and the number of visas issued has tripled in the last decade.<sup>143</sup> The government's catering to such labor needs has "produce[d] agricultural directed benefits and exceptions to immigration laws . . . that otherwise would protect employees in the nation's food systems."<sup>144</sup> This system was made for the agricultural industry, not the H-2A community, and a strong economic incentive exists to maintain the current system.

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program even though many of them return to the United States year after year with temporary visas.”).

<sup>139</sup> See Guadalupe T. Luna, *Land, Labor and Reparations*, 52 CLEV. ST. L. REV. 265, 269 (2005); see also *supra* Section I.B.

<sup>140</sup> See, e.g., Caitlin Dickerson & Jennifer Medina, *California Farmers Backed Trump, But Now Fear Losing Field Workers*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/us/california-farmers-backed-trump-but-now-fear-losing-field-workers.html> (clarifying that, although many California farmers voted for Trump, they did not believe he would truly implement his immigration policies and many now hope that Trump's promises will not become a reality); Sarah Gray, *Here's How Immigration Policy Impacts Your Avocados and Other Produce*, FORTUNE (June 19, 2018), <http://fortune.com/2018/06/18/immigration-policy-farm-labor-shortage> (commenting on how Trump's recent immigration policies have created a “chilling effect” in the agricultural industry that poses challenges to attaining farm labor).

<sup>141</sup> See STEPHEN G. BRONARS, PARTNERSHIP FOR A NEW AM. ECON., A VANISHING BREED 24 (2015) [hereinafter A VANISHING BREED], [http://research.newamericaneconomy.org/wp-content/uploads/2015/08/PNAE\\_FarmLabor\\_August-3-3.pdf](http://research.newamericaneconomy.org/wp-content/uploads/2015/08/PNAE_FarmLabor_August-3-3.pdf) (“[T]he labor shortage farmers have described in recent years is a real and pressing concern, and one that has not improved as wages have risen.”).

<sup>142</sup> See OFFICE OF FOREIGN LABOR CERTIFICATION, DEP'T OF LABOR, H-2A TEMPORARY AGRICULTURAL LABOR CERTIFICATION PROGRAM – SELECTED STATISTICS, FY 2018 (2018), [https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A\\_Selected\\_Statistics\\_FY2018\\_Q4.pdf](https://www.foreignlaborcert.doleta.gov/pdf/PerformanceData/2018/H-2A_Selected_Statistics_FY2018_Q4.pdf).

<sup>143</sup> See *H-2A Program Growing at Unprecedented Rate*, FARMWORKER JUSTICE: HARVESTING JUSTICE (Oct. 30, 2018), <https://www.farmworkerjustice.org/fj-blog/2018/10/h-2a-program-growing-unprecedented-rate-worker-protections-risk> (reporting that there were only 82,000 positions certified in 2008).

<sup>144</sup> Luna, *supra* note 139, at 269 (noting additionally that agricultural lobbying efforts create “exclusionary boundaries proving harmful to agricultural workers”).

Furthermore, current anti-immigrant sentiment in the United States may hamper progress. Trump's platform of building a wall between the United States and Mexico<sup>145</sup> and his claim that immigrants bring drugs and crime into the United States<sup>146</sup> foster restrictionist policies based on denigrating the foreignness of immigrants. Congress has even proposed allowing H-2A employers to apply for year-round workers,<sup>147</sup> forcing H-2A visa beneficiaries into prolonged systems of abuse lasting one year<sup>148</sup> rather than truly temporary work.<sup>149</sup> Waiting for the government to take initiative in counteracting racialization and protecting H-2A workers will prove unwise at best.

### B. *Nominal Enforcement of H-2A Workers' Legal Rights*

Racialization's diminishment of rights and power further infiltrates the area of enforcement, where a lack of government support denies H-2A workers their legal protections. Numerous farmworker advocates have denounced the DOL<sup>150</sup>—the primary agency responsible for H-2A Program oversight<sup>151</sup>—as neglectful of abuses of migrant farmworkers. The DOL's Wage and Hour Division (WHD) revealed that it conducted just 157 investigations of H-2A employers

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<sup>145</sup> See generally Lind, *supra* note 91 (describing the progress that the Trump Administration has made in constructing the border wall).

<sup>146</sup> See Donald Trump's Presidential Announcement, *supra* note 89.

<sup>147</sup> H.R. 3355, 115th Cong. § 538 (1st Session, 2017). Ultimately, this proposed Appropriations Act was incorporated into the Consolidated Appropriations Act and enacted, without the year-long H-2A provision. See generally H.R. 1625, 115th Cong. (2d Session, 2018) (enacted).

<sup>148</sup> See Letter from Vanita Gupta, President & CEO, Leadership Conference on Civil and Human Rights, et al., to Thad Cochran, Chairman, Senate Committee on Appropriations, et al. (Mar. 12, 2018), <https://civilrights.org/oppose-h-2-visa-riders-fy2018-omnibus-appropriations> (denouncing the proposition that H-2A migrant farmworkers provide year-round work, rather than temporary, seasonal work).

<sup>149</sup> H.R. 3355, 115th Cong. § 538 (1st Session, 2017) (stating that H-2A workers shall be admitted "without regard to whether such labor is, or services are, of a temporary or seasonal nature").

<sup>150</sup> See, e.g., MORE MUST BE DONE, *supra* note 116 (finding that, although some improvements have been made in enforcement, "current [DOL] enforcement levels do not appear to be deterring many agricultural employers from violating the law"); Chris Liu-Beers, *NC Dept. of Labor Neglects to Enforce Laws That Protect Farmworker Health and Safety*, FARMWORKER ADVOCACY NETWORK (Oct. 12, 2011, 8:58 AM), <http://ncfan.org/blog/2011/10/12/nc-dept-of-labor-neglects-to-enforce-laws-that-protect-farmw.html> (discussing Legal Aid of North Carolina filing a complaint with the DOL about the North Carolina DOL's failure to ensure safe working and housing conditions for migrant farmworkers).

