134,368 UNNAMED WORKERS: CLIENT-CENTERED REPRESENTATION ON BEHALF OF H-2A AGRICULTURAL GUESTWORKERS

BRIANA BELTRAN[∞]

ABSTRACT

Each year, tens of thousands of workers, mostly from Mexico and mostly men, enter the United States on temporary visas to labor in its agricultural fields. H-2A workers, as they are known, are the ultimate outsiders: contracted by a single employer for a specified period, they face dangerous labor and housing conditions, without the option of seeking other employment and with no other ties to or rights in the United States. Despite a robust regulatory scheme that mandates terms—including their hourly wage and expenses their employer is required to cover—H-2A workers are frequently exploited; experiencing everything from wage theft to the extraction of unlawful recruitment fees, they risk retaliation by employers and recruiters if they dare to complain about the mistreatment. To compound the problem, the systems in place to redress these wrongs are woefully insufficient: government enforcement is weak, and H-2A workers' ability to take direct action is undercut by factors such as their temporary and isolated presence in the United States and the limitations on their access to legal representation. Despite these constraints, there are examples of H-2A workers who have filed civil lawsuits against their employers. Having done so, they still encounter obstacles to their full participation in the process, due to the lack of familiarity with the U.S. legal system and the likelihood that the litigation will continue past the time they leave the United States.

In this article, I explore strategies for minimizing the disconnect between H-2A workers and the process of civil litigation and consider the ways in which litigation itself can be an empowering process and vehicle for amplifying worker voice. Using the frame of client-centered lawyering and drawing on two recent case studies of community lawyering among low-wage immigrant workers, I discuss the methods that lawyers representing H-2A workers can employ during the various stages of a civil lawsuit to ensure that their clients are not again relegated to an outsider status. In particular, I focus on four "moments" in the life of a case: the decision to file a lawsuit, the drafting of the complaint, discovery, and trial.

[∞] Clinical Teaching Fellow, Farmworker Legal Assistance Clinic, Cornell Law School (J.D., New York University School of Law; B.A., Stanford University). Thank you to the members of my small group at the New York University School of Law Clinical Law Review Writers' Workshop for their excellent insights and suggestions on an early draft of this paper: Deborah Archer, Danielle Pelfrey Duryea, Joseph Pileri, Margaret Reuter, Stephen Rosenbaum, and Colleen Shanahan. Thank you also to my colleagues at Cornell, John Blume, Beth Lyon, and Madalyn Wasilczuk (now at LSU Law) for their feedback and support throughout this process, and to the editors at the NYU Review of Law and Social Change, who provided thoughtful comments that improved this article.

Moreover, I consider how client voice can be amplified outside of the four corners of a lawsuit by providing strategies for how to do so while settling cases and discussing the downstream, indirect effects of litigation on H-2A worker empowerment. By putting these considerations into practice, I argue that litigation itself can both serve as an empowering experience for H-2A workers and shed light on the abuses within the H-2A program more generally.

I.
INTRODUCTION

In 2013, more than a dozen workers from the Mexican state of Oaxaca entered the United States on H-2A visas to work for a tobacco farmer in rural Kentucky.[1] Already in debt due to loans they had taken out to pay for pre-departure expenses, the workers soon learned that they had to pay $2,000 for their visas and still more for rent and additional costs of transporting them to the farm.[2] They were required to pay these charges via cash kickbacks to their supervisor throughout the season, reducing their already-low wages even further below the federally-mandated rates.[3] All of this is illegal, expressly prohibited by the regulations governing the H-2A program.[4]

When the U.S. Department of Labor ("DOL") came to investigate the allegations, the workers' supervisor, together with employees of the immigration law firm hired by the employer to file the applications to import the workers, pressured the workers to lie about these conditions to investigators under threat of canceling their visas and sending them back to Mexico.[5] In the end, U.S. DOL did not recover any funds for the workers—it collected a total of $6,300 in reduced fines from the employer and did not hold the law firm responsible for any of the violations.[6] Furthermore, the employer continued to bring in H-2A workers under the program in subsequent years.[7] In the absence of a remedy from U.S. DOL, a group of the workers filed a federal lawsuit against the employer and the law firm in 2015.[8]

These Kentucky tobacco workers are among the hundreds of thousands[9] of workers who have entered the United States on H-2A visas, serving as temporary participants in the American agricultural system—filling jobs that their employers assert no American workers are willing to take and lacking any long-term legal

1. John Cheves, *How a Scott County Tobacco Farm Allegedly Mistreated Workers from Mexico*, LEXINGTON HERALD LEADER (Aug. 8, 2015, 11:04 PM), http://www.kentucky.com/news/local/watchdog/article44614560.html [https://perma.cc/T8Y5-HWNM].

2. *See id.*; Deborah Yetter, *Lawsuits Allege Migrant Workers Exploited*, COURIER-J. (Louisville, Ky.) (May 29, 2015, 5:35 PM), https://www.courier-journal.com/story/news/local/2015/05/29/lawsuits-allege-migrant-workers-exploited/28174377/ [https://perma.cc/RYH6-SLY9].

3. Cheves, *supra* note 1; Yetter, *supra* note 2.

4. *See* discussion *infra* Section II.A.2.

5. Cheves, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*; Yetter, *supra* note 2. The case has since been dismissed. *See* Order of Dismissal, Cruz-Cruz v. McKenzie Farms, No. 05:15-cv-00157 (E.D. Ky. Sept. 5, 2017).

9. There is no way to know precisely how many individuals have worked as H-2A workers in the United States over the years, particularly since the same individual may return to the United States multiple times. However, with the program having been in existence for three decades and the annual number of visas issued now approaching 200,000, *see infra* notes 28–29 and accompanying text, this is a reasonable estimate.

ties to or rights in the United States. They are also among the significant number of H-2A workers who have experienced blatant workplace abuses.

Deciding to speak out, as the Kentucky tobacco workers did, is not an insignificant decision. H-2A workers may only work for the employer who has requested their labor,[10] are often in debt before arriving to the United States,[11] and are frequently victims of retaliation or blacklisting if they complain about mistreatment.[12] In short, there is reason to stay quiet. Those workers who do make the difficult choice to speak out and take their employers[13] to court then face a second uphill battle. During the course of litigation, H-2A workers remain at the margins: the U.S. legal system is likely foreign to them,[14] and their absence from the United States during litigation can render the process even more confusing and inaccessible.[15] Pursuing remedies for violations of their rights, therefore, poses the risk of reinforcing—rather than diminishing—H-2A workers' sense of being outsiders.

Litigation need not be this way. Numerous social justice-minded practitioners over the years have written extensively on how attorneys representing marginalized communities can approach such representation in a client-centered manner. Offering "an alternative vision of lawyering that conceptualize[s] legal representation primarily in problem-solving terms and redefine[s] the boundaries of decision-making authority in the lawyer-client relationship,"[16] the client-centered lawyering model emphasizes the client—the person who must live with the consequences and who best understands her own values—as the decisionmaker,

10. Observers have made outright comparisons between the H-2A and other guestworker programs and slavery. *See, e.g.*, S. POVERTY LAW CTR., CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES 1 (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [https://perma.cc/2D3Q-S45T] (quoting Congressman Charles Rangel as having stated, "This guestworker program's the closest thing I've ever seen to slavery."); Mary Lee Hall, *Defending the Rights of H-2A Farmworkers*, 27 N.C. J. INT'L L. & COM. REG. 521, 536 (2002) (noting that non-H-2A farmworkers, even undocumented workers, often describe H-2A workers as being "like slaves").

11. *See infra* note 96 and accompanying text.

12. *See infra* notes 108–14 and accompanying text.

13. Though I use the term "employers," defendants in H-2A lawsuits are not always limited to the direct employers and can include recruiters, joint employers, and other agents of the true "employer."

14. *See infra* notes 200–04 and accompanying text.

15. *See infra* note 249 and accompanying text.

16. Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 376 (2006); *see also* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 507 (1990) ("Client-centered counseling may be defined as a legal counseling process designed to foster client-decisionmaking."); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 503 (1994) (describing the model as one in which "lawyers should interact with clients in a way that allows clients to make decisions themselves"); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 437 (2000) (describing "primary concern" of the model as "ensur[ing] that clients play the central role not only in setting ultimate objectives but also in making important decisions," and that "[t]he model view[s] lawyering primarily as problem-solving").

rather than the lawyer.[17] Relatedly, other scholars have written about the importance of honing cross-cultural lawyering skills in order to more fully understand the client's situation and the biases that even well-intentioned lawyers may bring to the table.[18] Building on the client-centered tradition, in more recent years, other advocates have applied many of these lessons in the context of representing communities and broader social movements, rather than individuals. Often referred to as community lawyering, such lawyers place the community or movement first, with the lawyers playing a supporting role in the task of advocating for and empowering the individuals whose rights are at stake.[19]

For some lawyers, applying these lessons in the context of representing H-2A workers may seem intimidating, particularly when they will be representing clients who face such significant barriers to justice. However, these difficulties do not mean that the lessons of client-centered lawyering and its brethren need be thrown out the window entirely. On the contrary, civil litigation on behalf of H-2A workers provides numerous opportunities to apply such principles. This paper is an effort to explore those opportunities. In the discussion that follows, I consider the various ways in which advocates can be faithful to the goals of the client-centered and community lawyering movements in what would otherwise be a difficult context for applying such principles—litigating civil claims on behalf of H-2A workers.

I begin, in Part II, by providing an overview of the H-2A program, from the process of applying for H-2A workers to the protections theoretically offered to such workers, and conclude with a detailed look at the significant hurdles they face in accessing remedies for violations of their rights. In Part III, I turn to a vision for representing H-2A workers in a client-centered manner during the course of civil litigation. I discuss two case studies of community lawyering with low-wage workers and the role litigation played in each. Next, I examine litigation more broadly from two perspectives. First, I take a look at the process of litigation itself and how an attorney can approach the various phases of a lawsuit in a client-centered manner. I then consider the ways a client-centered approach can extend

17. *See* Kruse, *supra* note 16, at 402; *see also* Dinerstein, *supra* note 16, at 549 (arguing that the client as decisionmaker increases the likelihood that decisions will accord with the client's values).

18. Susan Bryant and Jean Koh Peters, in particular, were at the forefront of such scholarship. As Bryant states in an article growing out of their collaborative project that led to the establishment of the concept of the "five habits" of cross-cultural lawyering: "[A] competent cross-cultural lawyer acknowledges racism, power, privilege and stereotyped thinking as influencing her interactions with clients and case planning, and works to lessen the effect of these pernicious influences." Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 55 (2001); *see also* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 405–11 (1997) (calling for increased cross-cultural training in clinical legal education).

19. *See infra* Section III.A.

beyond the lawsuit through the pursuit of forward-looking remedies in the settlement of cases as well as the empowering effect that a lawsuit can have on H-2A workers more generally.

II.
OUTSIDERS WITH NO WAY IN: BACKGROUND ON THE H-2A PROGRAM AND THE DIFFICULTIES OF REMEDYING THE MISTREATMENT OF H-2A WORKERS

Below, I begin by providing an overview of the H-2A program and an explanation of the numerous reasons H-2A workers face unique complications in pursuing legal remedies for violations of their rights.

A. Overview of the H-2A Program

The current H-2A program is but the latest incarnation of the agricultural industry's long history of targeting racial minorities and non-citizens for field labor in this country.[20] The first official guestworker program began during World War I,[21] and the most infamous predecessor to the current system is the Bracero Program. The Bracero Program led to an influx of Mexican laborers during and after World War II, but the statutory predecessor to the current program was in fact the lesser-known "H-2" visa program, which largely brought Caribbean workers to the east coast of the United States.[22]

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20. *See, e.g.*, JUSTICE IN MOTION, VISA PAGES: U.S. TEMPORARY FOREIGN WORKER VISAS, H-2A VISA 5–6 (Nov. 2015), https://static1.squarespace.com/static/57d09e5c5016e1b4f21c9bd3/t/58c328fac534a58f937efd4e/1489185020017/VisaPages_H2A_2015update.pdf [https://perma.cc/S9NV-49RP] (summarizing use of Chinese immigrant labor in the United States after the abolition of slavery); Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 581–82 (2001) (describing the use of slave labor and sharecropping in the agricultural sector in the 1800s); *see also* Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 U. TOL. L. REV. 923, 931–37 (2007) (providing historical background of California farmworkers and the targeted recruiting of indigenous Mexicans, indigenous Californians, Chinese immigrants, and Japanese immigrants into farm labor from the late 1700s to the beginning of the Bracero Program).

21. *See, e.g.*, ETAN NEWMAN, FARMWORKER JUSTICE, NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 12 (2011), https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf [https://perma.cc/27EG-FDMC] (describing the history of farmworker programs in the United States); U.S. GEN. ACCOUNTING OFFICE, H-2A AGRICULTURAL GUESTWORKER PROGRAM: CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 18–19 (Dec. 31, 1997), http://www.gao.gov/archive/1998/he98020.pdf [https://perma.cc/Y526-RQEL] (describing Congress' temporary work program during WWI, the Bracero Program, and the growth of the "H-2" guestworker program).

22. *See* NEWMAN, *supra* note 21, at 12–13; S. POVERTY LAW CTR., *supra* note 10, at 3–5; Hall, *supra* note 10, at 528. For the ways in which the Bracero and Caribbean visa programs were characterized by significant mistreatment of workers, despite ostensible labor and contractual protections, see NEWMAN, *supra* note 21, at 12 (problems included wage theft, "deplorable" housing, unsafe transportation, and denial of healthcare, but few workers would complain "because they were tied to a single employer, and renewal of their contract depended on the employer's good will"); S.

The modern incarnation of the H-2A program took shape in 1986 with the passage of the Immigration and Reform Control Act ("IRCA").[23] IRCA split the H-2 program in two: the H-2A visa for agricultural work specifically and the H-2B visa for non-agricultural work.[24] While the H-2B program is subject to an annual statutory cap,[25] the number of H-2A visas that the government can approve each year has no such maximum.[26]

The two new programs began modestly, with just 44 H-2A visas and 62 H-2B visas issued in 1987.[27] The H-2A program expanded at a moderate pace in the

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POVERTY LAW CTR., *supra* note 10, at 4 (because many workers did not speak English, they "were often unaware of contractual guarantees," and employers often "shortchang[ed] workers"); Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE, & JUST. 27, 46–47 (2006) ("Although [the Braceros] were promised transportation and prevailing wages, they rarely obtained all of these rights."); Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 381 (2016) ("Among the abuses experienced by these early guestworkers were extremely poor living conditions, unpaid wages, physical abuse, and lack of access to medical treatment.").

23. *See, e.g.*, NEWMAN, *supra* note 21, at 13; S. POVERTY LAW CTR., *supra* note 10, at 5.

24. NEWMAN, *supra* note 21, at 13; S. POVERTY LAW CTR., *supra* note 10, at 5; Smith, *supra* note 22, at 381.

25. H-2B visas are limited by statute to 66,000 per fiscal year. 8 U.S.C. § 1184(g)(1)(B) (2018); *see also Cap Count for H-2B Nonimmigrants*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., https://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/cap-count-h-2b-nonimmigrants [https://perma.cc/6L6F-HGZH] (last updated Mar. 1, 2018). However, in 2017, the Department of Homeland Security approved a one-time increase in the cap, adding an additional 15,000 visas for the year. *See One-Time Increase in H-2B Nonimmigrant Visas for FY 2017*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., https://www.uscis.gov/working-united-states/temporary-workers/one-time-increase-h-2b-nonimmigrant-visas-fy-2017 [https://perma.cc/NUR4-DWNA] (last updated Sept. 20, 2017); *see also* Daniel M. Kowalski, *H-2B Visas and the Making of an 'Ultra Vires' Regulation*, LAW360 (July 25, 2017, 1:51 PM), https://www.law360.com/articles/947267/h-2b-visas-and-the-making-of-an-ultra-vires-regulation [https://perma.cc/L3KX-RP5J] (summarizing the 2017 cap increase and the "returning worker exemption" that had, in the past, allowed for exemptions from the cap for some employers).

26. DANIEL COSTA & JENNIFER ROSENBAUM, ECON. POLICY INST., TEMPORARY FOREIGN WORKERS BY THE NUMBERS: NEW ESTIMATES BY VISA CLASSIFICATION 9 (Mar. 7, 2017), http://www.epi.org/files/pdf/120773.pdf [https://perma.cc/D776-8ZXH].

27. *See Classes of Nonimmigrants Issued Visas (Detailed Breakdown) (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 1987–1991*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssuedDetailed/NIVClassIssued-DetailedFY1987-1991.pdf [https://perma.cc/7Y4E-R53G] (last visited Mar. 16, 2018) [hereinafter *Nonimmigrants Issued Visas 1987–1991*]. Commentators have observed the challenges in determining the exact number of H-2A workers actually present in the United States each year, given the numerous governmental agencies that play a role in the application and approval process and the resulting variation in statistics from each source. *See* JUSTICE IN MOTION, *supra* note 20, at 15–17 (contrasting the different reporting mechanisms for the number of H-2A visas issued as reported by U.S. DOL; U.S. Department of State ("State Department"); Department of Homeland Security ("DHS"); U.S. Citizenship and Immigration Services ("USCIS"); and U.S. Customs and Border Protection); *see also* COSTA & ROSENBAUM, *supra* note 26, at 8–10 (discussing the various factors that must be considered in determining the number of H-2A visa holders present in the United States). However, data from the State Department about the number of visas it issues is generally regarded as "giv[ing] perhaps the best idea of how many foreign H-2A workers may enter the U.S. in any given year." JUSTICE IN MOTION, *supra* note 20, at 16. I, therefore, generally (unless otherwise noted) refer to such figures from the State Department, which

years that followed but has ballooned in size in recent years: between 2012 and 2016, the program nearly doubled in size from approximately 65,000 to more than 134,000 visas.[28] The expansion has played out on a state level as well, with rapid growth over the past few years both in traditional H-2A strongholds in the southeast as well as expansion in states that are newer to the program, such as Michigan.[29] The program has also expanded into sectors that are not "temporary" or "seasonal," as H-2A jobs are supposed to be, such as sheepherding.[30] More recently, the dairy industry has been seeking to use the program as well.[31] Of these tens of thousands of H-2A visas that are issued each year, the vast majority are issued to young men[32] of Mexican nationality.[33]

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identify the number of visas issued in a given period. Moreover, unless otherwise noted, the data regarding the H-2A program given in this article generally corresponds to the fiscal years used by the government, rather than calendar years.

28. *Table XVI(B): Nonimmigrant Visas Issued by Classification (Including Border Crossing Cards), Fiscal Years 2012–2016*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableXVIB.pdf [https://perma.cc/T32M-LH3A] (last visited Mar. 16, 2018) [hereinafter *Nonimmigrant Visas Issued 2012-2016*]. For more detailed statistics on the number of visas issued by the State Department from 1987 to 2016, see Table 1 in attached Appendix.

29. *See H-2A Temporary Agricultural Labor Certification Program - Selected Statistics, FY 2014,* OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, https://www.foreignlaborcert.doleta.gov/pdf/H-2A_Selected_Statistics_FY2014_Q4.pdf [https://perma.cc/6LZH-EP28] (last visited Nov. 27, 2017) [hereinafter FY 2014]; *H-2A Temporary Agricultural Labor Certification* U.S. DOL on the number of H-2A positions certified by state, see Table 2 in the attached Appendix. Because the State Department does not provide a breakdown of visas issued by the destination state, it is necessary to look at the certification data provided by U.S. DOL instead. While the State Department is likely more accurate as to the actual number of H-2A workers in the United States in a given period, *see supra* note 27, it is incomplete in this regard.

30. *See* NEWMAN, *supra* note 21, at 32–34 (discussing the 2011 U.S. DOL directive allowing ranchers to employ H-2A herders for annual contracts with the possibility of extension).

31. *See id.* at 34–35 (discussing the dairy industry's goal to gain access to the H-2A program); *see also* Kelcee Griffis, *Immigration Bill Roundup: Visa Extensions, H-1B Reforms,* LAW360 (May 1, 2017, 4:56 PM), https://www.law360.com/articles/919056/immigration-bill-roundup-visa-extensions-h-1b-reforms [https://perma.cc/8GW2-FXER] (noting the introduction of H.R. 2087 in Congress by Rep. Sean Duffy of Wisconsin, which would allow dairy workers admittance under the H-2A program for an initial period of 18 months).

32. The United States government does not release data breaking down H-2A visa holders by age and sex, but it is common knowledge that H-2A workers are largely young men. *See* NEWMAN, *supra* note 21, at 26 (observing that "it is well known that women and older adults are basically absent from the H-2A program"). This is the case because it is the clear preference of employers. *See id.* at 17 (noting employers' ideal workforce as being "mostly young men removed from daily family obligations who will work long hours for low pay"); *see also* S. POVERTY LAW CTR., *supra* note 10, at 32 ("[T]he ability to choose the exact characteristics of a worker (male, age 25-40, Mexican, etc.) is one of the very factors that make guestworker programs attractive to employers."). For a recent report documenting the systematic sex-based discrimination in the various guestworker programs, see CENTRO DE LOS DERECHOS DEL MIGRANTE & UNIV. OF PA. LAW SCH. TRANSNATIONAL LEGAL CLINIC, ENGENDERING EXPLOITATION: GENDER INEQUALITY IN U.S. LABOR MIGRATION PROGRAMS (2017), http://www.cdmigrante.org/wp-content/uploads/2017/09/Engendered-Exploitation.pdf [https://perma.cc/8SYE-4NCM].

33. In 2016, 123,231 (91.71%) of H-2A visas went to Mexican nationals. *See FY 2016 Nonimmigrant Visas Issued*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/

How is it that the H-2A program has come to expand at such a rapid rate, particularly in the face of employer and industry complaints about the degree of red tape involved in the process?[34] It is because, despite the bureaucratic hurdles, H-2A workers have high appeal for certain employers. They represent perhaps the most extreme example of what law professor Leticia Saucedo calls the "subservient" worker.[35] Like the employers of the "brown collar" workplaces that Saucedo describes, H-2A employers seek "subservient workers" who are "desirable[] precisely because of their political disenfranchisement."[36] In other words, it is the H-2A workers' lack of visa portability, or the fact that their immigration status is entirely dependent upon their continued employment with the employer who requested their labor, that makes them the ideal workers.[37] Employers become accustomed to and develop a preference for a "highly productive and compliant" workforce, and thus continue to seek out H-2A workers in particular.[38]

With this background and brief snapshot of the current status of the H-2A program in mind, I will delve into the substance of the program in more detail. In the following sections, I examine the application process that employers and workers must navigate in order to obtain H-2A visas and then provide an overview of

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content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVDetailTables/FY16%20NIV%20Detail%20Table.pdf [https://perma.cc/3XZX-JYPS] (last visited June 27, 2017).

34. *See, e.g.*, Vanessa Rancano, *Will Trump's Tough Talk on Immigration Cause a Farm Labor Shortage?*, NAT'L PUB. RADIO (Jan. 21, 2017, 7:00 AM), http://www.npr.org/sections/thesalt/2017/01/21/510593227/will-trumps-tough-talk-on-immigration-cause-a-labor-shortage [https://perma.cc/NK8P-KZ8M] (summarizing farmer complaints about H-2A program being "cumbersome and expensive").

35. *See* Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 962 (2006).

36. *Id.* at 1009; *see also id.* at 962, n.1 (defining the brown collar workplace "as one in which newly arrived Latino immigrants are overrepresented in jobs or occupations"), 1009 ("[I]n the low-wage sector, employers perceive that because of their social situation, immigrant workers are more compliant than, and therefore, preferable to native born workers.").

37. *See, e.g.*, Hall, *supra* note 10, at 528–29 (explaining the ways in which H-2A workers "are not free," including the fact that workers "cannot change employers," a problem that is "written into the system"); Holley, *supra* note 20, at 595 ("Unlike any other farmworker in the United States, an H-2A worker is tied to a single employer."); Smith, *supra* note 22, at 387 ("Guestworkers' immigration statuses are tied to their employers. . . . The visas are not portable; a guestworker's visa is linked to their employer and, if their job ends, the guestworker loses their immigration status and ability to remain and work in the U.S."); *see also* Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 283 ("[T]he power of the state looms tyrannically over guest workers in the form of the constant threat of deportation . . . . This power is interrelated with and augments the power of the employer, who . . . acts with a form of authority over the worker to which citizens and [legal permanent residents] are not subject."). The H-2A regulations do contemplate that an H-2A worker can change employers if the prospective employer files a new petition on behalf of the worker, 8 C.F.R. § 214.2(h)(2)(D) (2018), however, this process is rarely used, especially among employers of Mexican nationals. *See* Smith, *supra* note 22, at 387 n.70 ("While it is theoretically possible for H-2A and H-2B guestworkers to change employers under some limited circumstances, it is quite difficult in practice.").

38. Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 6 (2017).

the substantive rights afforded to H-2A workers and the ways in which those rights are flagrantly violated.

1. The H-2A Application Process

Though H-2A workers are the individuals whose labor is sought to harvest American crops, they are largely outsiders in the process that transports them from their homes to the agricultural fields in the United States. Instead, employers control the process, filing applications with not one, but two federal agencies, purportedly demonstrating their compliance with numerous rules and regulations along the way.

The first step in this process involves U.S. DOL. As the governing regulations state, a potential H-2A employer is required to "demonstrate" to U.S. DOL "that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed."[39] To do so, the employer submits a "job order" to a state-level entity, known as the State Workforce Agency, between sixty and seventy-five days before the date the employer anticipates needing workers; after the job order is reviewed, the agency then places it in "intrastate clearance" to begin recruitment of U.S. workers.[40] The agency must refer "each qualified U.S. worker" who applies for the job to the employer.[41] Also during this time period, the employer must engage in "positive recruitment"[42] of U.S. workers,

39. 20 C.F.R. § 655.103(a) (2017); *see* 8 U.S.C. § 1188(a) (2018) (outlining conditions for approval of H-2A petitions); *see also* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 596 (1982) (stating that the statutory and regulatory framework provides two assurances to United States workers: that they will be given preference over foreign workers for jobs and the working conditions of domestic employees will not be adversely affected nor are they to be discriminated against in favor of foreign workers).

40. 20 C.F.R. § 655.121(a)–(c). The employer is to use a U.S. DOL Form ETA-790, which is a template form requiring the would-be employer to provide numerous details about the terms and conditions of the proposed job. *See* EMP'T & TRAINING ADMIN., U.S. DEP'T OF LABOR, AGRICULTURAL AND FOOD PROCESSING CLEARANCE ORDER ETA FORM 790, https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_790.pdf [https://perma.cc/YW8K-K46F] (last visited July 6, 2017) [hereinafter ETA FORM 790].

41. § 655.150(b).

42. The regulations define the term "positive recruitment" as follows:

> The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of the [Office of Foreign Labor Certification, designee of the Secretary of Labor for the purposes of this process], in recruiting and interviewing individuals in the area where the employer's job opportunity is located and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

§ 655.103(b).

including running two newspaper advertisements for the job[43] and clearly documenting any interviews with interested workers, including the specific reasons a particular U.S. worker is not ultimately hired for the job.[44] Within approximately a month,[45] U.S. DOL is to determine whether the employer has satisfied the requirements as outlined above; if so, the employer's application is certified by U.S. DOL, and the employer proceeds to the next step in the process.[46]

With approval from U.S. DOL in hand, the employer then turns to the Department of Homeland Security ("DHS") to file visa petitions—I-129 Forms—for the workers.[47] While regulations impose additional requirements to prove that a certain would-be worker is "qualified" for the job,[48] in practice, such requirements are rarely applicable in this context. Those requirements only apply to workers who are *named* as "beneficiaries" on the I-129s; however, DHS regulations do not even require that beneficiaries of petitions for H-2A visas be named.[49] Would-be H-2A workers are thus usually only identified as "unnamed workers."[50] They are, at this point, literally nameless.

Once the visa petition has been approved, the individual workers finally enter the picture. Most workers learn of job opportunities in the United States via recruiters, ranging from individuals to sophisticated entities, which operate on the ground in sending countries.[51] Regardless of how they find out about the job, these

43. § 655.151; *see also* § 655.152 (laying out specific requirements for advertising).

44. *See* § 655.156.

45. Specifically, this is to occur "no later than 30 calendar days before the date of need" for the workers given by the employer in the application. § 655.160 (2017).

46. *See* §§ 655.161–655.165.

47. *See* 8 C.F.R. § 214.2(h)(2)(i)(A) (2018).

48. *See* § 214.2(h)(5)(v). These "qualifications" generally relate to any employment, education, or job training requirements specified by the job order, as well as being able to perform certain job duties stated therein. *See id.*

49. Petitioning employers must list the names of any workers who are currently in the United States, but need not do so for workers outside of the United States at the time of the filing. Instead, employers are merely required to list the total number of workers for whom they are petitioning on Form I-129. *See* § 214.2(h)(2)(iii); *see also* § 214.2(h)(5)(i)(B) ("The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating temporary labor certification.").

50. I-129s refer to beneficiaries of H-2A visas as "unnamed workers." U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., INSTRUCTIONS FOR PETITION FOR NONIMMIGRANT WORKER 13 (Jan. 17, 2017), https://www.uscis.gov/i-129 [https://perma.cc/N99G-FL77] (under "Instructions for Form I-129 (PDF, 347 KB)" link). I have also found the use of the term "unnamed workers" to be quite common on such forms, having seen completed I-129s numerous times during the course of litigation.

51. *See* NEWMAN, *supra* note 21, at 22 ("[N]early all H-2A employers rely on private recruiters to find available workers in their home countries and arrange their visas and transportation to the fields."); S. POVERTY LAW CTR., *supra* note 10, at 9 ("U.S. employers almost universally rely on private individuals or agencies to find and recruit guestworkers in their home countries, mostly in Mexico and Central America."). For a recent and in-depth overview of the guestworker recruitment

workers must then appear at U.S. consulates or embassies for a visa interview,[52] a largely formulaic process that results in the H-2A worker being granted a visa to be placed in his passport, bearing the name of the employer for whom he has been approved to work.[53] Though this step is one in which it appears workers are active participants—they are the ones to formally apply for the visa in their home countries and they are the ones interviewed—in reality, the employers (and, more accurately, recruiters) continue to control the situation: recruiters often complete paperwork for the workers and coach workers on what to say in their visa interviews.[54]

Despite these numerous requirements, including the involvement of several government agencies at various steps, employers easily evade compliance with the regulations governing worker recruitment. For example, a recent investigative article detailed the degree to which employers affirmatively skirt the positive recruitment process by placing incomplete advertisements in newspapers; advertising in locations unlikely to generate any applicants; dissuading applicants by making the job sound as undesirable as possible or including productivity requirements that no worker is likely to meet; and lying to applicants by telling them there are no longer any job openings.[55] Employers have also been found to blatantly discriminate against current or past U.S. workers, systematically firing them in order

system, including the structural factors that lead to a high degree of worker exploitation in this process, see Jennifer Gordon, *Regulating the Human Supply Chain*, 102 IOWA L. REV. 445, 454–68 (2017).

52. *See H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., https://www.uscis.gov/working-united-states/temporary-workers/h-2a-temporary-agricultural-workers [https://perma.cc/GG4U-YQBF] (last updated Mar. 8, 2018) ("H-2A Program Process" dropdown: "Step 3: Prospective H-2A workers outside the United States . . . [a]pply for an H-2A visa with the U.S. Department of State (DOS) at a U.S. Embassy or Consulate abroad and then seek admission to the United States with U.S. Customs and Border Protection (CBP) at a U.S. port of entry[.]").

53. *See* Alana Semuels, *For U.S. Farmers and Mexican Workers, It's Tough Being Legal*, L.A. TIMES (Mar. 30, 2013, 10:00 AM), http://www.latimes.com/nation/la-na-guest-worker-20130331-dto-htmlstory.html [https://perma.cc/S77G-TCVD] (including image of two H-2A workers' visas with "The North Carolina Growers Association" printed on them).

54. *See, e.g.*, S. POVERTY LAW CTR., *supra* note 10, at 13 ("[T]wo consulates in Latin America routinely asked prospective H-2 workers how much they had paid in recruitment fees, apparently out of concern that a high level of indebtedness would cause workers to overstay their visas in order to repay the debt. Workers were told by their recruiters what the 'correct' – that is, false – answer should be, and workers dutifully understated the fees that they have paid.").

55. *See, e.g.*, Jessica Garrison, Ken Bensinger, & Jeremy Singer-Vine, *"All You Americans Are Fired."* BUZZFEED NEWS (Dec. 1, 2015, 5:41 PM), https://www.buzzfeed.com/jessicagarrison/all-you-americans-are-fired?utm_term=.ix5ebqggK#.vrLZmlKK3 [https://perma.cc/3UKZ-85SZ] (recounting the story of Linda White, a Louisiana-based agent who helped employers file H-2 applications with the government and who had recently been sentenced to federal prison for falsifying receipts for newspaper ads. In an interview with the reporters, she explained: "nobody was going to call for these jobs over dumb newspaper ads anyhow. When clients come to me, what they want is their Mexicans.").

to bring in more H-2A workers, all the while asserting that there are no available U.S. workers to meet the employer's labor needs.[56]

This activity demonstrates the steps employers will take to ensure they are able to obtain such a desirable workforce, leading to the dramatic expansion of the H-2A program in recent years. With it being so easy to appear rule-abiding during the recruitment process, it should be no surprise that, as the next section outlines, the trend of regulatory non-compliance continues into the period when the workers are in the United States.

2. The H-2A Program's Substantive Provisions

Once an employer has turned to the H-2A program and successfully imported its laborers, the employer faces a second set of regulations that govern the program—those concerning the job terms and conditions that employers must provide to H-2A workers in the United States. In the following sections, I provide an overview of some of the key parts of the H-2A regulatory scheme. In so doing, I highlight not just the rights that are afforded to the H-2A workers themselves, but also the counterintuitive reasoning behind such protections. I also provide an explanation of the rampant violations of those rights. In short, while the protections afforded to workers appear to be robust, such robustness is illusory both in purpose and execution.

a. Substantive Protections for H-2A Workers

The substantive protections afforded to H-2A workers cover a range of topics. The core of these protections concerns wages and other job-related expenses, but they also extend to secondary issues such as housing for workers and workers' compensation coverage. I briefly discuss this bundle of rights below.

First, the government sets out specific requirements for the wages that must be paid to H-2A workers. The employer must pay a wage that equals or exceeds the highest of "the [Adverse Effect Wage Rate], the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed."[57] In practice, the highest of these tends to be the Adverse Effect Wage Rate, or "AEWR"

56. *See* S. POVERTY LAW CTR., *supra* note 10, at 31 (summarizing complaint filed by the Equal Employment Opportunity Commission against Georgia-based Hamilton Growers, Inc., alleging discrimination against more than 600 U.S. workers by systematically firing workers over the course of three years, subjecting U.S. workers to disparate terms and conditions of work as compared to the H-2A workers, and making race-based comments to the U.S. workers); *see also* NEWMAN, *supra* note 21, at 21 (listing common strategies used by employers to dissuade U.S. workers and recounting the story of two experienced female agricultural workers in Georgia who were fired for failing to meet a production standard); Garrison, Bensinger, & Singer-Vine, *supra* note 55 (discussing Hamilton Growers case along with other anecdotes of employers intentionally attempting to avoid hiring U.S. workers).

57. 20 C.F.R. § 655.122(*l*).

as it is known.[58] The AEWR is set annually on a state-by-state basis; for 2018, the AEWR varied between $10.46 and $14.37 per hour, depending on the state.[59] Employers are permitted to pay workers on a piece rate,[60] but must ensure that the effective hourly rate is at least as high as what would otherwise be required under the regulations, including supplementing a worker's earnings if it falls below such a threshold.[61]

In addition to a base level of pay per hour, the regulations also contemplate a base level of pay for the entire contract period. A provision of the regulations known as the "three-fourths guarantee" requires an employer to "guarantee to offer" at least three-fourths of the hours contemplated by the work contract (generally, the "work contract" is the job order submitted to U.S. DOL), beginning on the first workday after the employee arrives to the worksite, and running through the end date of the period of need specified on the contract.[62] In the event the employer fails to meet this guarantee, she must supplement a worker's pay such that the total pay equals what the worker would have earned had he actually been offered all of the required hours.[63] There are circumstances under which the guarantee would not apply, however. It would not apply in the event an H-2A worker is displaced pursuant to the fifty percent rule, discussed in the following section.

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58. *See* NEWMAN, *supra* note 21, at 15 ("In most cases, the AEWR is the highest rate."). The method for calculating the AEWR has been criticized as resulting in an artificially low wage rate that does not meet the stated purpose of ensuring U.S. workers are not adversely affected by the set wage. This is so, at least in part, because the surveys used to determine the AEWR each year take into account the rate at which undocumented workers are paid, which tends to be lower than the pay rate of workers who are citizens or otherwise authorized to work in the United States. *Id*. ("wage levels are based on surveys of wage rates that are depressed because they include earnings of undocumented workers, not just U.S. workers"); *see also* Lee, *supra* note 38, at 10–11 (discussing the wage depression that affects the AEWR due, in part, to the large proportion of undocumented people employed in the agricultural industry); *see also* S. POVERTY LAW CTR., *supra* note 10, at 21 (same). Beyond the amount of the AEWR itself, advocates have also raised concerns that U.S. DOL is using the improper wage rate entirely: a group of farmworkers and a farmworker union very recently filed a lawsuit against U.S. DOL, asserting that the agency improperly approved job orders using the AEWR as the wage rate when the prevailing wage rate was much higher and should have been used instead. *See* Press Release, Pub. Citizen, Department of Labor is Sued over Improper Approval of Wages for Migrant Farm Workers (Aug. 23, 2018), https://www.citizen.org/media/press-releases/department-labor-sued-over-improper-approval-wages-migrant-farm-workers [https://perma.cc/TML9-KC2B] (announcing challenge to wage approvals for jobs in Montana, Nebraska, Nevada, North Dakota, and South Carolina, and noting that some of the wage approvals at the AEWR were nearly $15 per hour less than the prevailing wage for the given job).

59. *FY 2018 Adverse Effect Wage Rates*, OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, https://www.foreignlaborcert.doleta.gov/pdf/AEWR/AEWR_Map_2018.pdf [https://perma.cc/TWK5-93F3] (last visited May 16, 2018).

60. Commonly used in agriculture, a piece rate is a pay rate based on the quantity of certain units produced, e.g., buckets, barrels, or pounds of produce picked.

61. § 655.122(*l*)(2).

62. § 655.122(i)(1).

63. *See* § 655.122(i)(1)(iv) ("If during the total work contract period the employer affords the U.S. or H-2A worker less employment than that required under this paragraph, the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days.").

Additionally, there is a general "Act of God" defense that would modify the guarantee to only cover the period until performance of the work contract becomes impossible.[64]

Employers are also generally required to cover a worker's transportation costs. Specifically, employers are required to either advance "transportation and subsistence" costs to H-2A workers, covering travel "from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment," or must reimburse workers such costs by halfway through the contract.[65] With respect to return costs, when the worker completes the contract period or if he is terminated without cause and lacks any immediate subsequent H-2A employment, the employer must pay for the worker's transportation from the place of employment to the place from which the worker originally departed to work for the employer.[66] In addition, the employer is to provide free transportation from worker housing to the job site.[67]

An employer is also required to cover all expenses related to applying for and securing H-2A workers and is prohibited from passing on those costs to the H-2A workers.[68] Specifically, employers are required to assure that they and their agents have not "sought or received payment . . . for any activity related to obtaining H-2A labor certification," which explicitly includes the following items: "the employer's attorneys' fees, application fees, or recruitment costs."[69] Moreover, the term "payment" is defined broadly and covers, but is not limited to, "monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor."[70] Employers are also required to forbid any contractor or recruiter with whom the employer

64. § 655.122(o) ("In the event of such termination of a contract [due to impossibility], the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination[.]").

65. § 655.122(h)(1). Though the regulations specify the halfway-point of the contract as being the deadline by which to reimburse workers, certain courts have interpreted the Fair Labor Standards Act ("FLSA") as imposing a requirement that they be reimbursed in the first week of work in certain circumstances, holding that pre-arrival expenses are de facto deductions that must be reimbursed in the first week to the point they raise a worker's earnings to at least equal the minimum wage. *See, e.g.*, Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1231–32, 1237 (11th Cir. 2002) (FLSA requires employer to reimburse H-2A workers for "transportation, visa, and immigration expenses" in the first workweek). The H-2A regulations make particular note of the fact that the FLSA may impose additional, independent requirements on employers, thus providing support for a separate theory of recovery under federal law. *See* § 655.135(e) ("H-2A employers may also be subject to the FLSA. The FLSA operates independently of the H-2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage, and the payment of overtime.").

66. § 655.122(h)(2).

67. § 655.122(h)(3).

68. § 655.135(j).

69. *Id.*

70. *Id.*

works from seeking or receiving payment either directly or indirectly from prospective employees.[71] In short, it is clear: the H-2A workers are not supposed to cover any costs or pay any fees related to their H-2A visa.