<sup>151</sup> See 29 C.F.R. § 501.15 (2018); *Wage and Hour Division (WHD)*, U.S. DEP'T OF LABOR, [https://www.dol.gov/whd/ag/ag\\_h-2a.htm](https://www.dol.gov/whd/ag/ag_h-2a.htm) (last visited Apr. 5, 2019) (describing the H-2A visa application process through the DOL).

in 2011,<sup>152</sup> a year in which the government granted 51,927 H-2A visas.<sup>153</sup> Preliminary analysis of these 157 investigations found that only 25.5% of employers were compliant with H-2A provisions, the FLSA, the AWP, and the Occupational Safety and Health Act (OSHA).<sup>154</sup> Farmworker Justice published similar findings that between 2010 and 2013, 566,469 farms had hired labor, and yet the DOL only conducted 6119 investigations.<sup>155</sup> Given that statutory violations have increased in recent decades,<sup>156</sup> the DOL's debarment of only 34 employers since 2015 is disturbing.<sup>157</sup> Without the DOL, the impossible onus falls on migrant farmworkers to file complaints, despite logistical, cultural, and financial barriers.<sup>158</sup>

Trump's proposed 2019 budget for the DOL also signals a potential lack of support for the DOL's enforcement mission. Though the enacted 2019 DOL budget remains essentially equivalent to that of the agency's 2018 budget,<sup>159</sup> the Trump Administration initially appealed for a \$9.4 billion budget, a decrease of \$2.6 billion from the 2017-enacted level.<sup>160</sup> Not a word of the DOL budget mentions H-2A workers or oversight of temporary worker programs.<sup>161</sup> Slashing the

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<sup>152</sup> WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FY 2013: CONGRESSIONAL BUDGET JUSTIFICATION: WAGE AND HOUR DIVISION 22 (2013) [hereinafter 2013 BUDGET JUSTIFICATION], <https://www.dol.gov/dol/budget/2013/PDF/CBJ-2013-V2-09.pdf>.

<sup>153</sup> *H-2A Workers in the U.S. – Data*, GLOBAL WORKERS JUST. ALLIANCE, <http://globalworkers.org/iii-h-2a-workers-us---figures> (last visited Mar. 27, 2019).

<sup>154</sup> See 2013 BUDGET JUSTIFICATION, *supra* note 152, at 22.

<sup>155</sup> MORE MUST BE DONE, *supra* note 116, at 4–5.

<sup>156</sup> See *id.* at 3–4 (noting an increase in violations of 9.8% between agricultural investigations during the latter half of the Bush Administration and agricultural investigations during the first half of the Obama Administration).

<sup>157</sup> See OFFICE OF FOREIGN LABOR CERTIF., EMP. & TRAINING ADMIN., U.S. DEP'T OF LABOR, PROGRAM DEBARMENTS, [https://www.foreignlaborcert.doleta.gov/pdf/Debarment\\_List\\_Revisions.pdf](https://www.foreignlaborcert.doleta.gov/pdf/Debarment_List_Revisions.pdf) (last visited Mar. 28, 2019) (recording the debarment of thirty-four entities labeled “employer” from the H-2A Labor Certification program).

<sup>158</sup> See CLOSE TO SLAVERY, *supra* note 97, at 40 (“Because of the lack of government enforcement, it generally falls to the workers to take action to protect themselves from abuses.”).

<sup>159</sup> See DEP'T OF LABOR, FY 2020 DEPARTMENT OF LABOR BUDGET SUMMARY TABLES 6 (2019), <https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V1-02.pdf> (showing discretionary operating budget enacted in 2018 and 2019 as \$12.348 billion and \$12.131 billion, respectively).

<sup>160</sup> See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2019, at 75 (2018) [hereinafter OMB PROPOSED 2019 BUDGET], <https://www.whitehouse.gov/wp-content/uploads/2018/02/budget-fy2019.pdf>. This represents a twenty-one percent decrease from 2017 levels and a nearly twenty-four percent decrease from 2018 levels. Compare *id.* (identifying a 2019 requested budget of \$9.4 billion), with FY 2020 DEPARTMENT OF LABOR BUDGET SUMMARY TABLES, *supra* note 159, at 6 (identifying an enacted 2018 budget of \$12.348 billion).

<sup>161</sup> See OMB PROPOSED 2019 BUDGET, *supra* note 160 (failing to mention any temporary worker programs specifically).



agency's budget in the future would pose an even larger obstacle to changes to H-2A workers' livelihoods.<sup>162</sup>

### C. *The Series of H-2A Abuses that Racialization Fosters*

Racialization's resultant weakening of legal protections and enforcement of H-2A migrant farmworkers' rights fosters an environment in which the community becomes vulnerable to a series of abuses, including wage theft, sexual harassment and assault, and human trafficking. Such exploitation further disempowers migrant farmworkers and retrenches racialization within society.

With wage theft as one of the predominant abuses of H-2A workers, case after case document employers allegedly not paying workers their full earnings, from companies not compensating for short breaks<sup>163</sup> to tobacco farms imposing unreasonable deductions to wages or paying far below the required wage.<sup>164</sup> Wage theft often results from poor recordkeeping<sup>165</sup> or from violations by the farm labor contractor directly.<sup>166</sup> The Southern Poverty Law Center's findings in its report on guest worker programs in the United States indicate that employer practices "result in the chronic underpayment of wages, exacerbating guest workers' already precarious situation in the United States."<sup>167</sup> Farmers have been fined upwards of two million

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<sup>162</sup> See INST. FOR THE STUDY OF INT'L MIGRATION, GEORGETOWN UNIV., *LOW WAGE MIGRATION: PRESENT CHALLENGES, FUTURE SUPPLY* 3 (2014), <https://isim.georgetown.edu/sites/isim/files/files/upload/LowWageV4.pdf> (noting limitations to the DOL based on a lack of financial resources which inhibits enforcement capabilities).

<sup>163</sup> See, e.g., *Lopez Demetrio v. Sakuma Bros. Farms*, 355 P.3d 258, 263–64 (Wash. 2015) (en banc) (holding that Washington law requires employers to separately compensate migrant agricultural workers paid by the piece rate for short rest breaks).

<sup>164</sup> See, e.g., Esther Yu Hsi Lee, *Tobacco Farmers Allegedly Lured Mexican Workers to the U.S., Then Left Them in Rat-Infested Housing*, THINKPROGRESS (June 1, 2015, 6:42 PM), <https://thinkprogress.org/tobacco-farms-allegedly-lured-mexican-workers-to-the-u-s-then-left-them-in-rat-infested-housing-68ec92aeef8> (involving cases in which H-2A migrant farmworkers at Kentucky tobacco farms were not reimbursed for visa-related expenses and experienced wage theft, rat-infested housing, and seizure of their documents by the employer).

<sup>165</sup> Teresa Hendricks-Pitsch, *Slighting the Hands that Feed Us: How Labor Laws Leave Farmworkers in Left Field*, MICH. B.J., Nov. 2016, at 26, 27 ("Where poor recordkeeping exists, wage theft likely follows.").

<sup>166</sup> See, e.g., Esther Yu Hsi Lee, *Migrant Workers Allegedly Weren't Paid for a Month of Work on Blueberry Farm*, THINKPROGRESS (June 23, 2015, 4:51 PM), <https://thinkprogress.org/migrant-workers-allegedly-werent-paid-for-a-month-of-work-on-blueberry-farm-6ddb9545859b> (discussing a class-action lawsuit in which migrant farmworkers on a blueberry farm were not paid the agreed-upon wage for 2014 work); see also Guadalupe T. Luna, *The Dominion of Agricultural Sustainability: Invisible Farm Laborers*, 2014 WIS. L. REV. 265, 287 ("Once the [guest] workers arrive in the United States, many face wage theft and payroll deductions for transportation and other 'expenses.'").

<sup>167</sup> CLOSE TO SLAVERY, *supra* note 97, at 18.

dollars for forcing H-2A workers to bear costs of the program,<sup>168</sup> evidencing this chronic underpayment. In an employment relationship incredibly susceptible to abuse, nominal enforcement by government agencies like the DOL promotes the ubiquity of wage theft.

The imbalanced power dynamic between agricultural employers and migrant farmworkers is even more severe for women, a population of farmworkers that experiences historic sexual violence.<sup>169</sup> Nearly thirty-two percent<sup>170</sup> of the approximately 2.5 million farmworkers in the United States<sup>171</sup> are female, and around eighty percent of farmworker women experience some form of sexual harassment, including assault and violence.<sup>172</sup> A leading documentary, *Rape in the Fields*,<sup>173</sup> follows the story of Maricruz Ladino, one of many migrant farmworker women at C&C Agricultural Farms,<sup>174</sup> who was sexually assaulted by crew leaders and employees at her job.<sup>175</sup> More information has surfaced recently on the culture of sexual harassment,<sup>176</sup> and cases involving sexual violence against farmworker

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<sup>168</sup> See, e.g., Geoffrey Mohan, *Strawberry Grower Fined \$2.4 Million, Demanded Kickbacks from Mexican Workers*, L.A. TIMES (Aug. 30, 2016, 5:55 PM), <http://www.latimes.com/business/la-fi-farm-worker-fine-20160830-snap-story.html> (discussing a strawberry farmer who hired H-2A workers year after year, requiring that they pay back costs of transportation, housing, and other visa fees through their own earnings, thus bearing costs that the H-2A program requires employers to pay).

<sup>169</sup> See *Sexual Assault and Farmworkers*, NPR (Nov. 5, 2017, 8:06 AM), <https://www.npr.org/2017/11/05/562188700/sexual-assault-and-farmworkers> (“[I]f you look at the history of the farmworker community . . . , [sexual assault] has always been a problem.”). Sexual assault and harassment also affect farmworker men. Because sufficient data has not been acquired with respect to this issue among the male farmworker population, this Note focuses on the community of farmworker women specifically, as their experiences of sexual assault and harassment have been documented to a much larger extent.

<sup>170</sup> See NAWS, *supra* note 46, at 53 (reporting the percentage of each sex represented within the labor force).

<sup>171</sup> See FARMWORKER JUSTICE, *SELECTED STATISTICS ON FARMWORKERS* (2014), <https://www.farmworkerjustice.org/sites/default/files/NAWS%20data%20factsht%201-13-15FINAL.pdf>.

<sup>172</sup> See Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (2010). The methodology of this study focuses on Mexican immigrant farmworking women in California, *id.*, and is reflective of the larger population given that most farmworkers are both immigrant and Mexican. See NAWS, *supra* note 46, at i.

<sup>173</sup> See *Frontline: Rape in the Fields* (PBS television broadcast June 25, 2013), <https://www.pbs.org/wgbh/frontline/film/rape-in-the-fields>.

<sup>174</sup> See *Jane Doe v. C&C Agricultural Farms, L.L.C.*, No. 2:14-cv-206-FtM-38DNF (M.D. Fla. 2015) (Justia).

<sup>175</sup> See Bernice Yeung, *A Guide to What's Happened After Rape in the Fields*, REVEAL (Mar. 18, 2014), <https://www.revealnews.org/article/a-guide-to-whats-happened-after-rape-in-the-fields> (describing progress and challenges in combatting sexual harassment of farmworker women).

<sup>176</sup> See, e.g., HUMAN RIGHTS WATCH, *CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT*

women have taken center stage. *EEOC v. Harris Farms, Inc.*,<sup>177</sup> for example, revealed a farmworker woman's rape and receipt of threats of violence and intimidation throughout her employment. Championing farmworker women, the advocacy group Alianza Nacional de Campesinas raised its voice during the #MeToo movement and Time's Up campaign, asserting that gender-based violence is a "reality we know far too well. Countless farmworker women across our country suffer in silence because of the widespread sexual harassment and assault that they face at work."<sup>178</sup>

Both attention to and a movement based on issues specifically impacting farmworker women are growing, but "very few criminal charges have been prosecuted against perpetrators,"<sup>179</sup> and the vulnerable conditions of H-2A farmworkers persist. Scholar Christa Conry connects racialization and power dynamics to this sexual violence, remarking, "Discrimination against and institutionalized aversion to non-American workers is the greatest contributor and . . . the nucleus in the web of female migrant workers' susceptibility to harassment and unwillingness to report it. . . . Aggressors use the social and political policy deeming immigrants unworthy of protection and advocacy to enable their sexual violence."<sup>180</sup> Without responsible oversight by federal government bodies and further legal rights for farmworker women in particular, we can expect more of the same.

Termed "modern-day slavery,"<sup>181</sup> human trafficking also runs rampant in the agricultural industry, where foreign labor provides the

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3 (2012), [https://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf) (finding that nearly all farmworker women interviewed in a Human Rights Watch report had experienced sexual harassment or knew someone who had, and noting the trauma, mental illness, physical pain, and damaged relationships survivors may experience as a result of such events); Ariel Ramchandani, *There's a Sexual-Harassment Epidemic on America's Farms*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109> (quoting a spokesperson for the National Economic and Social Rights Initiative describing the sexual harassment problem as a "pandemic"); *Sexual Assault and Farmworkers*, *supra* note 169 (noting that shared housing may perhaps increase farmworkers' vulnerability to sexual violence and harassment, and reiterating the point that complaining about harassment may result in retaliation or termination).

<sup>177</sup> No. CIV F02-6199AWI LJO, 2005 WL 2071741, at \*1, \*3 (E.D. Cal. Aug. 25, 2005), *aff'd*, 274 F. App'x 511 (9th Cir. 2008).

<sup>178</sup> Alianza Nacional de Campesinas, *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault>.

<sup>179</sup> SARA KOMINERS, OXFAM AM., WORKING IN FEAR: SEXUAL VIOLENCE AGAINST WOMEN FARMWORKERS IN THE UNITED STATES: A LITERATURE REVIEW 24, 67 n.214 (2015), <https://www.northeastern.edu/law/pdfs/academics/phrge/kominers-report.pdf>.