Workers must also be provided with free housing that meets certain federal housing standards,[72] and employers are required to carry workers' compensation insurance.[73] While the latter requirement may not appear particularly onerous, it is a marked change in states that rely heavily on H-2A workers, as many states—particularly in the south—generally exempt agricultural work from their state workers' compensation system,[74] a legacy of the exclusion of primarily African American-dominated industries from New Deal-era labor protections.[75] As a result, this requirement in fact represents an additional protection for H-2A workers, as compared to U.S. workers in such states.

b. The True Intended Beneficiaries of the Substantive Protections

The scope of the regulations outlined above may lead one to believe that H-2A workers benefit from a robust set of labor protections. Indeed, some of the rights provided to them via regulation go above and beyond what similarly situated U.S. workers are guaranteed, such as the applicable minimum wage rate and the requirement of workers' compensation coverage. However, a closer look at the entirety of the regulatory framework—and the way some courts have treated it—reveals that U.S. workers, not H-2A workers, are the intended beneficiaries of this system. This further cements H-2A workers' status as outsiders to the program.

To begin, the H-2A regulations themselves make this less-preferred status clear—but in discrete ways. Specifically, the regulations include a provision termed the "fifty percent rule," whereby an employer must provide employment to a "qualified, eligible U.S. worker who applies to the employer until 50 percent

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71. § 655.135(k).

72. H-2A employers "must provide housing at no cost to the H-2A workers . . . who are not reasonably able to return to their residence within the same day." § 655.122(d)(1). The housing must meet standards set forth by either the Employment and Training Administration ("ETA") or the Occupational Safety and Health Administration, depending on the date the housing was constructed. *Id.*; § 654.401. Other standards may apply in the event the employer pays for rental or public accommodations to house workers. § 655.122(d)(1)(ii).

73. § 655.122(e)(1).

74. *See Workers' Compensation*, FARMWORKER JUSTICE, https://www.farmworkerjustice.org/content/workers-compensation [https://perma.cc/Z3QD-JKG9] (last visited Oct. 23, 2017) (listing the following states as those that do not require the workers' compensation for farm labor in any circumstances: Alabama, Arkansas, Delaware, Georgia, Indiana, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Dakota, South Carolina, Tennessee, and Texas, and noting that an additional eight states limit the circumstances under which such coverage must be provided).

75. *See, e.g.*, Ontiveros, *supra* note 20, at 930 ("As an industry, our labor and employment laws have systematically excluded agricultural workers from protection. This exclusion ranges from the lack of the right to organize to differential applications of wage and hour provisions. Historical records indicate that the exclusion stemmed from the fact that slaves had primarily engaged in agricultural work and freed slaves continued to dominate that industry.").

of the period of the work contract has elapsed."[76] This regulation is in keeping with the H-2A program's stated preference for the employment of U.S. workers. However, its execution would likely be at significant cost to a displaced H-2A worker[77] because he would lose substantive rights he would otherwise be afforded. Such a worker would no longer receive the protection of the three-fourths guarantee,[78] and, while the regulations would require his employer to cover his return transportation,[79] it is not clear that they obligate the employer to reimburse any inbound travel and subsistence costs.[80] More fundamentally, the relatively high-paying job in the U.S. agricultural sector[81] that the worker anticipated completing in full would now be cut short, depriving him of the ability to earn wages for the entirety of the season.

On a broader scale, this preference has also emerged in specific efforts to enforce H-2A workers' rights. This battle played out when advocates attempted to file lawsuits in federal court on behalf of H-2A workers, asserting "an implied right of action to enforce those provisions of federal law which establish the H-2A program and impose its minimal conditions of employment."[82] Courts disagreed, based in part "on the rationale that the H-2A statute and regulations were *not* 'intended to especially benefit alien workers . . . [but,] rather, their stated purpose is to protect the jobs of United States citizens.'"[83] Thus, the H-2A regulations, on their own, do not provide any free-standing enforceable rights for those

76. § 655.135(d).

77. Given the dramatic increase in the use of the H-2A program and employers' efforts to turn away U.S. workers, *see supra* notes 28–29 & 55–56 and accompanying text, displaced H-2A workers are probably few and far between. Regardless, the way in which the regulations would operate in this situation is clear.

78. § 655.122(i)(4) ("The employer is not liable for payment of the three-fourths guarantee to an H–2A worker whom the CO certifies is displaced because of the employer's compliance with the 50 percent rule[.]").

79. § 655.122(h)(2) ("The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H-2A worker is displaced as a result of the employer's compliance with the 50 percent rule . . . with respect to the referrals made after the employer's date of need.").

80. Unlike the outbound transportation regulation, *id.*, the inbound transportation regulation contains no provision about what would occur in the event an H-2A worker were to be displaced by a U.S. worker, *see* § 655.122(h)(1). It is arguably not even triggered, as the regulation, in theory, only obligates the employer to reimburse once the halfway-point of the contract is reached, *see id.*, and any situation with possible displacement of H-2A workers would occur before that halfway point, § 655.135(d). Of course, there may be freestanding obligations under the FLSA, as discussed above. *See supra* note 65.

81. *See infra* note 104 and accompanying text.

82. Holley, *supra* note 20, at 606.

83. *Id.* (alteration in original) (quoting *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638, 641 (9th Cir. 1984)).

workers.[84] As one observer has commented, "the protection afforded to H-2A workers by these rights was incidental, rather than intentional."[85]

In sum, though the H-2A program is characterized by a relatively robust regulatory scheme, this framework does not exist for the benefit of H-2A workers. Indeed, the flaws are inherent to the system: the H-2A program is "intended to achieve the dual and potentially conflicting goals of meeting employers' temporary labor needs while protecting the interests of U.S. workers."[86] Guaranteeing the labor and employment rights of the H-2A workers actually filling these jobs is omitted entirely from this set of priorities, perhaps unsurprisingly, given their outsider status. In the following section, I show how the failure to protect H-2A workers also extends to the operation of the regulatory scheme in practice.

c. The Utter Failure of the Substantive Protections

Despite the breadth of the regulatory framework, mistreatment of H-2A workers is widespread. For each protection outlined above, there is abundant evidence of non-compliance among H-2A employers. I briefly highlight some of these issues below.[87]

First, underpayment of H-2A workers is rampant. This is due to several factors. One factor is the use of piece rate pay. Employers generally prefer to pay by the piece because it is believed to "encourage[] workers to work faster than they would under an hourly rate and produce more for the employer."[88] While piece rate pay is permissible, so long as the employer also ensures compliance with the applicable minimum hourly rate,[89] sometimes workers are forced to turn over their

84. As I explain below, this does not mean there is no legal remedy; the mechanism for enforcing such rights is a state law breach of contract claim, but this approach has the significant downside of leaving workers to file suit in a likely unfavorable state forum, absent any other federal claim. *See infra* notes 217–18 and accompanying text.

85. Holley, *supra* note 20, at 607.

86. Smith, *supra* note 22, at 382. While the goals are conflicting, it is worth noting that advocates filing claims on behalf of H-2A workers may seek to generate more favor among judicial and even general audiences by emphasizing the U.S. worker goal in particular. Specifically, they may paint the employer as law-evading not just for failing the H-2A workers, but also for failing the U.S. workers the employer is theoretically supposed to seek to employ as an initial matter. *Cf.* Jennifer J. Lee, *Outsiders Looking in: Advancing the Immigrant Worker Movement Through Strategic Mainstreaming*, 2014 UTAH L. REV. 1063, 1076 ("Litigants may be more successful if they advocate policy justifications that consider the impact on workers generally, rather than just on the litigants before the court. Courts, for example, rationalize that denying wage and hour protections for immigrant workers has the perverse result of harming citizen workers by encouraging employers to engage in illegal hiring of unauthorized workers, contrary to IRCA.").

87. For a more in-depth discussion of the abuses in the H-2A program, see, for example, NEWMAN, *supra* note 21, at 20–31 (detailing the abuses of the H-2A program specifically); S. POVERTY LAW CTR., *supra* note 10, at 9–41 (in depth discussion of abuses in both H-2A and H-2B guestworker programs); Smith, *supra* note 22, at 385–93 (same).

88. *See* NEWMAN, *supra* note 21, at 24.

89. *See supra* note 61 and accompanying text.

supplemental pay to a crew leader or supervisor as a kickback.[90] More often, employers fail to supplement the piece rate at all and simply cover their tracks. Instead of recording the actual hours worked by the H-2A workers, employers back into the "hours worked" by dividing the total actual pay by the mandated hourly wage and documenting the result as the number of hours that were supposedly worked.[91] By doing so, employers seek to create a plausible defense in the event of complaints of underpayment, including enforcement through U.S. DOL investigations or private litigation.

Workers also experience wage theft in other ways. Employers often unlawfully deduct from workers' wages for items that the employer is legally supposed to provide, such as work tools or transportation costs,[92] the latter of which is a foreseeable expense for every H-2A job, given that H-2A workers necessarily migrate to and from their homes in other countries. These violations are common with transportation costs: in one study, based on interviews of several hundred Mexican H-2A workers, 62% of the workers reported having to pay some or all of their own transportation expenses.[93] Moreover, many H-2A workers are charged unlawful "visa" or recruitment fees. Such fees are typically charged by recruiters before workers depart for the United States; knowing that the supply of would-be H-2A workers exceeds the demand, "recruiters have a significant incentive to charge recruiting fees at great personal profit."[94] Workers' acceptance of this situation is not entirely irrational: as one scholar has noted, "[d]espite the high costs, guestworkers come to the U.S. because they believe they will make sufficient money to cover any expenses and still earn money for themselves and their families."[95] To further compound the problem, many workers take out loans in their home country to pay for travel or other job-related expenses, and these unlawful

90. *See* NEWMAN, *supra* note 21, at 24–25.

91. *See id.* at 25; *see also* S. POVERTY LAW CTR., *supra* note 10, at 18 (noting the "underreporting of hours" as an overt form of wage theft). I have also seen employers use this practice numerous times in my past cases.

92. *See* S. POVERTY LAW CTR., *supra* note 10, at 18 ("According to the law, employers must cover the costs of items that principally benefit the employer, such as work tools, safety equipment, and – in most parts of the country – workers' travel and visa expenses to come to the United States. Yet, employers routinely fail to reimburse workers for their travel and visa expenses, and they frequently make deductions from workers' paychecks for items that are for the benefit of the employer.").

93. JORNALEROS SAFE, MEXICAN H-2A FARMWORKERS IN THE U.S.: THE INVISIBLE WORKFORCE 11 (2013), https://static1.squarespace.com/static/57d09e5c5016e1b4f21c9bd3/t/58c32e7cebbd1a93b1805532/1489186429991/EXECUTIVE+SUMMARY+Jornaleros+SAFE.pdf [https://perma.cc/NU4G-W5SP].

94. NEWMAN, *supra* note 21, at 22; *see also* Smith, *supra* note 22, at 378 (noting that employers "can select from a nearly limitless supply of temporary foreign employees").

95. Smith, *supra* note 22, at 386.

charges simply put them deeper into debt.[96] H-2A workers are thus left in a financially precarious position, rendering them particularly vulnerable to mistreatment and abuse.

Non-compliance is also common outside of the core financial protections. Workers are often provided with substandard and dangerous housing.[97] One report has criticized this situation as being the result of "a tangled mass of state and federal regulations and agencies [that] holds authority over farmworker housing," making it possible that "deplorable [housing] conditions . . . go unnoticed."[98] With respect to workers' compensation, even if a worker receives medical treatment while in the United States, it can be nearly impossible for injured workers to access benefits once they have returned home.[99] And this all falls against the backdrop of one of the most dangerous industries in which to labor, the agricultural industry.[100]

In short, for almost every regulation that is meant to protect H-2A workers, one is just as likely to find widespread employer evasion or violation of the regulation and the mistreatment of workers. But, in reality, the harms extend even further. As one scholar has observed, many of the abuses experienced by H-2A workers do not give rise to legally actionable claims because the regulatory framework does not address common abusive practices such as intimidating or threatening workers.[101] Moreover, for certain types of violations—for example, substandard housing—the remedy lies exclusively or more naturally with the government, as private litigants cannot enforce housing codes and it would be difficult to compute damages for such legal violations. These obvious gaps reinforce the outsider status of H-2A workers—workers whose rights are arguably protected, though not with

96. *See, e.g.*, *id.* at 386 (despite prohibition on charging H-2A workers recruitment fees and for costs associated with obtaining labor certification, employers and recruiters nevertheless "sometimes charge unlawful fees and put guestworkers further into debt"); *see also* NEWMAN, *supra* note 21, at 23 (noting that some workers leave deeds to homes or cars as collateral in sending countries to ensure that they comply with the terms of their contract); S. POVERTY LAW CTR., *supra* note 10, at 9 (same).

97. *See, e.g.*, NEWMAN, *supra* note 21, at 28–30 (detailing the often poor housing conditions, which H-2A workers frequently describe as "dirty, cramped, unsanitary, or pest-ridden—and sometimes all of the above"); S. POVERTY LAW CTR., *supra* note 10, at 35.

98. NEWMAN, *supra* note 21, at 29.

99. *See* S. POVERTY LAW CTR., *supra* note 10, at 25–26 (explaining that H-2A workers, despite the requirement that their employers carry workers' compensation coverage, cannot practically access such coverage when they depart the United States because, among other reasons, the regulations contain no requirement of ongoing coverage, insurance companies may explicitly cut off benefits when a worker leaves the country, and some states require examining physicians to be in the state where the injury occurred or the worker to appear in-person at any hearings before the state workers' compensation body).

100. *See* NEWMAN, *supra* note 21, at 27–28 (noting that "crop production workers had a fatal injury rate nearly ten times the average rate for all industries," and that the non-fatal injury rate for crop production workers was 4.9 for every 100 workers).

101. *See* Lee, *supra* note 38, at 17–18 ("Even an employer's more egregious acts, such as intimidating workers, denying medical care, or threatening workers, generally cannot be reached under the [U.S. DOL] complaint process because there are no specific regulatory provisions that address these issues.").

any intent to benefit them and with little hope those protections will be met, and who face further hurdles to obtaining any legal recourse. In the following section, I turn to a more in-depth discussion of this final point: the numerous and substantial barriers to achieving remedies for violations of H-2A workers' rights.

B. Rights with Limited Remedies: H-2A Workers' Difficulty in Accessing Justice

With the above background on the H-2A program and its inherent flaws in mind, I now turn to the second part of the broader problem of employment-related abuses experienced by H-2A workers: the structural barriers they will face should they attempt to redress those wrongs. In general, these factors can be divided into two categories. First, I discuss the hurdles that are imposed by the very terms of the workers' H-2A visas, including their limited and isolated physical presence in the United States and the problems that result from the lack of visa portability imposed by the H-2A program. Second, I turn to the narrowing of the remedies available to workers due to weak government enforcement of the H-2A regulations, which necessitates turning to civil litigation as a legal remedy, but which itself is further constrained by restrictions imposed on the workers' right to counsel.

1. Boxed in and Boxed out by the Visa Itself

The very legal framework that brings H-2A workers to this country has pernicious effects on their ability to access justice, both during their time as H-2A workers and thereafter. H-2A workers are, in effect, both boxed in and boxed out by the terms under which their presence in this country is permitted: they are constrained to only working for one employer while here, in largely isolated and rural settings, and face significant disincentives from taking legal action even when they are no longer physically present in the country.

I have already referenced the fact that H-2A workers lack visa portability—in other words, the ability to change employers while in the United States on an H-2A visa.[102] This lack of mobility has significant consequences on the dynamics between H-2A workers and their employers. A worker does not realistically have the choice of going to work elsewhere if he does not like his current job.[103] Instead, the choice is more often between staying put in the job he has now, regardless of how bad the conditions are, or going back home, where his earnings are likely significantly lower[104] than even unlawfully low earnings in the United

102. *See supra* note 37 and accompanying text.

103. In this way, the three common options faced by a worker who encounters problems in the workplace—exit, voice, and loyalty—are modified in the circumstances of an H-2A worker. Thus, "exit" is not just "the option to take one's labor elsewhere," but more likely than not is the option of leaving for good and potentially having nowhere else to go. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1075 (2014) (discussing Albert Hirschman's "exit, voice, and loyalty" theory).

104. *See* Charlotte S. Alexander, *Explaining Peripheral Labor: A Poultry Industry Case Study*, 33 BERKELEY J. EMP. & LAB. L. 353, 377 (2012) (noting that, though immigrant workers generally

States.[105] What's more, this so-called choice might be taken away at a moment's notice: because the employer holds the "deportation card," "[a]t any moment, the employer can fire the worker, call the government and declare the worker to be 'illegal.'"[106] One scholar has even argued that the lack of visa portability and the concomitant power wielded by the employer means that H-2A workers "work in a state of involuntary servitude," in violation of the Thirteenth Amendment.[107]

As a result of this situation, H-2A workers are particularly vulnerable to retaliation should they choose to speak out about any mistreatment.[108] As one worker has explained with respect to a situation in which an employer demanded kickbacks from H-2A workers: "Many people wanted to complain but they were afraid . . . to have to [go] back to Mexico."[109] Similarly, a longtime advocate has commented that "[t]he only time H-2A workers freely express their feelings about their experiences is when they are no longer H-2A workers and have no need to be."[110] But the consequences of retaliation are not limited to this initial moment—rather, they are ongoing and widespread. An employer can blacklist a complaining worker by refusing to offer a visa for the same job in a subsequent season.[111] In the past, employers have done so on a large scale: the North Carolina Growers

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are aware of their poor working conditions, "the options and opportunities at home are often significantly worse," with "the average minimum wage for non-professional occupations in Mexico [being] the equivalent of roughly $4.68 *per day*" and "the minimum wage in Guatemala [being] the equivalent of roughly $8.75 *per day*").

105. To that end, the "voice" option discussed above, *see supra* note 103, is similarly unrealistic. *See* Hall, *supra* note 10, at 534 ("When they can no longer tolerate the conditions, most H-2A workers will 'vote with their feet' and leave silently rather than complain."); *cf.* Alexander & Prasad, *supra* note 103, at 1090–91 (summarizing findings that "less powerful and economically stable workers appear less likely to engage in claiming behavior" and that "[w]orkers who [have] held their job for fewer than twelve months [are] also less likely to have made a claim about a workplace problem during that time").

106. S. POVERTY LAW CTR., *supra* note 10, at 14.

107. Ontiveros, *supra* note 20, at 927; *see also id.* at 938 (arguing that the Thirteenth Amendment enshrined a "freedom to quit" a job, which is violated by guestworkers' inability to "stay for the length of the visa even if they quit or their employer fires them").

108. Notably, the risk of retaliation is not misperceived—workers have experienced or witnessed retaliation and thus are informed when they seek to avoid it. *See* Alexander & Prasad, *supra* note 103, at 1098 (explaining that low-wage workers surveyed in a large-scale study did not complain about legal problems because "they feared retaliation or doubted the efficacy of claims making," and that "these beliefs were rational" given that approximately 43% of workers experienced retaliation for a past claim they had made and 14% of workers witnessed a coworker being retaliated against).

109. *See* NEWMAN, *supra* note 21, at 24 (alteration in original).

110. Hall, *supra* note 10, at 523; *cf.* David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 83–84 (2005) (noting that workers often take legal action after they are no longer employed with the particular employer, "thereby lowering the cost of complaining at that point").

111. *See, e.g.*, NEWMAN, *supra* note 21, at 31 ("Because foreign citizens have no ability to apply independently for an H-2A visa, they must hope that an employer will request a visa for them. Employers have been able to retaliate against H-2A workers who assert themselves simply by refusing to offer visas to the workers in a following season.").

Association infamously maintained a blacklist of over 1000 workers, euphemistically entitled the "Ineligible for Rehire Report."[112] And the danger of blacklisting may not be limited to an individual "problem" worker—the entire community in the worker's sending country may be similarly barred from coming in on a visa in the future.[113] Because recruitment streams are limited,[114] the consequence of being shut out of one job in the United States realistically means that the worker, and even other members of his home community, can lose the chance of getting an H-2A visa in the future.

But the terms of the visa matter not just for the negative impacts they have on the workers' freedom of choice—they also pose a very practical problem for the ability of H-2A workers to take action in the face of legal violations due to the constraints the visa places on their presence in the United States. H-2A workers are only in the United States temporarily, and, because they are here to perform agricultural labor, they tend to live in rural settings, usually in employer-provided housing isolated on employer property.[115] Moreover, H-2A workers generally work long hours, with limited free time; they take the jobs in the first place so that they can earn as much as possible to support their family back home. Even if a worker returns to the same employer year after year, thus establishing some degree of consistency over time, the same limitations are present: the worker is only in the United States for the purposes of working, resides full-time on employer property with few opportunities to leave, and is not integrated into the local community.

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112. *See* S. POVERTY LAW CTR., *supra* note 10, at 16; *see also* Hall, *supra* note 10, at 533 (explaining that a single grower of the nearly 1,000 members of the Association could add a worker to the blacklist, thereby foreclosing employment opportunities with all of the members in future years); Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 43 (2012) ("The North Carolina Growers' Association, for example, maintained a blacklist of H-2A workers who were barred from rehire for the following season because they had complained about job conditions, such as the inability to access drinking water in the fields.").