<sup>180</sup> Christa Conry, *Forbidden Fruit: Sexual Victimization of Migrant Workers in America's Farmlands*, 26 HASTINGS WOMEN'S L.J. 121, 129 (2015).

<sup>181</sup> *What Is Human Trafficking?*, U.S. DEP'T HOMELAND SECURITY, <https://www.dhs.gov/blue-campaign/what-human-trafficking> (last visited Mar. 27, 2019).

basis of production.<sup>182</sup> Defined by the Department of Homeland Security (DHS) as “the use of force, fraud, or coercion to obtain some type of labor or commercial sex act,” human trafficking includes both sex and labor trafficking.<sup>183</sup> The Polaris Project, a nonprofit focused on preventing human trafficking, notes that certain conditions increase an individual’s susceptibility to human trafficking, notably temporary visa status.<sup>184</sup> The agriculture/farm/animal husbandry industry reports the highest number of human trafficking survivors, and thirty-four percent of survivors with temporary visas possessed H-2A visas specifically.<sup>185</sup> The agriculture industry itself demonstrates many indicators of human trafficking when it comes to migrant farmworkers and H-2A visa beneficiaries: economic abuse (including withholding earnings, debt, or threat to blacklist<sup>186</sup>), isolation, threat of deportation, and extreme work hours.<sup>187</sup> On top of this, H-2A survivors of human trafficking tend to report “squalid living conditions.”<sup>188</sup> In the most serious of cases, migrant farmworkers have endured indentured servitude, with employers beating, threatening, restraining, and locking up workers so as to force their labor.<sup>189</sup> Temporary status, isolation, lack of power, and racialized characterizations within this employer-employee relationship increase the risk of human trafficking. Ultimately, racialization’s influence on the law and

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<sup>182</sup> See *NAWS*, *supra* note 46, at i (reporting majority foreign population of farmworker labor force).

<sup>183</sup> *What Is Human Trafficking?*, *supra* note 181.

<sup>184</sup> See POLARIS, LABOR TRAFFICKING IN THE U.S.: A CLOSER LOOK AT TEMPORARY WORK VISAS 1 (2015) [hereinafter POLARIS, LABOR TRAFFICKING], [http://polarisproject.org/sites/default/files/Temp%20Visa\\_v5%20%281%29.pdf](http://polarisproject.org/sites/default/files/Temp%20Visa_v5%20%281%29.pdf). In 30,000 cases of human trafficking in the United States referred through the National Human Trafficking Resource Center’s (NHTRC) hotline, roughly eighteen percent of survivors involved had temporary visas. *Id.*

<sup>185</sup> See *id.* at 2 (noting 282 H-2A visa holders out of 823 total victims).

<sup>186</sup> See *id.* at 5 (showing breakdown of types of economic abuse reported to the NHTRC’s hotline).

<sup>187</sup> See *id.*; POLARIS, THE TYPOLOGY OF MODERN SLAVERY: DEFINING SEX AND LABOR TRAFFICKING IN THE UNITED STATES 33–35 (2017), <https://polarisproject.org/sites/default/files/Polaris-Typology-of-Modern-Slavery.pdf> (indicating that human trafficking in agricultural work is all the more difficult to identify because of the complex labor supply chain of recruiters, managers, contractors, subcontractors, growers, and buyers).

<sup>188</sup> *Id.* at 35; see also POLARIS, LABOR TRAFFICKING, *supra* note 184, at 5 (“Some examples of these conditions included no running water, heat, or air conditioning, inadequate plumbing, pest infestation, a lack of proper food storage or cooking sources, and overcrowding.”).

<sup>189</sup> See *Anti-Slavery Program*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/slavery> (last visited Mar. 27, 2019) (describing migrant farmworker survivors’ experience of employers “beating, threatening, restraining, and locking workers in trucks to force them to work as agricultural laborers”). For the Eleventh Circuit’s decision affirming the employers’ convictions, see *United States v. Navarrete*, 333 F. App’x 488 (11th Cir. 2009).

its enforcement often results in demeaned livelihoods for H-2A workers.

### III

#### A DUAL SOLUTION TO THE RACIALIZATION OF H-2A WORKERS: MIGRANT FARMWORKER COALITIONS SPARK GOVERNMENT CHANGE

While our immigration system must continue to question the need for an H-2A Program,<sup>190</sup> avoiding today's systemic abuses will require the federal government to ramp up legal protections for H-2A workers and enforcement thereof. That said, political realities make prospects for H-2A reform look "bleak."<sup>191</sup> Enter the Coalition of Immokalee Workers (CIW), a burgeoning migrant farmworker coalition realizing progress for its own community. Having argued that American society has racialized H-2A workers in the same way it has Latina/o immigrants, Part III of this Note proposes a "dual solution" in which migrant farmworker coalitions who are rewriting their own racialized narratives create a cultural groundswell that sparks government change.

#### A. *What Power Lies in Migrant Farmworker Coalitions*

Though the government will not resolve issues in the H-2A Program out of its own volition, migrant farmworker coalitions are providing that pressure by advocating for their rights to fair wages, freedom from sexual harassment, and zero tolerance for human trafficking. The CIW has achieved success in championing these essential protections<sup>192</sup> and continues to combat racialized narratives through actions that demonstrate their political power. In reclaiming racial identity formation and pressuring the food industry toward a critical mass of support, migrant farmworker coalitions may themselves create the groundswell that sparks government change.

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<sup>190</sup> See July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1. Keberlein is highly skeptical as to whether or not the H-2A Program should exist, if the Program simply serves as a method for employers to obtain "cheap," vulnerable labor, and if true increases in farmworker wages would attract U.S. workers and thus fill the labor gap. *Id.*

<sup>191</sup> Manuel Madrid, *Can a Revamped Farmworker Visa System Prevent Abuses?*, AM. PROSPECT (July 20, 2017), <http://prospect.org/article/can-revamped-farmworker-visa-system-prevent-abuses>.

<sup>192</sup> See *About CIW*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/about> (last visited Mar. 27, 2019) (discussing how CIW has struck agreements with top food purchasers to combat issues involving inadequate compensation, retaliation, sexual harassment, and other relevant issues in the migrant farmworker space).