113. *See* Smith, *supra* note 22, at 393 ("Blacklisting in particular is a threat sometimes turned on a guestworker's entire community if they complain or seek to improve their working conditions.").

114. In other words, sending communities often have ties to a single employer in the United States or a very particular industry. This means that workers in sending countries seeking to migrate to the United States have very limited (if any) chances for obtaining an H-2A visa. *See* Gordon, *supra* note 51, at 457–58 (noting that, unlike recruiting undocumented workers, which can happen at a local level and through word-of-mouth among existing worker networks, recruiting H-2A and H-2B workers necessitates the use of foreign intermediary recruiters that have ties in specific communities in sending countries); *see also* Jessica Garrison, Ken Bensinger, & Jeremy Singer-Vine, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS (July 24, 2015, 10:47 AM), https://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f?utm_term=.svKn3lNNV#.vv64zoxxP [https://perma.cc/39BV-4DB6] (detailing recruitment stream from Topolobampo, Sinaloa, Mexico to the Louisiana crawfish industry).

115. For a discussion on the ways in which the physical isolation of living in employer-controlled housing interrelates with and contributes to other forms of isolation, leaving workers even more vulnerable, see Smith, *supra* note 22, at 389–91.

What does this isolation mean for accessing the U.S. legal system in the event H-2A workers experience violations of their rights? As a starting point, they are much less likely to encounter actors who would help them engage with the legal system.[116] Legal services offices and other advocacy groups often conduct worker outreach to inform workers of their rights and the services that their organizations offer. However, both aspects of the H-2A workers' physical presence in the United States mentioned above—the temporariness of that presence and the isolated nature of that presence—make the task of establishing connections between legal advocates and workers much more difficult. H-2A workers can be hard to locate in rural settings,[117] and it can be time-consuming to conduct outreach to significant numbers of workers.[118] To complicate things even further, outreach workers often search for H-2A workers at their residences, but because these are on employer property, employers may encounter the outreach workers and, finding their message about worker rights to be undesirable, kick them out, often under threat of calling law enforcement.[119] The very ability to reach workers directly is limited,

116. Most recent immigrant worker advocacy efforts have tended to take place in urban settings, providing an ease of access that is simply not available for H-2A workers. *See* Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2143 n.41 (2007) ("[A]ll of these stories take place in large cities that offer non-profit organizations many potential forms of legal support, including well-developed pro bono programs in the private bar, numerous law school clinics, and both publicly- and privately-funded legal services organizations. Organizations in rural areas or smaller cities are likely to have a much more constrained set of options for representation.").

117. Though H-2A employers must disclose the location of worker housing on the job order they file with the U.S. government, *see* ETA FORM 790, *supra* note 40 (box 3), which is made publicly available through the public job registry, *see Welcome to the iCERT Visa Portal System*, U.S. DEP'T OF LABOR, EMP'T & TRAINING ADMIN., https://icert.doleta.gov/ [https://perma.cc/Q4YM-39NZ] (updated June 30, 2018), in my experience, it is not uncommon for the housing information to be incorrect, overly broad, or even misleading, rendering the job of outreach workers seeking to meet with H-2A workers all the more difficult, if not impossible. Moreover, the job order similarly requires disclosure of the anticipated period of employment, *see* ETA FORM 790, *supra* note 40 (box 9), but workers often arrive after the given start date, due to delays on either end, such as crop readiness issues or complications encountered during worker migration into the United States. Such uncertainty further complicates outreach, because outreach workers may plan to visit a farm just after the anticipated start date, particularly if the season is short, expecting workers to have arrived, when they may not actually be at the farm yet.

118. The number of H-2A workers at any given farm can vary substantially depending on the region and the industry. I have observed that the tobacco industry in Kentucky tends to employ fewer H-2A workers per farm—less than a dozen workers is not uncommon, with some even significantly less than that—than, for example, the large multi-crop farms in Georgia or the citrus industry in Florida, which can have hundreds of workers per farm. Outreach in the former circumstance thus requires more time and effort to reach the same number of workers than in the latter.

119. *See* Letter from Human Rights Project, Legal Aid Bureau, Inc., to Magdalena Sepulveda Carmona, Special Rapporteur on Extreme Poverty & Human Rights, United Nations Office of the High Comm'r for Human Rights (Dec. 13, 2012), http://www.mdlab.org/human-rights-docs/Migrant-Farmworker-Camp-Access-Human-Rights-Complaint-Dec-13-2012.pdf [https://perma.cc/NUY7-RYZ5] (documenting the widespread migrant camp access issues experienced by U.S. legal services, healthcare, and community service organizations); *see also* Hall, *supra* note 10, at 533–34 (recounting efforts of the North Carolina Grower's Association to proactively discredit legal services providers during the orientation of H-2A workers arriving in North Carolina).

and so it is likely that the vast number of workers go without direct contact with advocates.

In short, the rules under which H-2A workers must operate constrain their ability to take action. They risk serious consequences for speaking up, due to their lack of visa portability, and they encounter significant practical hurdles in even reaching legal advocates. In the event they do choose to take action, they also face hurdles in their options for legal remedies. I turn to this additional structural problem next.

2. The Need to Turn to Self-Help, and the Limitations on It

The first line of defense against the legal violations experienced by H-2A workers should be the administrator of the program itself, the U.S. government. Unfortunately, turning to government agencies for legal help is not a practical solution for H-2A workers.

As a primary matter, enforcement agencies, particularly within U.S. DOL, are woefully ineffective at enforcing the rules of the H-2A program. This is evident at the beginning of the process. As I noted above, many employers have been approved to participate in the program by U.S. DOL despite failing to make the required good faith efforts at recruiting U.S. workers.[120] However, the unjustified approval problem is even worse than that; it is well-documented that U.S. DOL continues to approve employers' applications to bring in H-2A workers even when they have been found to violate H-2A regulations in the past.[121] In the unlikely event that U.S. DOL actually takes the step of debarring—or temporarily banning—an employer from the H-2A program due to violations of regulations,[122] it

120. *See supra* notes 55–56 and accompanying text.

121. *See* S. POVERTY LAW CTR., *supra* note 10, at 38–40 (summarizing inaction by U.S. DOL in the face of employer violations, including a critique made by the Office of the Inspector General about the failure to suspend employers from participating in the program); *see also* Ken Bensinger, Jessica Garrison, & Jeremy Singer-Vine, *Employers Abuse Foreign Workers. U.S. Says, By All Means, Hire More.*, BUZZFEED NEWS (May 12, 2016, 3:06 PM), https://www.buzzfeed.com/kenbensinger/the-pushovers?utm_term=.rlPx2A99N#.siBLGmgg9 [https://perma.cc/PX5W-8BQ7] (detailing numerous examples of U.S. DOL's continued authorization of employer applications after grave incidents of worker abuse and explaining the bureaucratic hurdles within U.S. DOL that lead to few instances where employers are banned from guestworker programs).

122. *See* 29 C.F.R. § 501.20(a) (2018) (allowing for debarment of "an employer or any successor in interest to that employer" for a period of up to three years). In the past, very few employers were debarred. *See* S. POVERTY LAW CTR., *supra* note 10, at 39 (noting that, from approximately 2011 to 2013, U.S. DOL debarred only twenty-two H-2A employers). In more recent years, there has been an increase in the number of debarred employers. *See* OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, PROGRAM DEBARMENTS (2018), https://www.foreignlaborcert.doleta.gov/pdf/Debarment_List_Revisions.pdf [https://perma.cc/X42L-QPSL] (last visited Aug. 26, 2018) (displaying thirty-one H-2A employers on the list of temporary labor certification debarments, of a total of forty-seven listed debarment actions taken against H-2A employers, agents, and labor contractors). Given that proportionally few employers are even investigated and even fewer are found to violate regulations to begin with, *see infra* notes 128–31 and accompanying text, the fact that so few employers with violations are being debarred truly shows the extent of the repeat violator problem.

is not difficult for the employer to get around the prohibition, as it can file an application under a new entity or individual's name or address, thereby evading any suspicion and easily obtaining approval to import more workers.[123] Because different units within U.S. DOL are involved at different stages within the H-2A process, the problem is often a lack of inter-agency coordination. Specifically, it is the Wage and Hour Division ("WHD") that conducts any investigations into regulatory compliance and would have the authority to penalize employers, including debarring them,[124] but it is the Employment and Training Administration ("ETA") that reviews and approves new applications by employers.[125] When one also considers that DHS and the State Department, via its consulates and embassies, play roles in approving the visas for workers (after U.S. DOL certifies the employer's job order), the problem grows in magnitude. It is not simply that a few bad employers are slipping through the cracks—the government is leaving the door wide open for them.

Once problems have occurred, U.S. DOL is similarly ill-equipped to remedy the legal violations. As a general matter, the availability of government resources for enforcing the labor and employment rights of workers in the United States has declined over several decades.[126] While there was an increase in resources during the Obama administration,[127] the results of the increase in terms of enforcement action were mixed. An analysis conducted by the advocacy group Farmworker Justice of data related to WHD enforcement actions between 2005 and 2008, during the Bush administration, and between 2010 and 2013, during the Obama administration, found a slight decline in the number of agricultural investigations during the latter time period.[128] While the number of hours spent on cases and the

123. *See* Bensinger, Garrison, & Singer-Vine, *supra* note 121 ("The few companies that do get debarred often seem to view it as little more than a minor nuisance. Agency rules make it easy for debarred companies to simply reinvent themselves, filling out new visa requests under a different name or address, and quickly winning agency approval to bring in more workers.").

124. *See* 29 C.F.R. § 501.20(a) (giving authority to the WHD Administrator to debar employers pursuant to this regulation).

125. *See* 20 C.F.R. §§ 655.130, 655.103(b) (providing that the ETA-790 form is to be filed with the National Processing Center, and defining the National Processing Center as being a subunit of the Office of Foreign Labor Certification ("OFLC"), itself a branch of ETA).

126. *See* S. POVERTY LAW CTR., *supra* note 10, at 38 (citing 14% decline in wage and hour investigators from 1974 to 2004, but an increase from 56.6 million to 87.7 million workers whose rights are protected by the FLSA during that same time period); *see also* Weil & Pyles, *supra* note 110, at 62 (at WHD, 14% decline in wage an hour investigators and 55% growth in workers covered during the same time period).

127. In 2009, WHD increased its number of investigators by nearly one third, making 250 new hires. *See* Press Release, U.S. Dep't of Labor, Statement by US Secretary of Labor Hilda L. Solis on Wage and Hour Division's Increased Enforcement and Outreach Efforts (Nov. 19, 2009), https://www.dol.gov/opa/media/press/whd/whd20091452.htm [https://perma.cc/PR4U-VYHZ].

128. FARMWORKER JUSTICE, U.S. DEPARTMENT OF LABOR ENFORCEMENT IN AGRICULTURE: MORE MUST BE DONE TO PROTECT FARMWORKERS DESPITE RECENT IMPROVEMENTS 3 (2015), https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport2015%20%281%29.pdf [https://perma.cc/T7XS-9KR8] (noting 6125 cases during the final four years of the Bush administration and 6119 during the four-year sample of the Obama administration).

amount of wages and penalties assessed against employers increased during the Obama administration,[129] particularly with respect to investigations into H-2A employers,[130] the fact remains that the vast majority of employers are not investigated and are left free to conduct business as usual.[131]

Moreover, even in cases where U.S. DOL does engage in enforcement activity, there are still significant problems. First of all, the very structure of the administrative remedies in place to address problems within the H-2A program renders them largely one-sided. As one observer analyzed in detail, the mechanisms in place to address violations experienced by H-2A workers leave considerable room for discretion on the part of investigators, while any employer who files a complaint about issues they experience during the process of applying for H-2A workers, or the results of any WHD investigations, are provided with much greater protections than the workers themselves.[132] In short:

> [U.S. DOL's] regulations do not treat H-2A workers nearly as well as their employers. Under these regulations, an aggrieved grower has the right to a reasoned decision from the [Administrative Law Judge] within a definite, and frequently very brief, time period. In contrast, an aggrieved H-2A worker is free to make a complaint to [U.S. DOL], but is not even entitled to a report on the status of that complaint.[133]

To complicate the enforcement situation even further, because H-2A workers are present in the United States for only a short period of time, their ability to participate in a U.S. DOL investigation is greatly diminished. Based on my experience interacting with investigators, U.S. DOL does not appear to have a sufficient mechanism to allow H-2A workers to either initiate or participate in an investigation from abroad—most investigators are used to conducting interviews with workers in-person at the place of employment, and deviations from that procedure are rare.[134] At the back end, I have seen further bureaucratic problems:

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129. *Id.* at 4 (in agricultural investigations as a whole, a 41.2% increase in case hours, 219.1% increase in assessed penalties, and 127.4% increase in assessed back wages).

130. *Id.* at 9 (finding a 113% increase in investigations under the H-2A program, a 236.4% increase in case hours, a 1104.3% increase in penalties assessed, and a 95.1% increase in H-2A cases with violations). As the report notes, however, it's likely that part of the increase was simply due to the increase in the H-2A program's use during the relevant time periods. *Id.* at 8 ("Over the eight years under consideration (2005-2013), usage of the H-2A program grew, from 48,336 agricultural positions certified to 98,813, an increase of 104%. Increased enforcement activity over this time period may correlate at least partially to the program's robust expansion.").

131. *Id.* at 5 (noting that, during the four years of the Obama administration at issue, there were approximately 566,469 farms employing farmworkers, but only 6119 investigations).

132. *See* Holley, *supra* note 20, at 598–603. Some of the regulatory provisions cited by Holley have been modified slightly, or re-numbered, but the substance remains largely the same.

133. *Id.* at 603.

134. My experience has been that some WHD investigators are willing to attempt to communicate with workers by phone when they are back home, but this is certainly not the norm. Even in one case in which an investigator spoke to a worker back in his home country, this was only able to

even if the investigation has a positive outcome and U.S. DOL finds that workers are owed wages, there are enormous hurdles in sending those funds to workers in their home countries. The standard method of notifying workers that wages have been recovered on their behalf—sending notice by mail and having the worker complete a form and return it to the agency—is unlikely to be successful with H-2A workers who often live in remote villages in their home countries. Should U.S. DOL make contact, however, they would then move to the standard procedure of distributing wages: mailing a check to the workers. This is simply impractical for H-2A workers who often lack bank accounts that would enable them to do anything with a check in foreign currency. While some regional offices of U.S. DOL have been open to sending funds to workers via international bank-to-bank wire transfer, the logistics of such a task, in my experience, are enormous and often require the involvement of an advocate to go between the worker and U.S. DOL,[135] in addition to necessitating that a worker often travel long distances to a city with a bank and that he have enough funds to open an account in the first place. In short, there is currently no realistic way that a worker in his home country would be able to recover these funds by directly communicating with U.S. DOL.

Effectively shut out by government enforcement agencies, H-2A workers may turn to another option: enforcing their rights directly against their employers via civil litigation. Workers who choose such an approach also face a difficult situation. This is because H-2A workers are generally limited in terms of their options for legal counsel and the scope of representation such counsel may provide.

As an initial matter, the task of representing H-2A workers is a complicated one, as it involves representing (generally) non-English speakers who are located in rural areas and migrate to and from their homes in foreign countries. This does not render representation impossible,[136] but litigating with clients across borders is not something that many attorneys have done or are competent to do. Moreover, while federally-funded legal aid offices—formally known as grantee organizations of the Legal Services Corporation ("LSC"), the federal agency that funds

happen because I made the logistical arrangements and directly facilitated the communication via a conference call.

135. Specifically, someone assisting such a worker would have to give detailed instructions to the worker on what type of account to open (not all accounts are able to receive international wire transfers), and on the account- and bank-related information that the worker must gather in order for the transfer to be initiated. If there is some error in the transfer resulting in the funds being returned (e.g., if an account number was written incorrectly, if the account was the wrong type of account, etc.), the worker is not typically notified—apart from seeing that no money was received—and it can be a complicated process to have government officials verify that the money was returned, determine the error, and re-initiate the transfer.

136. *See, e.g.*, *infra* note 249.

legal aid—are able to represent H-2A workers, the scope of that representation is limited in two key ways.[137]

First, H-2A workers may only receive legal assistance from LSC grantee organizations if they have been "admitted to, or permitted to remain in" the United States on an H-2A visa,[138] and may only receive legal assistance on the following subjects: wages, housing, transportation, and "employment rights as provided in the worker's specific contract under which the nonimmigrant worker was admitted" to the United States.[139] While the catch-all reference to employment rights can be read broadly, and while such language may cover the scope of problems discussed in this article, it restricts LSC grantee organizations from representing workers regarding other significant problems they may experience. For example, workers who are victims of recruitment abuse or fraud in their home countries, but do not end up migrating to the United States on a visa for the promised job, are not covered by the regulation. Workers who are retaliated against by not being rehired for subsequent seasons are similarly out of luck: even if they have been H-2A workers in the past, such retaliation is forward-looking, and thus not related to a contract under which they were present in the United States. The requirement of having been admitted to the United States on an H-2A visa that relates to the legal

137. By focusing on LSC programs in this article, I do not intend to assert that *only* LSC grantee organizations represent H-2A workers. Many state-level farmworker programs are "unrestricted," meaning they are not LSC grantee organizations and are not subject to the restrictions described in this article. *See, e.g.*, *History of the Workers' Rights Project*, N.C. JUSTICE CTR., http://www.ncjustice.org/?q=workers-rights/history-workers-rights-project [https://perma.cc/2B8C-MNF2] (last visited Aug. 28, 2017) (describing litigation on behalf of H-2A and H-2B workers); *Our Projects Cross Boundaries*, FLA. LEGAL SERVS., http://floridalegal.org/our-projects/ [https://perma.cc/U7B3-HGXB] (last visited Aug. 28, 2017) (describing the Immigrant & Migrant Rights Project); *see also* LEGAL SERVS. CORP., 2017 GRANT AWARD DECISIONS, *infra* (providing a list of LSC grantee organizations, on which neither the North Carolina Justice Center nor Florida Legal Services appear). There are also regional or national groups that advocate for and have litigated on behalf of H-2A workers—for example, the Southern Poverty Law Center filed multiple class action lawsuits on behalf of H-2A workers in the mid-2000s. *See* S. POVERTY LAW CTR., *supra* note 10, at 20. Nevertheless, the LSC restrictions discussed below, *see infra* note 144 and accompanying text, are important to consider because of the sheer breadth of LSC grantee organizations. LSC is the largest funder of civil legal services in the United States. *See Who We Are*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/who-we-are [https://perma.cc/EG6K-WEQB] (last visited Aug. 28, 2017). There are over 800 LSC grantee offices nationwide. *See Quick Facts*, LEGAL SERVS. CORP., https://www.lsc.gov/quick-facts [https://perma.cc/HHJ3-2WF5] (last visited Aug. 28, 2017). Moreover, LSC dedicates specific grants to serving agricultural workers in particular. *See Basic Field Grant*, LEGAL SERVS. CORP., https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant [https://perma.cc/YZ5B-UZWR] (last visited Aug. 28, 2017). For a state-by-state breakdown of grant awards for 2017, including the agricultural worker grants, see LEGAL SERVS. CORP., 2017 GRANT AWARD DECISIONS, https://lsc-live.box.com/shared/static/d9laahldv6jucmkgopuc3ko59j0f5fix.pdf [https://perma.cc/T27C-4365].

138. 45 C.F.R. § 1626.11(a) (2017).

139. § 1626.11(c).

problems the worker experienced, therefore, operates to bar numerous individuals from accessing legal representation.[140]

Notably, recent proposed legislation would dramatically expand the restrictions even further. The Better Agricultural Resources Now Act of 2017 would amend the Immigration and Nationality Act to allow LSC grantees to only represent H-2A workers if "the alien is present in the United States at the time the legal assistance is provided" and would impose an alternative dispute resolution requirement before any legal assistance can be provided to H-2A workers.[141] Given the drawn out nature of litigation, not to mention that many H-2A workers may strategically choose to contact lawyers about legal problems only after they have completed their period of employment,[142] the physical presence restriction would be a significant impediment to LSC grantees in comprehensively representing H-2A workers. The dispute resolution requirement would have a similar effect: it would be much more difficult for an H-2A worker to have a successful result in such a context without legal representation, both on the merits (i.e., failing to recognize and thus possibly waiving cognizable legal claims he may have), and in terms of navigating the process at all.[143]

More generally, the LSC regulations impose restrictions on representation across the board, regardless of the client, that would impact possible advocacy on behalf of H-2A workers. Specifically, LSC grantee organizations are prohibited from litigating class actions, organizing work, and lobbying.[144] This trio of restrictions is undeniably intentional in its effect, seeking to undermine efforts at systemic changes. The class action restriction also impedes broader legal challenges within the civil litigation context—for example, a class action lawsuit may

140. Both examples given in the text are drawn from real cases I have encountered in my time representing H-2A workers, one while at an LSC grantee organization, and the other in my current position in a law school clinic.