Formed in 1993, the CIW began by organizing the migrant farmworker community as a nonprofit in Immokalee, Florida.<sup>193</sup> This small town serves as the crux of U.S. tomato production,<sup>194</sup> embracing a substantial migrant farmworker population.<sup>195</sup> Echoing tactics of the late Cesar Chavez and Dolores Huerta, and the United Farm Workers (UFW) movement in the late 1960s,<sup>196</sup> the CIW originally organized worker strikes, marches, and hunger strikes to address exponentially declining wages in the tomato industry.<sup>197</sup> While this farm-focused work achieved industry-wide wage increases, the CIW realized upon further evaluation that multinational food purchasers—such as grocery and fast food chains—were using their power to depress purchase prices, resulting in worse conditions down the line for migrant farmworkers.<sup>198</sup> Seeking a stronger and more thorough impact, the CIW shifted to a top-down model in 2001.<sup>199</sup>

Appeals to mega food purchasers began with the CIW's campaign against Taco Bell, a top purchaser of tomatoes from infamously exploitative Immokalee farms. Through "Boycott the Bell,"<sup>200</sup> the CIW sought to leverage more humane wages and working conditions for migrant farmworkers through Taco Bell's purchasing power.<sup>201</sup> When the fast food chain denied any responsibility for farmworker wages, the CIW boycott grew even larger in scale: "¡Yo no quiero

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<sup>193</sup> *Id.*

<sup>194</sup> See Lisa Cohen, *How America's 'Ground-Zero' for Modern Slavery Was Cleaned Up by Workers' Group*, CNN: FREEDOM PROJECT (Sept. 28, 2018, 8:50 AM), <https://www.cnn.com/2017/05/30/world/ciw-fair-food-program-freedom-project/index.html>.

<sup>195</sup> See *id.* (identifying Immokalee, Florida as a "migrant town").

<sup>196</sup> See Matt Garcia, *Cesar Chavez and the United Farm Workers Movement*, in OXFORD RESEARCH ENCYC. OF AM. HISTORY, <http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-217> (last visited Mar. 27, 2019). Cesar Chavez and Dolores Huerta worked among others as leaders of the UFW to achieve justice and improved conditions for migrant farmworkers through social protest and official unionizing in California, involving similar methods as the CIW of worker strikes, marches, boycotts, and hunger strikes. *Id.*

<sup>197</sup> See *About CIW*, *supra* note 192 (including three work strikes, a month-long hunger strike, and a 234-mile march from Ft. Myers to Orlando, Florida).

<sup>198</sup> See Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497, 505–06 (2017) (detailing how the CIW came to realize that purchasing practices of top food purchasers were having a significant effect on migrant farmworkers down the supply chain).

<sup>199</sup> See *About CIW*, *supra* note 192 (combining former grassroots political actions with direct appeals to powerful food purchasers).

<sup>200</sup> *Boycott the Bell*, COALITION IMMOKALEE WORKERS, [http://www.ciw-online.org/tz\\_site-revision/home/home.html](http://www.ciw-online.org/tz_site-revision/home/home.html) (last visited Mar. 27, 2019).

<sup>201</sup> See Rochelle Renford, *Picking a Fight*, ORLANDO WKLY. (June 14, 2001), <https://www.orlandoweekly.com/orlando/picking-a-fight/Content?oid=2261965> (noting that Taco Bell purchased huge amounts of tomatoes from an Immokalee producer who did not pay a living wage).

Taco Bell!” cried CIW members outside the fast-food chain’s headquarters.<sup>202</sup> Farmworkers’ children smashed piñatas of the Taco Bell Chihuahua in parking lots.<sup>203</sup> Protesters paraded down the street in tomato costumes.<sup>204</sup> During this important period of organizing, the CIW sharpened its strategy of consumer activism—“brand-busting”<sup>205</sup> popular food companies by exposing unfair and illegal practices within their supply chain. Through calls for dignity and distortions of brand image,<sup>206</sup> the CIW discovered its sweet spot, and Taco Bell finally agreed to CIW’s list of demands.<sup>207</sup>

Windfalls like the case of Taco Bell led to later agreements with McDonald’s, Whole Foods, Walmart, and the like,<sup>208</sup> before compelling the CIW to launch the Fair Food Program (FFP) in 2010.<sup>209</sup> The FFP concept revolves around CIW-created Fair Food Agreements with large food purchasers.<sup>210</sup> In signing the Fair Food Agreement, a corporation certifies that it will only purchase produce from growers in proper FFP standing—meaning growers who comply with the Fair Food Code of Conduct established by the CIW.<sup>211</sup> These legally-binding Agreements achieve progress by making multinational food purchasers at the top of the food chain accountable for abuses that occur on farms from which they purchase.<sup>212</sup> The threat of CIW-instigated public relations fiascos incentivizes top food corporations to

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<sup>202</sup> *Farmworker Hunger Strike*, COALITION IMMOKALEE WORKERS, [http://ciw-online.org/CIW%20hunger\\_strike\\_site/hunger\\_strike\\_daily\\_report.html](http://ciw-online.org/CIW%20hunger_strike_site/hunger_strike_daily_report.html) (last visited Mar. 27, 2019). “I don’t want Taco Bell!” serves as a play on words for Taco Bell’s catchy brand slogan. See *The Hall of Advertising, Taco Bell - Chihuahua (1997, USA)*, YOUTUBE (Feb. 20, 2013), <https://www.youtube.com/watch?v=AKLW0kQ83qg> (featuring an advertisement for Taco Bell in which a chihuahua says “I want Taco Bell” in Spanish).

<sup>203</sup> See Renford, *supra* note 201 (describing the ambiance and tactics of the CIW’s Taco Bell boycott).

<sup>204</sup> *Id.*

<sup>205</sup> See Jess Powers, *Food Boycotts, Buycotts, and Brand Busting in the Trump Era*, CIVIL EATS (Dec. 14, 2016), <https://civileats.com/2016/12/14/food-boycotts-buycotts-and-brand-busting-in-the-trump-era> (describing the brand-busting tactic as “tak[ing] the image, songs, ads of a company, elements of their public brand and twist[ing] it into a surprising or different form”).

<sup>206</sup> See, e.g., Bryan G. Pfeifer, *Farm Workers Target McDonald’s Next*, WORKERS WORLD (Apr. 8, 2007, 7:49 PM), <https://www.workers.org/2007/us/mcdonalds-0412> (portraying distorted brand images of McDonald’s golden arches).

<sup>207</sup> See *About CIW*, *supra* note 192 (describing the agreement struck between CIW and Taco Bell in 2005 in which Taco Bell agreed to all of CIW’s demands).

<sup>208</sup> See *id.* (describing agreements reached with a variety of major companies).

<sup>209</sup> See *Fair Food Program*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/fair-food-program> (last visited Mar. 29, 2019).

<sup>210</sup> *Id.* (explaining that FFP standards are enforced through Fair Food Agreements with purchasers of Florida tomatoes).