141. Better Agriculture Resources Now Act, H.R. 641, 115th Cong. § (j) (2017). This issue has arisen in the past; in the 1990s, the LSC created the Erlenborn Commission to determine whether grantees were already restricted in this way based on regulatory language that allowed for representation of H-2A workers who were "present in the United States." The Commission ultimately concluded in the negative, thus allowing for transnational representation. *See* LEGAL SERVS. CORP., THE ERLENBORN COMMISSION REPORT iv (1999), https://www.lsc.gov/sites/default/files/LSC/pdfs/jnecrpt.pdf [https://perma.cc/NX7B-TVGV]. Moreover, H-2A workers are not the only subjects of possible restrictions; in the past, Congress sought to prohibit LSC grantee attorneys who were representing welfare recipients from making legal arguments that challenged existing welfare law. The Supreme Court ultimately determined it was an unlawful restriction of such attorneys' First Amendment rights. *See* Legal Servs. Corp. v. Velasquez, 531 U.S. 533, 548–49 (2001).

142. *See supra* note 110 and accompanying text.

143. The proposed legislation does not appear to foreclose the employer's right to have counsel during such a dispute-resolution process. *See* H.R. 641 (imposing restrictions only on a worker's right to counsel, with no prohibition on employer's right to counsel). One can only imagine the outcome of a mediation between an employer who is represented by an attorney and an H-2A worker without a lawyer.

144. *See About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVS. CORP., http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs [https://perma.cc/PY7C-87EY] (last visited June 27, 2017). Notably, the restrictions are imposed on the grantee organization, meaning that the grantee cannot take such actions even through use of non-LSC funding sources. *See id.*

be a more appealing option for workers who prefer to retain some anonymity by simply proceeding as a class member, rather than being a named plaintiff in a straightforward civil case.[145] Class actions also provide financial benefits by increasing potential damages due to a greater number of claims, thereby producing a greater impact on the employer and industry more generally.[146] Despite these restrictions, straightforward, i.e., non-class action, civil litigation on behalf of named parties remains untouched, and LSC grantee organizations may represent H-2A workers in that capacity, so long as the other substantive requirements are satisfied.

In sum, H-2A workers whose rights have been violated face significant structural barriers to pursuing legal remedies for such violations.[147] The likelihood that a government enforcement agency will provide redress for these wrongs is minimal. Workers have few realistic options for counsel, and the scope of such counsel's activities is limited by federal law. This is all compounded by the high stakes workers face if they decide to speak out: retaliation is a very real risk and operates on a scale of significance not experienced by other workers in the United States. Despite these hurdles, I believe that civil litigation can provide a unique opportunity for vindicating the rights of H-2A workers and empowering them through the process. In the remainder of this article, I provide a vision for how to make this a reality by exploring the opportunities for practitioners to engage in client-centered lawyering during litigation, with the goal of amplifying the voices of the H-2A workers they represent.

III.
A VISION OF REPRESENTATION FOR H-2A WORKERS IN CIVIL LITIGATION

Civil litigation is not a new approach to vindicating the rights of marginalized communities. However, in the decades after an impact litigation strategy led to significant legal victories during the social movements of the 1950s and 1960s, it began to fall out of favor with social-justice minded practitioners.[148] In part, this

145. To illustrate the potential benefits, consider one recent example of a class-action filed by an unrestricted farmworker program; in that case, two H-2A workers filed a federal lawsuit against a blueberry farm in Washington and seek to represent a class of more than 600 H-2A workers in total. *See* Press Release, Columbia Legal Servs., Class Action Filed Against Munger Brothers and Sarbanand Farms for Pattern of Threats and Intimidation That Violated Federal and WA State Labor Laws (Jan. 25, 2018), http://columbialegal.org/class-action-filed-against-munger-brothers-and-sarbanand-farms-pattern-threats-and-intimidation [https://perma.cc/G2PL-URYX].

146. *See* Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.-C.L. L. REV. 168, 195 (2018) (noting that class actions provide a benefit for plaintiffs' counsel because they aggregate claims, thereby increasing damage awards and, "as a result, . . . have a much bigger specific and general deterrence effect").

147. For a detailed review of the J-1 visa program, another guestworker program with a framework that causes significant access to justice issues that in many ways outpaces the problems of the H-2A program, see Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269 (2013).

148. *See, e.g.*, Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 1988 (2017) (discussing post-*Brown v. Board of Education*

was due to a critique that litigation did not best serve the marginalized communities it purported to help; critics questioned whether operating within the very political system that led to such disempowerment was the best way to lift up those communities at all.[149] Others questioned whether civil rights impact litigation posed ethical concerns for plaintiffs' attorneys, in light of the potentially diverging goals of the funders of civil rights organizations and the individuals whose rights were at issue in the cases themselves.[150] Such critiques were soon followed by the poverty lawyering scholarship of the 1980s and early 1990s that provided powerful anecdotes of "lay lawyering," in which clients or community advocates were often more effective at engaging with and confronting legal decision-makers than lawyers.[151]

Against this backdrop, practitioners tended to take a step away from litigation as a central mobilizing strategy and turned instead towards a broader approach in representing marginalized communities. Often referred to as community lawyering, this style of advocacy has been particularly favored by attorneys working with and on behalf of low-wage and immigrant workers. Given this tendency, it is worth examining what such models have looked like and whether any lessons can be drawn from these approaches for the purposes of representing H-2A workers.

In the following sections, I first explore the role and views of litigation among community lawyering scholars and practitioners, with a focus on two particular

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critique of lawyers' role in social movements and "the question of whether lawyers promoted or impeded reform," which focused on both the accountability of lawyers to marginalized communities as well as the efficacy of court-centered legal strategies for pushing for social change).

149. *See, e.g.*, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879, 1904–05 (2007) ("In light of the inherent indeterminacy of legal reasoning, using adjudication to define and resolve social and economic disputes by left lawyers had the effect of legitimizing and reinforcing an established political structure, the same structure constructed for managing and oppressing poor people."); *see also* Dias-Abey, *supra* note 146, at 179 (summarizing "socio-legal . . . criticisms about the use of litigation as a tool for progressive change"). Ashar recognizes the discomfort such effects can have on lawyers in such circumstances, describing "progressive public interest lawyers" as "conflicted agents of the legal system, sympathetic to the methods and goals of resistance movements but bound by the forms of the legal establishment." Ashar, *supra* at 1880.

150. *See e.g.,* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 490 (1976) (acknowledging a possible conflict for lawyers if the interests of funders diverge from the interests of the clients being served); *see also* Cummings, *supra* note 148, at 1992–93 (analyzing Bell's argument).

151. *See, e.g.*, Ashar, *supra* note 149, at 1906 ("The underlying theory (or implication) of social change was that poor people could transform communities and entrenched legal systems through their assertions of power against bureaucrats and lawyers. The themes of the legal academic literature were manifested in the field by a move away from professionalism to 'lay lawyering'—poverty lawyers and community advocates less focused on litigation and law reform as a means of redress and instead oriented toward participation in local, non-legal efforts for social change."); *see also* Leslie G. Espinoza, *Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender*, 95 MICH. L. REV. 901, 924–25 (1997) (citing to clinical law literature regarding client-centered approaches with "outsider" clients, but also noting the criticism thereof, on the grounds that "poor clients are no different than rich clients" because poor clients also "come to lawyers for outcomes"); Piomelli, *supra* note 16, at 457–86 (summarizing leading literature and scholarship on "collaborative lawyering").

cases of low-wage worker advocacy: restaurant workers in New York and day laborers in Los Angeles. With these examples in mind, I then turn to a specific framework for how to effectively advocate for H-2A workers in a civil litigation context, with a detailed exploration of how to preserve and amplify client voice at various stages in the life of a lawsuit. Finally, I go beyond the confines of litigation itself, and explore the benefits and methods of empowerment that are available beyond a successful resolution of an H-2A worker's particular claims, specifically the opportunity for forward-looking remedies in cases as well as the downstream benefits that litigation can provide.

A. Existing Views of Litigation in Low-Wage Worker Advocacy

Community lawyering is a method of representation by which attorneys work together with, and advocate on behalf of, a "community"[152] in order to empower that group, and do so by using a broad set of legal strategies.[153] The community—whether that is a local organization, a broader social movement, or some other official or unofficial group—is represented in a client-centered manner,[154] with the lawyer serving less as the sole leader and decider of the legal representation, and more as an ally to the community's cause.[155] Litigation can have a role in a community lawyering practice, but it is not a panacea; if anything, litigation is a

152. The use of the term "community" has been critiqued for the neatness and simplicity it implies. As Jennifer Gordon has observed, assuming that there is "a single unit called 'the community'" opens the door "to the dangers of assuming that people who live near each other and share markers of race or ethnicity are bound by a common conception of their interests." Gordon, *supra* note 116, at 2135. Instead, Gordon argues, lawyers should be cognizant of "organizations committed to a particular (albeit inevitably contested) set of goals and view of justice" based on a belief "that organizations engaged in the fight for social change cannot focus on race or class exclusively but must pursue racial and economic justice hand in hand." *Id.* at 2135–36.

153. For example, a lawyer can engage in "direct representation of the groups (or their members) in litigation, advocacy, or transactional work," or it can be a "more informal or fluid" relationship between lawyer and community organization. *Id.* at 2141.

154. *See* Cummings, *supra* note 148, at 1989 (quoting Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, 249, 257–58 (Austin Sarat & Stuart A. Scheingold, eds., 2006)) ("Prescriptively, the literature suggests that lawyers *should* represent movements in client-centered terms, using the law to ensure that 'the movement takes the lead.'").

155. *See* Piomelli, *supra* note 16, at 509–10. Ascanio Piomelli's account of his representation of community members in East Palo Alto, California, provides a clear vision of lawyer-as-ally. He describes his role in community mobilization efforts at public city meetings as follows:

> This initial skirmish over the appointments to the Rent Board also refined my understanding of how to collaborate successfully with clients. It led me to abandon my initial reluctance to speak at public meetings. I soon recognized that, as long as I was careful to ensure that my clients also spoke and I did not monopolize the spotlight, my public addresses led clients to view me as more firmly on their side. Silence on my part was perceived not as respectful deference but as aloofness or indifference. I soon realized that if I wanted to be a collaborative team player, my clients expected me to carry my weight in the public arena too. Moreover, our adversaries might have construed my silence as fear, incompetence, or unwillingness to confront their actions.

Id.

means to the end of empowering community members beyond the frame and timeline of any particular court case. Directly engaging with the legal system "is one of many tools in the arsenal of social change tactics"[156] and a victory in the legal system is not necessarily the goal. Rather, community "lawyers measure the success of their work in relation to how much more power the groups develop and how much closer it brings them to achieving their vision."[157] Indeed, some observers have noted how litigation can, in fact, harm community mobilization and advocacy efforts.[158]

Two case studies demonstrate this style of lawyering, with litigation as one of several tactics used by low-wage worker advocates as part of a broader organizing strategy. The first concerns a law school clinic's representation of Restaurant Opportunities Center of New York ("ROC-NY"), a Manhattan-based workers' center whose members worked in the restaurant industry.[159] The representation was focused on a ROC-NY campaign against a large corporate restaurant chain.[160] In large part, the work done by the lawyers—in this case, the clinic and its students—resembled typical legal work. Students researched legal claims related to underpayment experienced by workers, interviewed clients, and drafted and filed a complaint in federal court.[161] They litigated the federal case and also represented workers in an investigation conducted by the National Labor Relations Board.[162] They also played a key role in responding to crises brought about because of the ongoing organizing and legal activity, including investigating allegations of retaliation experienced by workers and "communicating quickly and strongly with opposing counsel" about such incidents.[163] In this last instance, the students most embodied the lawyer-as-ally role: by reassuring the workers that the lawyers

156. Gordon, *supra* note 116, at 2141.

157. *Id.*; *see also* Ashar, *supra* note 149, at 1917 ("The organizers and workers themselves defined the problem area, chose targets within the industry, and directed public protest and media advocacy with lawyers supporting these activities through affirmative and defensive legal action.").

158. *See* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 438–40 (1995) (noting dangers of overreliance on legal services within the context of low-wage worker mobilization); Piomelli, *supra* note 16, at 502 (recalling concern that use of litigation in an East Palo Alto, CA rent control dispute could have had the unintended consequence of providing "County elites" with another forum to promote their "gentrification agenda").

159. *See generally* Ashar, *supra* note 149. Notably, Ashar terms the style of representation in this case study "public interest" lawyering, specifically within the context of movement organizing. *See, e.g.*, *id.* at 1921 ("Public interest lawyers and movement organizations have much to gain from collaboration . . . ."). For an explanation of workers' centers and a background on their rise in the United States, see *id.* at 1892–95.

160. *Id.* at 1899. Ashar notes that part of the reason the clinic ended up representing ROC-NY was because of the prohibitions imposed on federally-funded legal services agencies that kept such organizations from representing undocumented workers and from representing individual clients other than via direct services. *Id*. This case is an example of the detrimental effect of the LSC restrictions on legal options for workers. *See supra* notes 137–46 and accompanying text.

161. Ashar, *supra* note 149, at 1880, 1901–02.

162. *Id.* at 1912–14.

163. *Id.* at 1913.

would not abandon them in moments of vulnerability, the workers were "more likely to participate in campaign activities and resist employer coercion."[164]

In other ways, however, the lawyers' role was complicated because of their status as lawyers (or soon-to-be lawyers). In particular, the duties imposed by the rules of professional responsibility proved difficult to manage in a campaign defined by "a tripartite relationship between lawyers, workers, and organizers."[165] The lawyers had to ensure that third parties—i.e., the organizers—would not influence clients' legal decision-making and also had to carefully navigate organizer involvement in lawyer-client conversations so as not to risk the loss of attorney-client privilege.[166] In response, the lawyers chose an adaptive strategy; rather than "reject[ing] the influence of the organizers," the lawyers chose to "learn to discern the boundaries between lawyer-client, lawyer-organizer, and client-organizer decision making."[167] Beyond the internal members of the campaign, the lawyers also experienced difficulties in the context of the federal litigation in light of the presiding judge's hostility to the use of the lawsuit as part of a broader campaign, which had an effect on several discovery issues.[168] In one notable encounter, after being confronted with a proposed confidentiality agreement by defense counsel—which the lawyers viewed as counter-productive to the goals of both the clients (who refused to sign it) and the campaign more broadly—the judge lectured the legal team on what their role should be: "He said derisively that the lawyers were not to use a case in his court to advance a cause or to transform overall conditions in the industry. He instructed the team to litigate the individual case and not to be unreasonable in negotiations."[169] The organizers, not operating in a framework of professional responsibility and ethical obligations, did not face the same type of constraints; it was only the lawyers who were directly impacted by these additional considerations.[170]

What does the experience of the clinic tell us about the role of lawyers and litigation in community lawyering? In some ways, as noted above, the work is not that different: "the core legal work remained the same" as that of a lawyer operating in one of the "traditional modes of public interest legal advocacy (impact litigation, legal services, lawyer as organizer)."[171] In the case of a broader campaign, however, the lawyers added value because they could serve as an intermediary between the rigid legal system and the organizers seeking to push boundaries; the

164. *Id.*

165. *Id.* at 1910.

166. *See id.*

167. *Id.* at 1910.

168. *See id.* at 1914.

169. *Id.* at 1914 n.137.

170. I intentionally note that the impact is only *directly* felt by lawyers. Of course, the added pressure imposed by ethical obligations as well as a hostile judge would indirectly impact the campaign, workers, and organizers, in that any bad outcomes experienced in the litigation would have an effect on the underlying cause as well.

171. Ashar, *supra* note 149, at 1918.

legal work added a kind of "legitimacy" to the organizers' broader advocacy efforts, but the organizers did not have to operate under the limitations of court rules.[172] This also helped the organizers strategically, as they could "maintain distance from governmental and private entities," which allowed them to "remain oppositional and retain movement vitality."[173] The litigation itself, however, also furthered the "greater resistance agenda" of the campaign.[174] The clinic's involvement in the campaign made it clear that direct participation in the legal system can be particularly powerful for immigrant workers because "the assertion of rights through litigation can, at least partly, compensate for [the workers'] lack of legal status as they attempt to assert countervailing power in their workplaces and communities."[175] It also demonstrated that such advocacy serves to "strengthen[] the sense of membership in American communities and the solidarity of some of the immigrant workers."[176]

The second case study is a chronicle of a more than two-decade long litigation strategy regarding the rights of day laborers in the Los Angeles area.[177] The challenges mounted against antisolicitation ordinances[178] were part of a broader campaign seeking to protect, promote, and enforce the rights of day laborers, with multiple key actors and organizations playing organizing and legal roles. In particular, the strategy revolved around "First Amendment challenges to ordinances passed and actively enforced throughout the region," with a goal of "abrogat[ing] (or modify[ing]) ordinances in cities that . . . passed them and to deter their enactment in cities where they are under construction," the "ultimate legal objective" being "a definitive ruling on the merits in favor of solicitation."[179]

The role of litigation in the overall day laborer campaign was not unlike that of the wage and hour case on behalf of restaurant workers in New York—it was meant to serve as one aspect of a broader campaign, as a way to complement an overall organizing strategy.[180] While organizers mobilized workers and advocated for their position with local governmental officials, the ability to go to court—and,

172. *See id.* at 1922.

173. *Id.*

174. *Id.* at 1918.

175. *Id.* at 1921.

176. *Id.*

177. *See generally* Scott L. Cummings, *Litigation at Work: Defending Day Labor in Los Angeles*, 58 UCLA L. REV. 1617 (2011).

178. Antisolicitation ordinances "aim to regulate immigration indirectly," by "criminaliz[ing] conduct engaged in disproportionately by immigrant workers." *Id.* at 1620. Though the exact contours vary, which Cummings explains in detail, *see id.* at 1633–37, they generally target some aspect of the activity of soliciting work in public spaces to drive away day laborers from the communities in question.

179. *Id.* at 1621.

180. *See id.* at 1639 (noting that one of the attorneys involved from the start "sought to advance a vision of community lawyering in which the lawsuit was complemented by efforts to build an organizing base").

after the first victory in one of the cases, the ability to *win* in court—proved essential: "The organizing complemented the litigation, like 'carrot and stick,' showing cities that there was a high road toward cooperative solutions on day labor, but that movement lawyers could prevail on the legal merits if necessary."[181]

The integration of lawyers and the litigation into the campaign was not always so neat, however. Some of this was simply based on a particular lawyer's approach to client and organization relations, with some attorneys placing more of an emphasis on the need to "relate to day laborers and value the contributions of organizers," as opposed to what some advocates considered a more "'paternalistic'" approach of other lawyers to "'just go[] and report[]' on the litigation"; this allowed the former group of lawyers to build trust between themselves and the workers.[182] However, there was also an overall tension between the core principles of the day laborer movement and the particular legal strategy employed by the lawyers. Specifically, relying on a First Amendment theory may have been a more "winnable" claim, both legally and also from a public-relations perspective—"cast[ing] day laborers in their most favorable light: active, diligent, and contributing to the economic good by taking jobs no one else wanted"—but it aligned with the movement's goals less neatly than a discrimination claim would have.[183] In choosing the free speech theory over a discrimination theory, the lawyers "obscure[ed] the real motivation of [the antisolicitation ordinances'] proponents: to eliminate immigrant workers from the street," and instead "made a choice to maximize the chances for success on the legal merits to advance the immediate movement goal (eliminating ordinances) rather than to make stronger claims that may have supported the immigrant rights movement's most ambitious agenda."[184]

Beyond the difficult tactical choice in claims, litigation also proved to be problematic because of its inherent risk. Given that the ultimate legal objective was to obtain a definitive legal ruling on day laborer rights, the stakes were high. A negative ruling from an appellate court carried with it the possibility of undoing years of strategic work—and an initial decision from the Ninth Circuit did just that.[185] Fortunately, a rehearing of the case *en banc* resulted in a more favorable outcome,[186] but the successful outcome does not change the fact that the very nature of the goal of the litigation carried with it an inherent—and sizeable—gamble on the part of the legal team.

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181. *Id.* at 1649. The organizers also referred to the high road approach, focused on making connections with local law enforcement officials and the business community, as a "human relations" model. *See id.*

182. *Id.* at 1682.

183. *Id.* at 1685.

184. *Id.*

185. *See id.* at 1680 (noting that the "damage had been done," and that "[t]he decade-long path to a definitive ruling on the merits by the Ninth Circuit striking down antisolicitation ordinances had resulted in just the opposite").

186. At the time of publication of the case study, advocates were awaiting a ruling from the Ninth Circuit Court of Appeals as to the constitutionality of an antisolicitation ordinance in Redondo Beach, California; a three-judge panel had previously upheld the ordinance, and the plaintiffs filed

Such a risk is not necessarily inherent to litigation as a tactic, however, but may instead say more about the underlying population whose rights are at issue. As Scott Cummings reflected at the close of his case study, when the Ninth Circuit case was still pending:

> Despite the uncertain future of the day labor campaign, it is important to emphasize in conclusion that how we evaluate its outcome has to be framed in relation to the question: As opposed to what? What were the alternative avenues of preserving the right of day laborers to solicit work? Politically, they were weak—and continue to face significant challenges to building political power. If litigation does not ultimately "work" in this context, it seems likely that it reflects not the deficits of litigation per se, but the underlying political vulnerability of day laborers themselves.[187]

Similarly, the advocates involved in the movement, while crediting the role of litigation in the overall organizing strategy, did not hang their hat on the outcome of the case. Instead, they highlighted various other victories achieved along the way: making connections to political leaders, building coalitions with the business community, organizing and building relationships with workers, and, overall, building the power of the community of day laborers whose rights the movement was intended to advance.[188]

In the end, like the restaurant workers, the day laborer study tells the story of litigation serving as one prong of a multi-faceted strategy to support worker organizing. On the other hand, the study also illustrates that a broad legal goal can lead to greater risk and create potential downsides for the movement. Even in smaller-scale litigation, the stakes can still be quite significant: a victory can give a meaningful boost to organizing efforts, and a loss in court or the use of chilling tactics by employers or defense counsel during litigation can impede movement goals by dissuading workers from coming forward about legal violations or engaging in activism around their rights.

There are several other lessons about the role of litigation that can be drawn from these two case studies. The first is that, in many ways, the core work of the lawyers is not that dissimilar from what lawyers in other settings do. They research and strategize about legal claims, they file lawsuits and interact with judges and defendants and their counsel while the lawsuit progresses, and they settle cases

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a petition for rehearing *en banc* and were awaiting the decision from the full panel of judges. *See id.* at 1680–81. In September 2011, the Ninth Circuit issued its decision, holding that the ordinance was facially unconstitutional. *See* Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 940 (9th Cir. 2011) (en banc); *see also* Press Release, MALDEF, Ninth Circuit Court Ruling Sets Positive Precedent for Day Laborer Rights (Sept. 16, 2011), http://www.maldef.org/news/releases/ninthcircuitruling_dlr/ [https://perma.cc/VV2X-5L5T].

187. Cummings, *supra* note 177, at 1699. In a subsequent article, Cummings provides a more in-depth analysis challenging the view that lawyers and legal systems always have a negative effect on social movements. *See* Cummings, *supra* note 148, at 1991–2014.

188. *See* Cummings, *supra* note 177, at 1687–90.

along the way or pin their hopes on a final decision from a court. Beyond this work, however, the case studies spotlight how lawyers engage with the workers and organizers who are at the core of the movement. The lawyers are not separate from the workers and the organizers but occupy their own role and function within the movement. This engagement further serves the important goal of building trust between the lawyers and the workers and organizers, which will prove integral to any successful legal representation. Finally, given their unique position as advocates within the legal system, lawyers and the litigation they pursue on behalf of their clients give a particular kind of legitimacy and recognition to the movement and its goals. Although the lawyers are not the protagonists of the story,[189] their work helps to give a particular resonance to the story and to the individuals who are.

B. Voice and Empowerment in Litigation

While there is some organizing of guestworkers both in the United States and their home countries, these examples are limited, particularly among H-2A workers.[190] Given the inherent hurdles that advocates face in reaching H-2A workers,[191] it is understandable why such communities are difficult to mobilize. As a result, it is often the case that, when litigation on behalf of H-2A workers is undertaken, it is conducted in isolation, without the organizing activity that permeates the community lawyering models described above. Nevertheless, it is possible to work towards the goals of community lawyers and have litigation serve as a

189. *See generally* Gordon, *supra* note 116.

190. The organizing work in the United States is largely focused on guestworkers more generally, rather than H-2A workers specifically. *See, e.g.*, Lee, *supra* note 38, at 43 (describing role of the National Guest Worker Alliance in organizing H-2B guestworkers); *see also* Chuang, *supra* note 147, at 324–25 (noting National Guest Worker Alliance role in organizing J-1 visa holders and possible expansion of organizing efforts in that field). There are some exceptions, however. For example, in the early 2000s, the Farm Labor Organizing Committee, an AFL-CIO affiliate that had already organized farmworkers elsewhere in the United States, engaged in a successful organizing campaign in North Carolina that resulted in a union contract, such that any H-2A workers who are brought in on H-2A visas by the North Carolina Growers' Association are beneficiaries of the contract. *See About FLOC*, FARM LABOR ORG. COMM., AFL-CIO, http://www.floc.com/wordpress/about-floc/ [https://perma.cc/X2P4-MALR] (last visited Mar. 23, 2018). More recently, H-2A workers engaged in a successful strike in Quincy, Washington. *See* Eli Francovich, *Strikes, Work Stoppages in Washington Fields Indicative of Changing Agriculture Labor Environment*, SPOKESMAN REV. (Spokane, Wash.) (Nov. 5, 2017, 6:25 PM), http://www.spokesman.com/stories/2017/nov/05/strikes-work-stoppages-in-washington-fields-indica/#/0 [https://perma.cc/J77D-YXG7]. Moreover, one example of organizing in home countries comes from the organization called Centro de los Derechos del Migrante ("CDM"), which is focused on empowering Mexican migrants who work in the United States. CDM spearheads an initiative known as Contratados, an online portal where workers can share reviews and experiences with specific recruiters so as to enhance the knowledge of and transparency for other migrant workers going forward. *See Campaigns + Targeted Initiatives*, CENTRO DE LOS DERECHOS DEL MIGRANTE, INC., http://cdmigrante.org/special-initiatives/ [https://perma.cc/2XZ8-5BAT] (last visited May 10, 2018); *Home*, CONTRATADOS, http://contratados.org/en [https://perma.cc/BB2T-WULV] (last visited May 10, 2018).

191. *See supra* notes 116–19 and accompanying text.

tool for empowerment and worker voice even in the absence of parallel organizing efforts.

The way in which the process of litigation itself can serve as a tool for client voice and empowerment, however, is under-explored. For example, one relatively recent article analyzes civil litigation through the lens of procedural justice, a field of social psychology that examines the link between an individual's participation in the legal process and her sense of satisfaction with that process.[192] In considering the ways in which civil litigation provides litigants with an outlet for "voice, process control, or [the] opportunity to be heard,"[193] the article touches the ways in which a lawsuit can be an outlet for client voice, but does so only briefly, as part of a broader discussion of multiple legal doctrines, and without regard to variations in approaches and experiences depending on the client bases being served.[194] General considerations of a litigant's subjective feelings of fairness, in keeping with a procedural justice analysis,[195] may be a useful tool for evaluating an H-2A worker's interaction with the legal system overall: with would-be plaintiffs who are outsiders to such a significant degree, even minimal increases in a sense of "fairness" will likely be substantial in proportion to their initial trust of the system. However, I seek to move beyond generalities and provide a more context-specific approach. To that end, the following discussion will take particular care to highlight the ways in which expressing voice can be complicated by the fact that a litigant is an H-2A worker. At the same time, I also underscore the additional value that such moments can have because of the worker's status.

Below, I focus on what I call four "moments" in the life of a civil lawsuit: the decision to file a lawsuit, the filing of the complaint, discovery, and trial.[196] Litigation is obviously unpredictable and it goes without saying that not all of these moments will occur in any given case that gets filed in court. And even if they do,

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192. *See generally* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127 (2011). Hollander-Blumoff contextualizes the procedural justice field as follows:

> Over thirty years ago, psychologists began to research legal systems in an effort to increase compliance with judicial decisions. In particular, researchers focused on what kinds of processes would seem most fair to disputants and would lead to increased acceptance of and adherence to judicial decisions. This research provided robust empirical evidence that individuals care deeply about the fairness of the process by which decisions are made, apart from considerations about the outcome of the decision.

Id. at 132.

193. *Id.* at 142.

194. *See id.* at 149–75.

195. *See id.* at 145 (noting that scholars writing about procedural justice issues focus not on winners and losers in the legal system, but rather the degree to which all participants leave a legal interaction feeling that they have had a fair experience).

196. Settlement—rather than trial—is more likely to be the closing "moment" in a lawsuit. *See infra* note 248 (discussing decreasing rate of trials in civil cases as well as other means by which civil cases are resolved). Because of the opportunity settlement provides for forward-looking remedies, however, I have chosen to discuss settlement in the section that focuses on opportunities for voice beyond a lawsuit itself. *See infra* Section III.C.1.

the nature of how a case may unfold at each step can vary depending on numerous factors, including the location of the litigants, the collaborative nature of opposing counsel (or lack thereof), and the willingness of the court to adapt to the unique demands of a lawsuit involving H-2A worker plaintiffs. I attempt to address these nuances at each phase in the following discussion.

1. Taking Legal Action

The first step in the life of a civil lawsuit occurs before it even exists—the decision to file a case in the first place. Indeed, this moment is what has drawn much of the focus of the client-centered lawyering literature.[197] With H-2A workers as clients, however, this decision and the related discussions between lawyer and client should be approached with extra care.

One anecdote from the day laborer case study provides a useful analogue for the present discussion. As an attorney and organizer discussed the possibility of filing a lawsuit against the city of Baldwin Park with affected day laborers, the workers responded with a host of questions, including: "Will you be the lawyer? Who will be the judge? Will we get arrested? How long will it take?"[198] While the questions are clearly tailored to the enforcement activity experienced by those specific workers, the "very pragmatic"[199] inquiries nevertheless illustrate the questions other advocates and I have fielded from H-2A workers. Broadly speaking, they fall into two categories: questions concerning the process of filing a lawsuit and those concerning the consequences, both potential and perceived, of doing so.

With respect to the process, H-2A workers are likely to be unfamiliar with the legal system in the United States because of their cultural and linguistic backgrounds. H-2A workers tend to be monolingual Spanish speakers, though some

197. Such a focus has often been to the exclusion of other important decision-making moments in the course of a lawsuit. For example, Binny Miller has noted that analysis of client decision-making tends to focus on decisions that are concerned with legal process and glosses over other elements of legal strategy where client decision-making may also play a role:

> With few exceptions, client-centered writers analyze the decisions facing the client in generic terms, without distinguishing the type of decision at stake. When they discuss the context of a decision specifically, the most active arena of client decisionmaking appears to be in the area of legal process, either in initiating legal procedures – by filing a lawsuit or an appeal or invoking an informal mechanism, for example – or in disposing of a case through settlement or trial. This focus on process implies that other kinds of decisions are relegated to lawyers and thus are excluded from the lawyer-client dialogue.

Miller, *supra* note 16, at 505–06; *see also* Dinerstein, *supra* note 16, at 589–90 (noting origin of client-centered model as focusing on decision between litigating, settling, or doing nothing).

198. Cummings, *supra* note 177, at 1672. In addition to Baldwin Park, the case study provides other examples of pre-filing discussions with workers. *See id.* at 1661 (describing a lawsuit in Redondo Beach as being viewed as "the only viable course of action" by the workers after law enforcement raids), 1666 (noting detailed discussions between lawyers and day laborers in Lake Forest about filing suit, including concerns regarding retaliation and confidentiality, and the ultimate decision to do so because "the workers 'collectively decided it was worth the risk'").

199. *Id.* at 1672.

workers speak an indigenous language, either exclusively or with Spanish as a second language.[200] Moreover, they grew up and still reside in other countries and often come from lower-income or impoverished communities in their sending countries.[201] While marginalized communities within the United States may also view the legal system as foreign,[202] they at least benefit from a certain degree of cultural osmosis, not to mention outright civic education,[203] having grown up in the culture and speaking the same language of the participants and deciders in the legal system. H-2A workers, on the other hand, likely arrive to the United States with expectations based on their understanding of how the legal system functions back home. One observer has commented on this phenomenon in the context of another subset of low-wage (often recently arrived) immigrant workers—those laboring in the poultry industry:

> Peripheral poultry workers may carry over legal knowledge from their home countries, which may have less robust, or even less robustly enforced, labor and employment rights regimes. They may have experience with corruption in the justice systems of

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200. *See, e.g.*, S. POVERTY LAW CTR., *supra* note 10, at 10–11 (noting that many Guatemalan workers are illiterate and speak Spanish as a second language), 28 (stating that H-2 workers "usually speak no English"); Holley, *supra* note 20, at 613 (characterizing H-2A workers as "Spanish-speaking"); Smith, *supra* note 22, at 390 (noting the linguistic isolation experienced by guestworkers who may not speak English or who "speak only languages, such as Mixteco Bajo, which have no written component and are not commonly spoken in the U.S.").

201. One report from 2013 summarized the situation for H-2A workers as follows:

> The simple fact is that workers from Mexico, Guatemala and many other countries often have very few economic opportunities. In recent years, rural Mexicans have had an increasingly difficult time making a living at subsistence farming, and in some regions there are virtually no wage-paying jobs. Where jobs exist, the pay is extremely low; unskilled laborers can earn 10 times as much, or more, in the United States as they can at home. Most perceive the guestworker program as their best chance to get to the United States and provide a better life for their families.

S. POVERTY LAW CTR., *supra* note 10, at 12.

202. The sense of foreignness can be quite literal. Lucie White has written about the "clash of cultures" that can occur when a poor person enters a courtroom, noting that "[p]oor people obviously do not speak in the same dialect that lawyers, judges, and elite businesspeople use." Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 542–43 (1987). To that end, she has equated a lawyer's job with serving as "a translator," "shap[ing] her client's experiences into claims, arguments, and remedies that *both* the client and the judge can understand." *Id.* at 544; *see also* Jacobs, *supra* note 18, at 373 (the lawyer has a two-prong problem: how to "translate" the client's story and how to then "assist the listener[s]" within the legal system "in understanding the client's story"); Miller, *supra* note 16, at 516–17 ("The lawyer translates the client's story so it can be heard and understood in the legal system."). In a different context, Kathryn Sabbeth has made a similar observation about the gap that lawyers can fill when representing indigent clients, writing that, "without access to lawyers with time for adequate representation, many indigent litigants, both civil and criminal, find their experience in the adversary process quite disrespectful of their basic dignity." Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantánamo*, 44 U.C. DAVIS L. REV. 1487, 1497 (2011).

203. Thank you to Deborah Archer for this insight regarding the educational system's role in teaching about the judicial branch of government in the United States.

> their home countries. Undocumented workers in particular may have a deep mistrust of the U.S. government, believing that interaction even with "friendly" or "status-neutral" agencies puts the worker at risk of deportation.[204]

In short, the substantive protections, the remedies, even the role of lawyers—all of this varies from country to country and culture to culture, and those bridges can be difficult to cross in the context of H-2A workers.

Because of these differences, the entire idea of a lawsuit can be a black box to H-2A workers. As a result, attorneys seeking to be client-centered and to give voice to their clients by representing them in civil litigation should be prepared to answer inquiries regarding the process of litigation in a comprehensive and respectful way. Explaining what a lawsuit is, at its most fundamental, is essential. By way of example, I have typically offered clients an overview along the following lines:

> Filing a lawsuit means that we will prepare a formal document saying what happened to you and what laws were broken as a result of that. We will take that document and file it with a court. We will then give your employer a copy, to notify him that he has been sued. He will then have the chance to respond. From there, the case can proceed through a long process of something known as discovery[205] before potentially getting to something that is called a trial. A trial is when everyone will go to the courthouse where we filed your case and sit in a room in front of a judge, and maybe a group of ordinary people (the jury), who will hear from witnesses and look at the other evidence, like documents. At the end, either the judge or the jury (if there is one) will decide who wins. But, most cases don't get to that point, and instead come to a resolution with a mutual agreement between both sides, generally with a payment from the employer to you and the other workers who filed the case in exchange for dropping the case. Unfortunately, I cannot predict when or if the case will resolve in that way. I only know that most cases do end that way. So, while that is likely to happen, we have to assume that we are going all the way to trial until and unless we have a signed agreement that ends the case and your claims.

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204. Alexander, *supra* note 104, at 382; *see also* Alexander & Prasad, *supra* note 103, at 1101 ("Immigrant workers may also import legal knowledge from their home countries that is inapplicable in their U.S. workplaces and derive inaccurate beliefs about their workplace rights from relatively insular information 'islands' and ethnic networks."); Dias-Abey, *supra* note 146, at 176 ("In the case of migrant farm workers, their interactions with the law in their home countries (e.g. negative experiences with state officials) may affect their readiness to make use of formal law to resolve workplace issues.").

205. For additional discussion on describing the discovery process in detail, see *infra* Section III.B.3.

On one level, this is a very general overview, omitting the twists and turns and painstaking detail of litigation. On another level, it is a detailed explanation of the general process of a civil lawsuit, covering what is likely to happen over the course of a case, and trying—perhaps unsatisfactorily—to answer one of the questions posed by the day laborers cited above: "how long will it take?" For attorneys or for relatively legally sophisticated clients, these steps are generally assumed and not often broken down in such a basic way. The same is likely true of the overarching uncertainty of the process. But for H-2A workers, who are not familiar with the U.S. legal system and who may not have ever had any interaction with any legal system, here or at home, this is an essential roadmap that allows them to approach the decision in a much more informed manner, having a better, more realistic understanding of what this process may entail.

Beyond the process, workers may also have questions about the risks they face by deciding to file a lawsuit. In particular, H-2A workers may be concerned about experiencing retaliation due to suing their current or former employer. Admittedly, retaliation is not a problem experienced only by H-2A workers; undocumented workers, themselves frequently exploited,[206] are also legal outsiders in many ways,[207] and face very real consequences if they speak up about workplace problems, including the risk of deportation.[208] However, the consequences of retaliation are even more serious with H-2A workers because undocumented workers at least have the "freedom to change jobs."[209] And undocumented workers themselves realize these differences, as one advocate has recalled:

> I am always struck when a group of non-H-2A farmworkers discusses the situation of H-2A workers; at least one always says that H-2A workers are "like slaves," even if that person is him or herself undocumented. The other workers in the group always readily agree with this assessment. Non-H-2A migrant farmworkers who

206. *See, e.g.*, Ashar, *supra* note 149, at 1882 ("[M]ost undocumented workers operate in everyday sweatshop conditions, including consistent underpayment of wages for regular hours and overtime, health and safety violations, and hierarchical relationships of power in the workplace marked by low-intensity verbal abuse, and racial and sexual harassment.").

207. *See, e.g.*, Gordon, *supra* note 158, at 418–27 (detailing structural limitations on protection of undocumented workers' rights by government enforcement, legal services offices, and labor unions).

208. *See, e.g.*, Weil & Pyles, *supra* note 110, at 83 n.19 ("For undocumented workers, the costs of retaliation may also relate to a threat of exposure and deportation because of immigration status."); *see also* Alexander, *supra* note 104, at 379 (noting a "constant specter of removal or deportation" for undocumented workers in the poultry industry).

209. *E.g.*, Lee, *supra* note 38, at 56 ("Just like guest workers, undocumented workers are often required to accept jobs with low wages, hazardous working conditions, and high productivity requirements because of their tenuous immigration status. Undocumented workers, however, usually have more bargaining power than guest workers because they have the freedom to change jobs, albeit with difficulty.").

> have interacted with H-2A workers probably grasp the dynamics of the system more readily than anyone else.[210]

It is thus the nature of the H-2A program itself, with its lack of visa portability, which leaves H-2A workers particularly at risk of experiencing retaliation on a scale generally not experienced by other groups of vulnerable workers.

In light of this unique situation, H-2A workers are likely to ask what may happen to them if they decide to sue their current or former employer. They may want to know if filing a lawsuit will impact their ability to get another visa in the future, or they may ask if potential future employers will know about the lawsuit. While the answers will depend upon the particularities of a given worker's situation, one guiding principle in responding to such inquiries is the importance of recognizing the difference between the letter of the law and the reality of its application. For example, being a plaintiff in a lawsuit may not be a legal bar to getting an H-2A visa in the future—there is no blacklist of civil plaintiffs maintained by U.S. government officials along these lines—but it may be a problem if the worker knows of no potential routes to obtaining an H-2A visa other than the employer who is named as a defendant in the lawsuit, and is therefore unlikely to hire the same H-2A worker again. Moreover, an employer's decision not to rehire the same H-2A worker may be explicitly retaliatory in its motivation, but as a worker with a temporary visa and no ongoing right to return or to obtain another visa in the future, an H-2A worker seeking to make a legal claim out of the lack of rehire would likely fail. In short, the answers to the questions may not always be "good"—and may likely be enough to dissuade a worker from filing suit. However, they are useful answers, in that they fully acknowledge the client's situation, because they provide information to the worker that is not simply based on the law, but also based on the on-the-ground reality they experience. Such an approach is particularly important with H-2A workers because, for workers who have already experienced such blatant and regular violations of their rights, it is too often the case that such rules by which their employers are supposed to abide can be worth as much as the paper on which they are written.