<sup>211</sup> *Id.*

<sup>212</sup> See *id.* (describing the “human-rights-based Code of Conduct” to which participating buyers are held accountable through Fair Food Agreements).

formally sign onto the Agreements.<sup>213</sup> While the CIW initially focused on tomato plantations in Immokalee, Florida, the movement has now expanded to farms across the country.<sup>214</sup>

The Fair Food Agreements entail six main provisions: (1) farms abiding by the Fair Food Code of Conduct, which guarantees zero tolerance for sexual assault and human trafficking; (2) buyers paying a “penny per pound” more for FFP produce purchased, which increases workers’ pay; (3) worker-to-worker education sessions on farms that inform laborers of the Code’s standards and how to report violations; (4) a complaint resolution mechanism run by third party Fair Food Standards Council (FFSC) that ensures compliance with the FFP, investigates violations, resolves issues, and suspends farms from FFP status if necessary; (5) health and safety worker committees on farms; and (6) continuous farm auditing.<sup>215</sup> Today, ninety percent of Florida farms carry the FFP badge, demonstrating the top-down success of the CIW within the agricultural food chain.<sup>216</sup> Worker-led, consumer consciousness-raising models like the CIW’s are now being replicated across the United States, most recently in Migrant Justice’s Milk with Dignity Campaign, which reached an agreement with Ben and Jerry’s<sup>217</sup> to counteract rampant abuses in the dairy industry.<sup>218</sup>

Migrant farmworker coalitions’ success appears twofold: These movements combat racialization by reclaiming racial identity through political organization while nearing industry-wide consensus among powerful food purchasers. As prominent race theorists Omi and Winant detail, racial formation occurs and is perceived through both micro- and macro-level social organization: the micro-level a matter of individuality and identity; the macro-level a matter of collectivity, be it economic, political, or cultural/ideological.<sup>219</sup> Speaking to the inter-

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<sup>213</sup> The CIW’s ability to highlight abuses that major food purchasers cause downstream “generate[s] growing consumer action and support for CIW’s nascent campaign.” Asbed & Hitov, *supra* note 198, at 507.

<sup>214</sup> See Cohen, *supra* note 194 (identifying FFP operations in Georgia, South Carolina, North Carolina, Maryland, Virginia, and New Jersey).

<sup>215</sup> See *Fair Food Program*, *supra* note 209.

<sup>216</sup> See *id.*

<sup>217</sup> See *A New Day for Dairy: Milk with Dignity Agreement Signed! Watershed Moment for Worker’s Rights in the Dairy Industry*, MIGRANT JUSTICE (Oct. 3, 2017 10:14 AM), <http://migrantjustice.net/victory>. This victory in the dairy industry came after more than two years of persistent appeals and negotiations with the company. *Id.*

<sup>218</sup> See, e.g., CARLY FOX ET AL., WORKERS’ CTR. OF CENT. N.Y. & WORKER JUSTICE CTR. OF N.Y., MILKED: IMMIGRANT DAIRY FARMWORKERS IN NEW YORK STATE 7, 9–12 (2017), [https://milkedny.files.wordpress.com/2017/05/milked\\_053017.pdf](https://milkedny.files.wordpress.com/2017/05/milked_053017.pdf) (finding that dairy farmworkers in New York State are almost all undocumented, that they work on average twelve hours a day without a mandatory rest day, and that forty-eight percent of workers report having suffered bullying or discrimination in the workplace).

<sup>219</sup> OMI & WINANT, *supra* note 35, at 66–67.



connectedness of these two “levels,” the late legal scholar Chris K. Iijima proposed that true construction of “counter racial identities”<sup>220</sup> by people of color occurs through “the dynamic process of effectuating actual political change . . . .”<sup>221</sup> Migrant farmworker coalitions like the CIW participate precisely in these two levels of racial identity formation, subverting the racialized crime-sex-drug narrative of migrant farmworkers and H-2A beneficiaries<sup>222</sup> through stories of political empowerment and progress. As explained in the documentary *Food Chains*, the CIW’s work is an expression of agency, relying completely upon its migrant farmworker-led foundation.<sup>223</sup> Members lead the CIW model through and through, from moderating farmworker education sessions to triggering the FFSC complaint resolution system.<sup>224</sup> Instead of accepting portrayals as “rapists,”<sup>225</sup> drug lords,<sup>226</sup> or exoticized “Others,”<sup>227</sup> migrant farmworker coalitions project their self-image as an empowered, driven, righteous community.<sup>228</sup> Furthermore, their grassroots-like hunger strikes, marches, and boycotts carry political currency emblematic of former social-political movements, allowing them to stake a claim as to their own racial narratives through public visibility. Political movement becomes the agent through which their racial identity formation occurs,<sup>229</sup> allowing migrant farmworkers to see themselves “as people who have

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<sup>220</sup> Iijima, *supra* note 43, at 50.

<sup>221</sup> *Id.* at 63.

<sup>222</sup> See *supra* Part I.

<sup>223</sup> FOOD CHAINS (2014).

<sup>224</sup> See *About CIW*, *supra* note 192 (describing the CIW as a “worker-based human rights organization”).

<sup>225</sup> *Donald Trump’s Presidential Announcement*, *supra* note 89.

<sup>226</sup> See *supra* Section I.C.

<sup>227</sup> Aoki, *supra* note 69, at 6.

<sup>228</sup> See, e.g., Sarah Lazare, #MeToo in the Fields: Farmworkers Show Us How to Organize Against Sexual Violence, IN THESE TIMES (Dec. 21, 2017 9:03 AM), <http://inthesetimes.com/working/entry/20787/me-too-sexual-violence-farmworkers-coalition-of-immokalee-workers-wendys> (quoting Nely Rodriguez, a CIW organizer, remarking upon the migrant farmworker women’s movement against sexual violence, “We have the power to speak and end the silence. We don’t want fear and silence to persist any longer”); Jonathan Leavitt, *Poverty Wages, Deportations, Wage Theft, Cockroaches: Farmworkers Demand Dignity from Ben & Jerry’s*, TRUTHOUT (July 12, 2017), <https://truthout.org/articles/poverty-wages-deportations-wage-theft-cockroaches-farmworkers-demand-dignity-from-ben-jerry-s> (quoting Zully Pallacios, member of another migrant farmworker coalition Migrant Justice, speaking of her work to strike an agreement with Ben & Jerry’s, “[W]e are strong, we’re united[,] and we’re not going back into the shadows,” and Enrique Balcazar, a leader of the movement, stating, “I felt so inspired. . . . [T]hose of us who are invisible, those of us without documents—we’re the ones who face the greatest challenges . . . and so . . . we need to be pushing forward with the solution”).

<sup>229</sup> See Iijima, *supra* note 43, at 49 (“[P]rogressive racial identity . . . must include a common political outlook and agenda based upon a shared worldview that seeks freedom from that subordinated condition.”).

the power to better themselves and act on their own behalf.”<sup>230</sup> Given these coalitions’ success in changing industry-imposed and worker-felt conditions, their work is most certainly “political contestation over racial meanings”<sup>231</sup> that counteracts historic racialization.