In sum, it would be difficult to provide an exhaustive list of potential questions and suggested answers for attorneys of H-2A workers to use as a reference—indeed, every case presents a unique set of circumstances, actors, and risks. The above discussion does not aim to do so. Rather, I simply argue that an attorney following client-centered principles should recognize and be prepared to address the likely gap in understanding when it comes to H-2A worker clients, even more than that which exists with U.S. worker clients. If a lawsuit is to serve as a vehicle for worker voice and empowerment, it is critical that an H-2A worker first understand the context in which his voice is being heard, and it is the attorney's job to ensure that the worker has such an understanding.

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210. Hall, *supra* note 10, at 536.

2. Filing the Complaint

The filing of a complaint represents the first moment in the course of a lawsuit in which an H-2A worker asserts himself in a public manner and is able to upend the previous dynamic that existed between himself, his employer, and the U.S. government.[211] Outsiders from the beginning, H-2A workers now stand to take the power the U.S. government had granted to their employers back and bring it to their side. In so doing, an H-2A worker plaintiff finds his voice in two important ways: (1) by no longer being nameless and (2) by being able to tell the story of what has happened to him.

As to the first point, I have already discussed how H-2A workers proceed through most of the H-2A application process as unnamed workers.[212] Such anonymity often continues throughout their time in the United States. Due to language barriers, workers rarely communicate directly with their employers, instead using supervisors or other sufficiently bilingual individuals to assist with interpretation among the parties. Thus, the employers are unlikely to know specific workers by name. On the contrary, it is not uncommon for employers to simply refer to their workers generically—and, arguably, disparagingly—as their "Mexicans" or a similar term.[213] By contrast, when a worker files a complaint in court against his employer, his name appears at the top of the complaint, in clear and unequivocal terms.[214] For perhaps the first time in the entirety of his interactions with his employer, the worker now goes by his actual name.

In addition to empowerment through identification, the filing of the complaint also provides a worker with the opportunity to tell his story for the first time, outlining what happened to him in order to support the legal claims brought against

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211. Stephen Pepper has noted that, though a civil lawsuit without the United States government as a party may not appear to "pit[] 'the state,' with all its power, against an individual," as the criminal system does, a civil lawsuit still involves the power of the state on one side:

> [T]he very point of civil litigation is to allow the private plaintiff to gain the power of "the state" to enforce her claim against the defendant, thus removing the need for, or utility of, acquiring private police or armies to enforce claims. Civil litigation is a contest over which side is to have the vast power of "the state" on its side in a dispute.

Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 623.

212. *See supra* note 50 and accompanying text.

213. *See, e.g.*, *supra* note 55; *cf.* Holley, *supra* note 20, at 612 (recounting statement by a legislator from western Kentucky describing immigrants as "your Mexicans").

214. There are instances in which this may not happen, such as if a worker is attempting to proceed as a John Doe plaintiff as a precautionary measure against potential retaliation against himself or his family. *See, e.g.*, Lee, *supra* note 112, at 73–74 ("In cases where workers fear retaliation by the employers, such as blacklisting, deportation, and violence, workers may be able to initiate a lawsuit anonymously."). There may also be cases, such as class actions, where not all workers who may ultimately recover damages are named on the complaint. However, in the vast majority of cases, workers do file as named plaintiffs.

the employer.[215] As a threshold issue, it is important to note that lawsuits on behalf of H-2A workers present an added wrinkle due to the limited claims, particularly federal claims, that are available to H-2A workers. Specifically, H-2A workers are expressly excluded from the federal statute that provides protections to other farmworkers in the United States, the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA").[216] Because of this exclusion from AWPA, H-2A workers who experience legal violations are generally left to pursue claims premised on a violation of state law,[217] which would, absent any other federal claims, relegate the workers to litigation in a generally unfavorable state forum.[218] Given that H-2A workers tend to be employed in higher numbers in the southern United States,[219] the practical result would be to have to appear in a southern, rural courthouse as a foreign, non-English speaking plaintiff—a rare sight in such locations—and face local employers and powerful industries in courts headed by elected judges.[220]

As a result, attorneys representing H-2A workers face the added pressure of having to hone in on a federal cause of action to get their clients into a more favorable federal court setting. For straight wage violations, this can prove to be a significant hurdle, given the difference between the current federal minimum wage of $7.25/hour under the FLSA and those set each year as the AEWR. In other words, H-2A workers can be paid just over half as much as they are legally supposed to be paid per hour[221] and still be without access to a federal court, a particularly absurd result given that the AEWR, the effective minimum wage for

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215. *See* Hollander-Blumoff, *supra* note 192, at 152 (analyzing the way in which the pleading process allows for a plaintiff to express his or her voice).

216. *See* 29 U.S.C. § 1802(8)(B)(ii), (10)(b)(iii). AWPA is the preferred statutory abbreviation of farmworker advocates; the statute tends to be abbreviated as "MSPA" by enforcement agencies, such as WHD. *See Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, https://www.dol.gov/whd/mspa/ [https://perma.cc/55H5-DHN2] (last visited Nov. 2, 2017).

217. *See, e.g.*, Lopez v. Fish, No. 2:11-CV-113, 2012 U.S. Dist. LEXIS 83550, at *4–5 (E.D. Tenn. May 21, 2012) ("[T]here are federal cases too numerous to count which have held that H-2A workers may pursue state breach of cont[r]act claims against employers who fail to comply with clearance orders issued by the DOL.").

218. *See* Holley, *supra* note 20, at 608–13.

219. *See supra* note 29 and accompanying text.

220. For a palpable example of bias against H-2A workers in state courts in the south, see Holley, *supra* note 20, at 610–12 (summarizing a preemptive lawsuit filed by a tobacco grower in Kentucky state court—to which judges are elected—against H-2A workers whose rights had been violated, subsequent efforts by Congressional representatives to introduce legislation to restrict H-2A workers' choice of forum, and U.S. senator's threats to investigate legal services agency representing H-2A workers for misuse of federal funds).

221. Because the AEWR currently ranges between $10.46 per hour and $14.37 per hour, *see supra* note 59 and accompanying text, an H-2A worker would have to be significantly underpaid to have an effective wage rate falling below the federal FLSA minimum wage of $7.25 per hour, thus providing the basis for a federal claim. The case law finding FLSA violations if a worker is not reimbursed for certain job-related, pre-departure expenses in the first workweek, *see supra* note 65, is thus a critical development, as that allows workers in a case involving what would otherwise only be violations of the AEWR throughout the season to have a basis for federal court jurisdiction.

H-2A workers, is set by a *federal* agency implementing *federal* regulations and statutes.[222] H-2A workers would, therefore, have to be victims of quite severe wage underpayment in order to get into federal court on that basis alone.

H-2A workers may, however, have alternative options for getting into a federal forum in cases of very specific types of mistreatment. For example, H-2A workers may have remedies under federal statutes including the Trafficking Victims Protection Act ("TVPA"), the Racketeer and Influenced Corrupt Organization Act ("RICO"), or Title VII or equivalent anti-discrimination statutes.[223] However, TVPA, RICO, and discrimination claims tend to target relatively narrow—and egregious—behavior.[224] Such legal violations certainly arise in the context of H-2A work, but not all wrongs experienced by H-2A workers can be easily fit into these boxes, and the most common types of violations, including underpayment and the imposition of recruitment fees, do not give rise to such claims on their own.[225]

Once an attorney has engaged in the task of finding a federal cause of action for her clients, the next task is the actual drafting of the allegations themselves. While it is possible to file a complaint that focuses solely on the specific facts giving rise to the worker's claims and not delve into much else—for example, simply outlining the hours he worked and pay he received in the context of a wage and hour claim—such a strategy fails to paint a complete picture of the worker and his situation. By taking a broader view of the purpose of the complaint, an advocate can be more faithful to the worker's experience, giving it voice, and can thereby assist in conveying the worker's story, and the story of the H-2A program more broadly, to the opposing party and the court itself.[226] For instance, the complaint filed on behalf of the Kentucky tobacco workers described at the start of this article contained an overview of the H-2A program; the targeted recruitment of the workers in Mexico; the various pre-employment expenses and debts the

222. *See* 20 C.F.R. § 655.103(b) (defining the AEWR as a wage that is based on a wage survey conducted by the U.S. Department of Agriculture); § 655.120(c) (directing the OFLC Administrator to publish the AEWR in the Federal Register each year). While a similar analysis may be true of other low-wage workers on a superficial level—workers in states with a minimum wage above $7.25 per hour would similarly be relegated to state court unless their wages fall below the federal threshold—in those cases, those workers are only looking to their relevant state law to show a legal violation, unlike H-2A workers looking at the federally-set AEWR.

223. *See* Lee, *supra* note 112, at 50–67.

224. *See id.* at 74.

225. The payment of recruitment fees may be a useful component to a claim for forced labor under the TVPA, but would not give rise to a claim independently; rather, a plaintiff bringing such a claim would also generally make allegations regarding coercive or threatening behavior on the part of the defendant. *See id.* at 52–54 (summarizing forced labor claims under the TVPA).

226. Sharing the worker's story, particularly within the judicial system, would be especially important because, as commentators have noted, federal courts tend to be venues dominated by corporate, rather than individual, parties. *See, e.g.*, Hollander-Blumoff, *supra* note 192, at 147–48 (discussing dominance of corporate parties in federal court litigation). As such, telling the story of an ultimate outsider litigant—the H-2A worker—will prove to be a strong counter-narrative to the normal stories that such courts would hear.

workers incurred; the employer's resulting obligations to the workers; the employer's pay practices and the under-payment of the workers; the deplorable state of worker housing; and the ongoing unlawful payments the workers were required to make, all against a repeated stream of threats to cancel their visas if they refused to comply.[227] Such a comprehensive narrative painted a clearer picture of what happened, providing necessary context for the trafficking claims brought in that case,[228] as well as garnering enough interest from a reporter to lead to an in-depth story published in the local paper a few weeks later.[229]

While powerful because of the statement that it sends, the degree to which the complaint represents a worker's voice is muted by the reality that it serves as a specific legal document that must be in keeping with pleading standards and other legal rules.[230] Thus, the worker's story is there, but amidst statements regarding the jurisdiction of the court to hear the case, or citations to certain statutes that the employer allegedly violated. More generally, the complaint is in English—often not understood by workers—and so there is the more literal translation of having to tell the worker's story in a language in which it did not originate. In other words, while the complaint does represent the worker's first moment to use his voice in litigation, in reality it is more of an indirect voice, telling the worker's story, but in a "sterilized" way,[231] or in the "dialect" of the legal system.[232] Nevertheless, the acts of drafting and filing the complaint present the opportunity to paint a picture and set the (public) stage, and advocates endeavoring to be client-centered can find methods by which to incorporate the voices and experiences of clients amidst other legally-required or preferred language.

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227. *See* Plaintiff's Complaint, Cruz-Cruz v. McKenzie Farms, No. 05:15-cv-00157-REW (E.D. Ky. May 28, 2015).

228. Because forced labor claims require demonstrating something a bit more subjective—i.e., that the plaintiffs were threatened with "serious harm," or that the defendant "threatened abuse of law or legal process," *see, e.g.*, *id.* ¶¶ 144–53—a complete picture of the plaintiff's situation at the time of the defendant's actions makes it necessary to understand the plaintiff's state of mind.

229. *See supra* note 1.

230. Rebecca Hollander-Blumoff has also noted that the heightened pleading standards imposed by the two Supreme Court decisions of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), may have a negative meta effect on voice:

> From the plaintiff's perspective, the restrictions on pleading – even though they require a pleader to say more – may decrease perceptions of procedural justice. Pleaders often are not fully aware of the facts in a dispute, especially the facts most supportive of their allegations. Although requiring plaintiffs to say more about these facts may look, at first blush, like an opportunity to *increase* participation, in fact this requirement dampens participation because it raises the bar to have one's case heard before the court at all. By raising this level, these two decisions will cause some cases not to be heard, thereby completely depriving potential plaintiffs of their voice.

Hollander-Blumoff, *supra* note 192, at 153.

231. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2428 (1989) (arguing that fitting facts into the style required by a court complaint "sterilize[s] them," and "legitimate[s] the current social order").

232. *See supra* note 202.

3. Discovery

Once a civil lawsuit has proceeded beyond the initial pleading stages, the parties then turn to the multi-faceted process known as discovery. At its core, discovery is about the exchange of information, providing litigants with an opportunity to share their story with the other side.[233] Similarly, discovery also levels the playing field between parties who may possess different amounts of information, and therefore, power.[234] As such, it provides an opportunity for enhancing the voice of H-2A worker litigants.

Discovery itself has numerous aspects, but the two that are important from the perspective of client voice are responding to interrogatories and depositions.[235] Generally speaking, both interrogatory responses and depositions provide the opportunity, albeit not unlimited, for an H-2A worker plaintiff to respond to questions from the opposing party and provide information in his or her own voice.[236]

In the case of interrogatories, the degree of voice is slightly attenuated. On the one hand, unlike a complaint drafted by attorneys, the responses do, literally, belong to the worker.[237] However, because they are written and because they are provided in response to specific questions posed by the opposing party, there is a certain degree of control over voice that is lost. The opposing party frames the

233. *See, e.g.*, Hollander-Blumoff, *supra* note 192, at 154–55 (noting that discovery "is a mechanism that is expressly designed to enable participation and voice" and that it "provides both parties with the opportunity for meaningful participation by allowing them access to information that will form the basis for their presentation to the court"). In a similar vein, I have taken to using the term *intercambio de información*—literally, the "exchange of information"—to explain the idea of discovery to Spanish-speaking clients.

234. *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 513–14 (2000) (describing the advent of the Federal Rules of Civil Procedure and its implementation of the discovery process as a method of "eliminating systematic unfairness resulting from disparities of wealth and power by prescribing means by which less powerful litigants could obtain the information necessary to prove their claims").

235. The third in the trio of primary discovery tools is requests for production of documents. FED. R. CIV. P. 34. While documents produced in discovery pursuant to Rule 34 could reveal some degree of client voice—for example, they could include past correspondence or other writings, or even audio or video recordings, *see id.* 34(a)(1)(A) (including "electronically stored information" such as "sound recordings" within the scope of items that can be requested by a party)—they would not (generally) involve the expression of voice after a lawsuit has been filed—in other words, with the intention of remedying a violation of the worker's rights. For this reason, I focus less on this possible implication of past voice, and instead focus on the more direct implication of voice in the present that is brought about through interrogatory responses and depositions.

236. Lucie White similarly recognized that affidavits submitted by clients in the course of a case she litigated represented the "one aspect" of the case that "gave the clients something of a voice." White, *supra* note 202, at 541 n.26. However, because affidavits are prepared by an individual's own attorney and are generally not in response to a very specific line of questioning, unlike both interrogatories and depositions, the analysis of client voice in such a setting would more likely align with that of client testimony at trial, *see infra* Section III.B.4, as opposed to the discovery process.

237. As an individual, the worker would be the "responding party," and would have to answer an interrogatory "under oath" and sign the answers. *See* FED. R. CIV. P. 33(b)(1), (b)(3), (b)(5).

issues, and thus the worker may not be telling his story in the way that he may most desire. Moreover, because interrogatory responses are provided in writing, they must be in English, necessitating both a literal and figurative translation from the worker's original answer. Both of these factors equate to a certain loss of voice during this process. Despite this inevitability, a lawyer seeking to emphasize the client's perspective can minimize the loss of voice by making sure that the client's written response uses terminology and phrasing that captures the client's voice, as opposed to mimicking the legalese that the opposing party is likely using in the interrogatories themselves.[238]

Depositions, on the other hand, provide a worker with a greater degree of participation, as well as literal moments of voice and expression. Because of this, a lawyer seeking to embody client-centered principles should put the deposition in context for the H-2A client. Much like a lawsuit as a whole, a deposition is also an unknown setting into which a worker is entering. Thus, an attorney should not simply dive into a standard deposition preparation, reviewing the facts giving rise to the worker's claims, but should instead take the time to explain what a deposition is, both as a technical matter and as an extended interpersonal interaction. For example, I have often explained a deposition as a formal one-on-one interview under oath, conducted by the attorney for the other side, and with a court reporter taking notes of what everyone says. In addition, I also believe it is important to explain to clients some of the dynamics and roles that should be expected during such an event. Specifically, clients should be aware that their responsibility is simply to listen to the questions and answer by telling the truth. Anything else—if opposing counsel behaves disrespectfully or asks inappropriate questions—falls within the lawyer's responsibilities. Even more generally, it is critical to situate the interactions within the broader context of the case. Specifically, I have explained to clients to expect that, when we arrive to the deposition, I will be polite with the other attorney, shaking their hand and engaging in small-talk. Without a prior explanation, such an interaction may seem jarring to the client, who suddenly sees his own attorney fraternizing with the opposition.[239] A preemptive warning that this is simply part of the process and not any substantive betrayal or disrespect of the client is important to set the client's expectations for the event.

Turning to the substance of the deposition, the moment offers a chance for worker voice because it is, quite literally, a setting in which the worker provides

238. The problem of legal terminology leading to client misunderstanding and therefore loss of voice can also occur in depositions. *See infra* note 245. With interrogatories, however, defense counsel may use stock interrogatories, particularly if they regularly represent employers or defendants in insurance disputes (as employment defense counsel may be appointed by an employer's insurance company to defend the employer in the lawsuit). The risk of legalese and straying away from the core of the client's story is, therefore, more common—or, at least, less immediately and easily remedied—when it is in a written medium, as opposed to an interpersonal interaction.

239. Credit for this specific aspect of explaining depositions to clients goes to Katy Youker, my former colleague at Texas RioGrande Legal Aid, Inc.

verbal testimony in response to questioning by the opposing party's attorney.[240] He thus speaks and tells his story in his own language, using his own words. And, importantly, when using these words, an H-2A worker litigant is generally (absent any misconduct by opposing counsel) afforded the respect and dignity that he might not have otherwise seen during his time as a worker, having been given the floor to speak in front of individuals who are usually considered more powerful and thus usually on the receiving end of such respect—such as multiple attorneys, court personnel, perhaps corporate representatives, and others that may be present during a deposition.

In spite of this literal use of voice, there are some important caveats about the power of deposition testimony. The first is that, in most cases, the worker testifies with the aid of an interpreter, and thus loses a certain degree of voice in the translation from one language to another, as with interrogatories. This loss may be more than figurative—there is also the risk of inaccurate translations and the loss of meaning in terminology or sayings that exist in one language but not the other (or figures of speech or words used by the worker that may be regional or industry-specific and not known to the interpreter). The risk of error is compounded by the fact that deposition testimony, transcribed by a court reporter, usually only provides a record of the interpreter's English language translation of the worker's answer.

One of my own experiences with such an interpreter error, and the substantive confusion and problems it caused, serves as a useful illustration. Some of my clients have used the Spanish term *contratados* in depositions to refer to H-2A workers. This is a common term among H-2A workers and literally means "contracted," or "the contracted ones," i.e., the workers who are contracted, or on H-2A visas. This is a colloquial term that may not be immediately understood by interpreters who speak more formal Spanish. In the course of a deposition, a client used this term, and the interpreter translated it as "contractor," likely due to a lack of familiarity with the term.[241] Given that the translation into English was essentially the opposite of what the client was saying in Spanish—the supervisor, as opposed to the worker—I and my colleagues interjected, stating that the witness had used the Spanish word *contratados*, and likely meant "H-2A workers." As a result, the interpreter checked with the witness, confirmed this understanding, corrected the mistranslation, and employed the correct terminology going forward. Had that correction not been made, the transcript would have been confusing and fundamentally incorrect. In addition to correcting the record in the moment, another method to guard against the possible lasting effect of such errors is to tape or film the

240. *But cf.* FED. R. CIV. P. 31 (allowing deposition of a witness, including a party, by written questions).

241. H-2A workers generally use the term *contratista* to refer to the "contractor," usually meaning the supervisor or recruiter, depending on the circumstances. Because both words derive from the verb *contratar*, to contract or to hire, and because the English term "contractor" is used much more frequently than the idea of someone being a "contracted worker," the interpreter likely assumed the worker meant contractor, rather than the more literal (and colloquial) term he intended.

deposition, recording the actual words spoken by the testifying worker.[242] This strategy has the additional benefit of preserving the original testimony of the worker in the event he is not able to appear for trial.[243]

The final caveat, to which I alluded briefly in the context of interrogatories, is the larger issue of who defines the contours of this testimony. A deposition is most often taken by the opposing party, and it is therefore the opposing party who generally sets the line of questioning and focus of the deposition.[244] At times, this may involve asking about information that a worker may consider irrelevant or even sensitive—for example, questions about his family or employment. But, it may also include open-ended questions seeking to get as much information as possible, thereby getting the worker to say as much as possible about the facts underlying the worker's claims. Of course, the degree to which this bears out in practice can vary by case and by attorney,[245] but the fundamental point remains: at the end of the day, it is *opposing counsel's* time and deposition, and they are the ones who decide how to spend it.