Alongside combating racialization, the CIW and migrant farmworker coalitions are nearing a critical mass of support among multinational food purchasers, perhaps driving a wedge in the agricultural lobby. Coalitions’ hold on companies across the board exemplifies an important degree of consensus in this sector of the agricultural industry.<sup>232</sup> While the CIW continues its appeals to—and boycotts of—two holdouts, Wendy’s<sup>233</sup> and Publix,<sup>234</sup> it may not be long before the majority of food purchasers at the top of the food chain accept full corporate responsibility for migrant farmworkers’ working conditions. Though lobbying remains strong on behalf of the agricultural industry,<sup>235</sup> the CIW and migrant farmworker coalitions may have created an “in” through their work, chipping away at lobbyists’ power by forming connections with their target market of purchasers. Ultimately, these coalitions’ rewriting of racialized narratives through political action may create the cultural groundswell that sparks government action.

### B. *What the Government Can Do*

The federal government must increase statutory safeguards for H-2A workers, including the FLSA’s overtime provisions,<sup>236</sup> the NLRA’s right to collective bargaining,<sup>237</sup> and access to migrant farmworker protections in the AWPAs.<sup>238</sup> A right to overtime would increase overall compensation, offering a dose of fairness to

<sup>230</sup> Renford, *supra* note 201.

<sup>231</sup> See OMI & WINANT, *supra* note 35, at 69 (emphasis omitted).

<sup>232</sup> See *Campaign for Fair Food*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/campaign-for-fair-food/#agreements> (last visited Mar. 29, 2019) (explaining that a vast majority of tomato growers and many important buyers participate in CIW’s Fair Food Program). The CIW has attained Fair Food Agreements with massive companies such as Walmart and Bon Appétit, as well as many fast-food chains, including McDonald’s, Subway, Taco Bell, Chipotle, and Burger King. See *About CIW*, *supra* note 192.

<sup>233</sup> See *Wendy’s*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/wendys> (last visited Mar. 29, 2019) (noting that Wendy’s marks the “final fast food hold-out” for the CIW Fair Food Agreements).

<sup>234</sup> See *Publix*, COALITION IMMOKALEE WORKERS, <http://ciw-online.org/publix> (last visited Mar. 29, 2019) (describing Publix’s refusal to join the Fair Food Program).

<sup>235</sup> See *supra* notes 115, 139–44 and accompanying text.

<sup>236</sup> 29 U.S.C. § 207 (2012).

<sup>237</sup> 29 U.S.C. § 157 (2012). The NLRA currently withholds this collective bargaining right from “any individual employed as an agricultural laborer.” 29 U.S.C. § 152(3) (2012).

<sup>238</sup> 29 U.S.C. §§ 1801–1872 (2012).

farmworkers who report inhumanely long hours.<sup>239</sup> Overtime might also offset the pattern of illegal deductions and wage theft that occurs regularly.<sup>240</sup> Meanwhile, a collective bargaining right would establish internal compliance. H-2A employees could speak up when employers inadequately compensate them or when working conditions become problematic.<sup>241</sup> Finally, H-2A migrant farmworkers merit AWPA protections typically given to other non-visa beneficiary migrant farmworkers given that excluding H-2A workers does not meet the needs of the full migrant farmworker community.

The H-2A Program itself must change as well, mirroring the portability provision<sup>242</sup> and pathway to citizenship<sup>243</sup> afforded to H-1B “specialty occupation[s].”<sup>244</sup> These rights balance power between employer and employee, providing more agency and security to H-2A workers. The portability provision would allow H-2A workers agency to make free market decisions about their employment<sup>245</sup> and to speak up with less fear of retaliation. Meanwhile, a path to citizenship would allow workers who return year after year to create a life in the United States, and it would also decrease overall anxiety in the employment relationship.

In addition to these legal changes, the DOL must prioritize enforcement of the H-2A Program. Adequate enforcement requires the DOL’s rigorous review of petitioning H-2A employers, increased audits and investigations of approved employers, utilization of debarment tools, and enhanced prosecution of employers found in violation of the law. Otherwise, wage theft, sexual harassment, and human trafficking will almost certainly persist.

### C. *Where We Go from Here*

Mobilization of migrant farmworker coalitions must happen in tandem with government change, offering a dual solution to H-2A

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<sup>239</sup> See, e.g., Berger, *supra* note 112 (describing one farmworker’s schedule as reaching fourteen hours per day for six days each week with just an hour-long lunch break).

<sup>240</sup> See CLOSE TO SLAVERY, *supra* note 97, at 18 (clarifying that wage theft may take many forms, including unlawful deductions from pay).

<sup>241</sup> This right should be paired with a portability provision or pathway to status to further protect migrant farmworkers from employer retaliation. See *supra* notes 128–36 and accompanying text.

<sup>242</sup> 8 U.S.C. § 1184(n) (2012).

<sup>243</sup> *Id.* § 1184(h).

<sup>244</sup> *Id.* § 1101(a)(15)(H)(i)(B) (2012); *id.* § 1184(h).

<sup>245</sup> See FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 9 (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20fwj.pdf> (recommending that H-2A migrant farmworkers possess the freedom to change employers in order to reduce their vulnerability).

migrant farmworkers' subordination. While coalitions' quasi-legal workarounds have advanced their cause greatly, prior movements of this nature may have benefited from an increased view toward government progress. Government advancements would reinforce and legitimize changes already gained through coalitions' work. Though necessary action may not occur during the Trump administration,<sup>246</sup> this Note proposes that migrant farmworker coalitions' revision to their racialized narratives may garner a critical mass among food purchasers to induce government change for H-2A migrant farmworkers in the future.

The UFW movement of the 1960s and 1970s serves as an example of how the longest-lasting impact on migrant farmworker livelihoods may arguably occur via appeals to the government. Cesar Chavez, the UFW, and its leaders similarly combatted abuses of workers, particularly on grape farms, who made an average of ninety cents per hour and experienced inhumane working conditions.<sup>247</sup> A source of inspiration to the CIW and migrant worker coalitions' tactics,<sup>248</sup> the UFW also played an essential role in terminating the Bracero Program.<sup>249</sup> Considering the vast exploitation that plagued the Bracero Program,<sup>250</sup> it is no surprise that the UFW consistently opposed it, "call[ing] upon allies in other unions, in churches[,] and in community groups" to ultimately push politicians to end the Bracero Program in 1964.<sup>251</sup> Furthermore, the UFW achieved a collective bargaining right for migrant farmworkers in California through the California Agricultural Labor Relations Act (ALRA) of 1975.<sup>252</sup> Governor Jerry Brown called the passing of this Act "[t]he greatest accomplishment

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<sup>246</sup> See generally *Donald Trump's Presidential Announcement*, *supra* note 89 (stating unfavorable views of Mexican immigrants).

<sup>247</sup> See *UFW History*, UNITED FARM WORKERS, <https://ufw.org/research/history/ufw-history> (last visited Mar. 29, 2019) (describing conditions of migrant farmworkers pre-UFW).

<sup>248</sup> See Garcia, *supra* note 196 ("[T]he UFW inspired a new generation of . . . youths to organize their communities and peers.").

<sup>249</sup> See *UFW History*, *supra* note 247 (achieving this victory before ultimately procuring the right to collectively bargain for farmworkers in California).

<sup>250</sup> The Braceros endured vast abuses, ranging from unsanitary living conditions to exploitative contracts. See, e.g., Elaine Y. Chang, *Social Workers and the Bracero Program: Working Within Migration Discourse and Conflicting Policy* 8, 14 (Spring 2010) (unpublished thesis, University of California Berkeley), [https://nature.berkeley.edu/classes/es196/projects/2010final/ChangE\\_2010.pdf](https://nature.berkeley.edu/classes/es196/projects/2010final/ChangE_2010.pdf) (noting that unsanitary living conditions included inadequate amounts of food and lack of restrooms and sinks); Oliveira, *supra* note 61, at 158–60 (noting that exploitative contracts were often written in English, preventing workers from understanding the terms of their contract, including wages and tax deductions).

<sup>251</sup> See *UFW History*, *supra* note 247.

<sup>252</sup> See CAL. LAB. CODE § 1140.2 (West 2011).

of [his] [a]dministration.”<sup>253</sup> Yet despite these crucial political achievements, the UFW’s short-lived momentum is often ascribed to the group’s apprehension toward government solutions.<sup>254</sup> Chavez and the UFW appear to have struggled to “work within the law,” leaning predominantly on social organization outside of politics.<sup>255</sup>

Regardless of what led to the UFW’s undoing, achievements through government progress pushed the organization’s work, and will also play a key role in the CIW and migrant farmworker coalitions’ impact. As CIW cofounder Greg Asbed remarked, “[Immokalee] used to be a town without law so bosses could do those sorts of things without consequence . . . . What the coalition did was create consequences.”<sup>256</sup> But sooner or later, one needs the law. The law has been paradoxically both what provides the foundation for Fair Food Agreements, and what has subordinated migrant farmworkers for decades. By tackling the law and government head-on, the CIW and migrant farmworker coalitions may achieve more nationwide solutions, affecting H-2A migrant farmworkers on a macro level. Concretizing overtime provisions, a collective bargaining right, migrant farmworker protections, and H-2A Program revisions would impact this community for years to come.

While the Trump administration may resist progress for H-2A workers,<sup>257</sup> migrant farmworker coalitions’ political actions that counter racialized narratives and amass industry support may still create fertile ground for government change. Just as the UFW did, the CIW and coalitions may place enough pressure on politicians and the agricultural industry that change cannot help but manifest. Consensus among agricultural purchasers matched with revised portrayals of migrant farmworkers’ racial identity have the potential to reveal to the federal government a need for change to the H-2A temporary worker system. In this way, coalitions of migrant farmworkers may upend their own racialization and increase their legal protections

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<sup>253</sup> *April 17, 2015: Farm Labor and the ALRA at 40*, UC DAVIS: GIFFORD CTR. FOR POPULATION STUDIES (Apr. 17, 2015), <https://gifford.ucdavis.edu/events/2015-04-17>.

<sup>254</sup> *See, e.g.,* Garcia, *supra* note 196 (“Chavez’s lack of faith in the strategy of state-sponsored collective bargaining further hindered progress under ALRA.”); Nelson Lichtenstein, *The Rise and Fall of Cesar Chavez and the United Farm Workers*, ALTERNET (Apr. 8, 2012), [https://www.alternet.org/story/154859/the\\_rise\\_and\\_fall\\_of\\_cesar\\_chavez\\_and\\_the\\_united\\_farm\\_workers](https://www.alternet.org/story/154859/the_rise_and_fall_of_cesar_chavez_and_the_united_farm_workers) (“[Chavez] was a most ambivalent trade unionist even when the UFW had achieved real power and worldwide renown in [sic] 1970s. . . . [A]s union success came to achieve . . . materialist desires, Chavez became estranged from his own constituents.”).

<sup>255</sup> Garcia, *supra* note 196.

<sup>256</sup> Renford, *supra* note 201.

<sup>257</sup> *See generally* Donald Trump’s Presidential Announcement, *supra* note 89 (stating unfavorable views of Mexican immigrants).

through a mixture of their own work and government-supported legislation.

### CONCLUSION: *DESCANSE EN PAZ*

Racialization has cast a shadow historically over Latina/o immigrants and, most recently, H-2A migrant farmworkers. This shadow carries notes of stigma and exploitation: Nominal enforcement of H-2A workers' minimal legal protections creates ample opportunity for abuses like wage theft, sexual harassment, and human trafficking. While the need for a temporary worker program should not be taken for granted, this Note makes a novel contribution to the discussion of racialization within the H-2A context, and proposes a "dual solution" to its corrosive effects in which migrant farmworker coalitions rewriting their own racialized narratives create a cultural groundswell to spark government action. Neither the government nor the CIW may fulfill their missions alone, but, led by migrant farmworkers in their self-advocacy, each becomes stronger.

A cross rests on a hard pillow of snow in Western Illinois. "D.E.P. Humberto Casarrubias-Sánchez"—rest in peace.<sup>258</sup> The marker of his death, and life, is visible from the side of the road where trucks and pickups pass every day, where buses full of foreign workers will travel to and fro' in the haze-filled summer. Not a speckle of corn marks the flatland fields: No germination, yet for many the cross might symbolize a rebirth. For the Immokalee Workers, the fight is growing. The fair labor and fair food movement lies in the hands of a new generation of workers. "I go hungry today so that my children won't have to tomorrow,"<sup>259</sup> they cry at hunger strikes. For workers here and long gone, their message echoes into the acres.

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<sup>258</sup> July 8 E-mail from Miguel C. Keberlein to author, *supra* note 1.

<sup>259</sup> Patricia Boling, *Moral, Ethical, and Just: Rediscovering How to Make Public Claims About Food*, in *GLOBAL FOOD, GLOBAL JUSTICE: ESSAYS ON EATING UNDER GLOBALIZATION* 44 (Mary C. Rawlinson & Caleb Ward eds., Cambridge Scholars Publishing 2015) (describing signs carried by farmworkers participating in CIW's Fair Food Campaign).