It is important to acknowledge that a worker's own attorney may also have a limiting effect on the worker's voice. Specifically, an attorney may seek to strategically restrict the worker's testimony, for example, by counseling the worker against testifying about privileged matters or other matters that may be beyond the scope of discovery.[246] From the perspective of the worker's attorney, this is done in the worker's best interest, to further his claims and not risk opening the door to irrelevant topics or lines of questioning that may be intrusive or even harassing. With that in mind, it is possible—if not likely—that a worker may view his attorney's advice to limit his voice in this regard as supportive of his experiences and his concerns, particularly if the attorney takes care to fully explain to her client the reasoning behind the position she is taking and the justification for not requiring the worker to talk about sensitive matters. Nevertheless, it is worth considering

242. This should be done in addition to, and not in place of, correcting errors on the record. If the errors are not corrected, the confusion would still remain in the formal transcript, which could be used as an exhibit in court pleadings, not to mention in the room during the remainder of the deposition itself.

243. Depositions, whether reading the written transcript into the record or playing a recording of the deposition (if it was recorded), may be introduced at trial in the event a worker is unable to appear at trial. *See* FED. R. CIV. P. 32(a)(4). For additional discussion of difficulties in travel to the United States that would preclude a worker from appearing in person at trial, see *infra* note 249.

244. There are exceptions to this general rule. For example, a lawyer may seek to depose his or her own client in order to preserve testimony in the event the client is unable to appear in person for trial.

245. In particular, counsel who are accustomed to deposing relatively sophisticated litigants or witnesses may naturally fall into a questioning style not readily comprehensible to an average H-2A worker. For example, asking a worker what facts he knows to support his "claims" may not make any sense to the worker—but taking a step back and asking questions with less reliance on legal jargon is likely to be a more successful method of gathering information.

246. The discoverability of a plaintiff's immigration status, for example, is often a disputed area in litigation that involves immigrant or migrant workers. *See, e.g.*, Lee, *supra* note 86, at 1075–76.

the degree to which this intervention by a lawyer might alter what would otherwise be the worker's sole choice of whether or not to speak about certain matters.

In sum, discovery certainly provides an opportunity for an H-2A worker to express himself in ways that he would not yet have been able to do, at least in the course of litigation. He is able to use his own words and is not as constrained by legal technicalities as he is in the complaint, for example. At the same time, a worker is not always able to define the contours of his voice. As Jean Koh Peters recognized, "poor people are asked to both divulge more information and to limit the stories that they are allowed to tell."[247] Attorneys for H-2A workers need to be aware of the ways in which they—and not only opposing counsel—have this effect on their client's voice. Such actions are not inherently problematic, but attorneys should attempt to take such steps in keeping with the worker's own desires and interests—while making sure they are aware of the worker's preferences by maintaining an open channel of communication between attorney and client—in order to amplify the stories that the workers themselves seek to tell.

4. Trial

Moving on from discovery, I will now examine the opportunities for worker voice at trial.[248] In many ways, the opportunities for voice at trial are similar to the opportunities for voice at depositions. A worker is generally able to testify using his own words, in his own language, and, therefore, tell his story more directly, albeit largely within the constraints discussed above (interpretation from his native language, most importantly). However, there are two significant differences between voice at a deposition and voice at trial: the opportunity that trial presents to testify in-person in a court, and a change in who controls and defines the contours of the testimony.

247. Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J.L. & POL'Y 17, 24 (2001).

248. Civil trials, particularly in federal court, are increasingly uncommon. *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (noting that, by 2002, 1.8% of civil cases filed in federal court went to trial); *see also* Stephen Susman, *Civil Jury Trials Are Fast Becoming Extinct*, HARV. L. REC.: OPINION (Apr. 25, 2016), http://hlrecord.org/2016/04/civil-jury-trials-are-fast-becoming-extinct/ [https://perma.cc/H24W-ZDQR] (summarizing decline in federal trials and noting that steep decline coincides with Supreme Court decisions in 1986 establishing new summary judgment legal standards). I therefore focus a good deal on the settlement of claims as a vehicle for client empowerment and discuss this in a subsequent section. *See infra* Section III.C.1. Moreover, there are methods by which civil cases reach a resolution other than going to trial or via a settlement. For example, there is the possibility that a worker loses on the merits through some decision by the court before trial, for example, dismissal of the claims or a grant of summary judgment in favor of the defendant. (Rarer still, a court may grant summary judgment in favor of the plaintiff.) While I acknowledge that it is a possibility, there is no real role for the worker in those situations, given that they are usually decided on written pleadings submitted by the lawyers. Because of my interest in worker voice in litigation, I choose to focus the discussion on the two modes in which the parties can play an active role in resolving the claims, trial and settlement.

Testifying in person at trial, barring any extenuating circumstances that would prevent an in-person appearance,[249] is a particularly powerful moment for amplifying a worker's voice in the course of litigation. The worker has the floor, just as he does at a deposition, but the circumstances are heightened even further—he is in a courtroom in front of a judge and a jury (in the event it is not a bench trial), counsel for the parties, perhaps the other parties, and anyone observing in the courtroom. He is the recipient of the attention and the respect—ensured, in this context, by the presiding judge—of all individuals who are present, a total change in the dynamics from when he was an H-2A worker. He shares his story, and even if an interpreter is being used, observers in the courtroom are still able to hear the tone of and any emotion in his voice and observe his mannerisms and expression.

249. Generally speaking, the issue of worker presence in the United States is one of the most significant logistical issues—and, potentially, the most significant dispute among the parties—during the course of litigation. Counsel for H-2A workers regularly encounter this issue because the workers are often not present in the United States, given that they are migratory workers, and options for workers to come to the United States to give in-person testimony are limited. Specifically, a migrant worker from Mexico or Central America does not have the automatic right to travel to and from the United States, as such countries are not part of the Visa Waiver Program. *See Visa Waiver Program*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html [https://perma.cc/HD99-MDRD] (last visited Aug. 24, 2017). A worker may attempt to secure a visitor (B-1 or B-2) visa in order to travel into the United States, but migrant workers would likely face difficulty establishing that they lack "immigrant intent," in other words, that they intend to return home at the end of the visa validity period, rather than stay in the United States. *See Visa Denials*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T STATE, https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visa-denials.html [https://perma.cc/S4RS-N9KG] (last visited Aug. 24, 2017) ("INA Section 214(b) – Visa Qualifications and Immigrant Intent" dropdown). A migrant worker with few obvious, permanent ties to his home—e.g., a steady income, owning property, having a family of his own—is unlikely to make such a showing. *See id.* This is especially true for young men from Latin America—the demographic of most H-2A workers. Alternatively, a worker may attempt to enter the United States by applying for humanitarian parole, though such a course is also uncertain, because it is intended for situations involving a "significant public benefit" and, at the end of the day, the grant of parole is an entirely discretionary act. *See Guidance on Evidence for Certain Types of Humanitarian or Significant Public Benefit Parole Requests*, U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP'T OF HOMELAND SEC., https://www.uscis.gov/humanitarian/humanitarian-parole/guidance-evidence-certain-types-humanitarian-or-significant-public-benefit-parole-requests [https://perma.cc/G755-825G] (last visited Aug. 24, 2017). Moreover, because USCIS suggests including "[c]ourt documents stating the date and time of the legal proceedings" when applying for parole to participate in a civil case in the United States, it's much less likely that such an application would be approved in the context of a deposition occurring between the parties, as opposed to appearing for a set trial date. *See id.* ("To Participate in Civil Legal Proceedings in the United States" dropdown). In light of such difficulties, courts have often sided with plaintiffs when the parties have an unresolved dispute as to when and where to conduct depositions of workers, concluding that the plaintiffs are not required to travel to the United States for depositions and may instead be deposed in their home countries or by remote means, such as by videoconference. *See, e.g.*, Murillo v. Dillard, No. 1:15-CV-00069-GNS, 2017 U.S. Dist. LEXIS 15391, at *4–13 (W.D. Ky. Feb. 3, 2017) (denying defendants' motion for protective order seeking to prohibit plaintiffs from conducting trial depositions in Mexico on the grounds that the defendants' preference for conducting the depositions in Kentucky was significantly outweighed by the burden and expense on plaintiffs, who were impoverished migrant workers with potentially no legal option to travel to the United States). Transnational litigation in cases with guest-worker plaintiffs is the subject of a forthcoming project I am beginning with my colleagues Beth Lyon at Cornell and Nan Schivone of Justice in Motion.

Thus, in addition to having the interpreter convey the content of the worker's testimony, the simple act of direct observation further allows the individuals in the courtroom to experience the worker's voice and story.

In addition, the switch from deposition testimony to trial testimony also represents a change in who defines the contours and thus controls the testimony. At trial, it would be counsel for the plaintiff who would first question the worker.[250] Therefore, it is not opposing counsel who decides the focus of the story that is being told, but rather the worker and his attorney, who together engage in a colloquy before the audience in the court in order to present their proof and have the factfinder decide in favor of the worker. As with the framing of the story in the complaint, information about the worker and his background at trial can provide useful additional context to the worker's situation and provide greater substance to his claims. In speaking directly to all those present in court about his experiences and mistreatment, a worker is given an opportunity to amplify his voice and tell his story to a greater extent than at any other moment in the course of a civil lawsuit and in ways not available to him as an H-2A worker.

C. Beyond Litigation

While the above discussion provides advocates with strategies for how to litigate H-2A cases in a client-centered manner, the focus on maximizing client voice need not be confined to those moments alone. Rather, in keeping with the broader strategies used by community lawyers, a lawsuit can serve as a jumping off point for various other mechanisms to empower H-2A workers. Below, I discuss the

250. Defense counsel would have the opportunity to cross-examine the worker, and therefore control is not entirely removed from the opposing party. This could result in difficult questioning and a focus on sensitive or irrelevant issues, just as in a deposition. However, with the benefit of having already experienced such questioning at a deposition, a worker and his attorney would have a sense of what to expect. Therefore, this concern should be less potent on account of the ability to prepare the worker in advance for issues that may arise during his testimony at trial. Moreover, I am skeptical that cross-examination maintains its same degree of effectiveness, as a strategic matter, with witnesses testifying through an interpreter. In January of 2015, I observed several days of testimony in a civil trial brought by H-2B guestworkers against their former employer and its agents, including testimony by one plaintiff and a third-party worker witness, both of whom testified via an interpreter. While I admit to being a biased observer, I nevertheless found striking the degree to which an aggressive style of cross-examination by defense counsel fell flat when the courtroom audience had to wait for the interpreter to translate the question, the worker to answer, and the interpreter to then translate the answer. This is but one anecdotal experience, of course. Notably, however, the jury found for the plaintiffs a few weeks later, awarding them $14 million in damages. *See* Kathy Finn, *Indian Workers Win $14 Million in U.S. Labor Trafficking Case*, REUTERS (Feb. 18, 2015, 8:20 PM), https://www.reuters.com/article/us-usa-louisiana-trafficking/indian-workers-win-14-million-in-u-s-labor-trafficking-case-idUSKBN0LN03820150219 [https://perma.cc/SAL4-EUKL]; *see also* Beth Ethier, *Alabama Company Admits Locking Katrina Workers in Squalid Camps, Settles for $20 Million*, SLATE (July 15, 2015, 8:21 AM), http://www.slate.com/blogs/the_slatest/2015/07/15/signal_international_lawsuit_settlement_guest_workers_for_katrina_rebuilding.html [https://perma.cc/3GXU-NKJY] (detailing the employer's declaration of bankruptcy after the Louisiana court outcome and the subsequent settlement of related lawsuits that were headed for trial).

ways in which the settlement of a lawsuit can provide for forward-looking remedies that can maximize voices of all workers, not just the litigants, before turning to an exploration of the positive indirect effects of litigation for H-2A workers.

1. Forward-Looking Remedies

Because trials are so rare,[251] it is far more common to resolve a claim through a settlement among the parties after direct negotiation, private mediation, or a court-led settlement conference. As a result, it is worth considering the ways in which this frequent end to a civil lawsuit can serve as a means of empowering clients, and other similar workers, through the amplification of their voice.

On the surface, settlement does not appear to be a particularly fruitful venue in which to maximize client voice, for at least two reasons. First, the goal of settlement is usually for the plaintiff to receive some sort of compensation from the defendant in exchange for dismissing his claims. In other words, settlement is about money, not about the ability of the plaintiff to tell his story. Moreover, once the key terms—namely, the amount of the payment—are agreed upon, settlement is generally a technical process, with attorneys for both sides drafting the agreement to memorialize the resolution of the case. Such an agreement is often replete with legalese, once again implicating the concern with the "dialect" of the legal system.[252]

Nevertheless, settlement does present a unique opening for amplifying a worker's voice. As a starting point, settlement agreements usually operate in a way that allows employers to suppress, rather than enhance, worker voice. Confidentiality clauses are exceedingly common in employment cases.[253] The use of such clauses thus represents another method by which disputes are kept out of the public eye, and information about legal violations hidden from view. However, in the context of employment disputes, there are numerous decisions that provide authority for arguing against including a confidentiality clause in a settlement agreement. Several courts have concluded that confidentiality clauses are incompatible with the resolution of minimum wage claims under the FLSA, finding them to be contrary to the purpose of the statute to establish minimum workplace standards in the United States.[254] Thus, if a case is being filed in such a jurisdiction, or at least, not in a jurisdiction that has adopted the contrary view, counsel for an H-2A

251. *See supra* note 248.

252. *See supra* note 202.

253. *See, e.g.*, Gordon, *supra* note 158, at 440 ("Even when employers settle a matter with a small group of workers, they frequently require the workers to sign a binding confidentiality agreement.").

254. *See, e.g.*, Steele v. Staffmark Invs., LLC, 172 F. Supp. 3d 1024, 1030–31 (W.D. Tenn. 2016) (rejecting parties' arguments in favor of a confidentiality clause in a FLSA settlement because of underlying policy purposes of the FLSA and a general presumption of public access to judicial documents); Wolinsky v. Scholastic Inc., 900 F. Supp. 2d 332, 337–41 (S.D.N.Y. 2012); Dees v. Hydradry, Inc., 706 F. Supp. 2d 1227, 1244–46 (M.D. Fla. 2010).

worker with FLSA minimum wage claims would have a strong argument against the inclusion of a confidentiality clause in the settlement agreement.

If the attorney is successful in this regard, the worker would then be free to talk about the case, both informally and formally, whether through organizing efforts or even in the press. By speaking openly about the mistreatment he experienced and filing a lawsuit to hold the employer responsible for such violations, he can inform others about their rights and remedies under the law, perhaps resulting in those workers taking legal action themselves. The original worker's voice will be maximized, leading to further worker empowerment and possibly action by encouraging other workers to consider litigation or alternative means of standing up for their rights. In sum, confidentiality should not be treated as another throwaway settlement term, a "given" that is accepted without any consideration, when its inclusion can have significant consequences on the worker's own voice and downstream effects on other workers.

An additional way of encouraging broader worker empowerment by settlement is to negotiate for ongoing steps the employer must take to guard against any future legal violations. The possibilities here are numerous, given that a settlement agreement is largely treated as another contract, with the parties having a great degree of latitude as to what can be bargained for and included as a term. For example, a settlement agreement may require an employer to provide payroll information for its workers for a given period in the future, after execution of the settlement agreement.[255] While not explicitly about worker voice, such a clause ideally benefits future workers so that they do not experience the same violations as past workers. But even more worker- and voice-oriented provisions could be included. For example, the defendant could be required to affirmatively distribute information about workers' legal rights, perhaps even requiring approval of plaintiff's counsel before doing so. Or the parties could require that the employer adopt a complaint hotline, enabling workers experiencing violations to more easily speak out about the problem. Community lawyering advocates have included such

255. This was the approach taken in the Kentucky tobacco worker case with respect to resolution of the claims brought against the workers' former employers. The settlement agreement, which was reviewed and then approved by the court because it involved resolution of FLSA claims, included provisions requiring the employers to affirmatively agree to comply with the FLSA and the H-2A regulations, to provide pay stubs as required by the H-2A regulations, and to provide a quarterly report to counsel for the plaintiffs documenting compliance with these terms, together with payroll information and sample pay stubs for any H-2A workers employed by the employers for a period of two years. *See* Settlement Agreement and Release of Claims 7–8, Cruz-Cruz v. McKenzie Farms, No. 05:15-cv-00157-REW (E.D. Ky. Jan. 15, 2016); *see also* Proceedings: Telephonic Conference, Cruz-Cruz v. McKenzie Farms, No. 05:15-cv-00157-REW (E.D. Ky. Feb. 5, 2016) (memorializing status conference with settling parties regarding motion for approval of settlement agreement); Order Approving Settlement Agreement, Cruz-Cruz v. McKenzie Farms, No. 05:15-cv-00157-REW (E.D. Ky. Feb. 5, 2016) (signed order approving settlement agreement).

broad, non-monetary provisions in settlement agreements of litigated cases in order to further campaigns.[256] Moreover, federal enforcement agencies often include such terms in consent decrees used to resolve cases.[257] Private litigants should not shy away from terms that require some degree of ongoing compliance, though the decision on whether or not to push for such terms will ultimately come down to careful discussions with the client and take into account the totality of the circumstances of the negotiation between the parties.

The above suggestions are simply meant as a starting point, to encourage attorneys representing workers to consider the process of settling a civil lawsuit as not merely a substance-less coda at the end of the story that was one worker's case, but rather as a prologue to the sustained empowerment of workers more generally. Ultimately, an attorney is constrained by the reality that the client is the decision maker on questions of settlement[258] and, at the end of the day, the attorney represents and thus owes duties to the specific client,[259] not other non-client workers. Both of these factors may create dynamics that push against inclusion of forward-looking terms in a settlement agreement. Nevertheless, if the particular plaintiff is interested in using the process of litigation as a way to amplify not only his voice, but those of other workers as well, then an attorney should be attentive to that desire and consider this moment as another opportunity to do so.

2. Indirect Effects of Litigation

Litigation can also be empowering to workers because of the outcomes it has beyond the particular case and resolution of the claims before the court. Such "indirect effects" of litigation, as this has been labeled by one scholar, include "framing grievances in justice terms, conferring legitimacy on a movement's claims,

256. *See, e.g.*, Ashar, *supra* note 149, at 1916 (summarizing settlement terms, including addition of guaranteed sick and vacation days as well as "some measure of job security for [the worker clients] for one year following the execution of the agreement"); Lee, *supra* note 86, at 1089–90 (describing the use of provisions that included, among others, complaint-resolution procedures and translation of materials for non-English speaking employees, as part of a settlement of federal lawsuit and National Labor Relations Board complaints against restaurant).

257. *See, e.g.*, Press Release, U.S. Equal Emp't Opportunity Comm'n, Koch Foods Settles EEOC Harassment, National Origin and Race Bias Suit (Aug. 1, 2018), https://www.eeoc.gov/eeoc/newsroom/release/8-1-18b.cfm [https://perma.cc/RP39-HVM4] (announcing settlement of employment discrimination and retaliation case against Mississippi poultry processing plant, including $3,750,000 in monetary relief for victims and a three-year consent decree that included provisions "implementing new policies and practices designed to prevent discrimination based on race, sex or national origin; providing anti-discrimination training to employees; creating a 24-hour hotline for reporting discrimination complaints in English and Spanish; and posting policies and anti-discrimination notices in [the] workplace in English and Spanish").

258. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2(a) ("A lawyer shall abide by a client's decision whether to settle a matter.").

259. *See, e.g.*, *id.* r. 1.7 cmt. 1 (citing "[l]oyalty" to a client as an "essential element[]" in the representation of a client).

generating favorable publicity, raising consciousness among a movement's constituency, and fostering empowerment."[260] Others have recognized the value that such participation in the legal system can have on the litigants. For example, litigation can be meaningful for clients because it "give[s] them the formal standing to be heard regarding breaches of their legal rights and claims for judicial intervention" and "[i]t can confirm that the conditions of their lives are not fair and give them hope that things need not remain as they have always been."[261] Litigation can also help foster group solidarity through the storytelling that emerges in the course of a lawsuit.[262]

Both of the community lawyering case studies described above[263] highlight these indirect effects achieved by the litigation on behalf of day laborers and restaurant workers. They tell the stories of alliances built and power mobilized in Los Angeles[264] and the increased sense of solidarity among workers in New York.[265] Litigation with H-2A workers can achieve similar effects. H-2A workers are perhaps the ultimate "disenfranchised workforce."[266] The United States and its residents rely on their labor to sustain this nation through the food they harvest, but in exchange for this exploitation of labor, the workers get nothing in return. The workers have no real legal ties to the United States—no path to citizenship, regardless of how many years they may have worked in the United States on an H-2A visa—and no ability to participate directly in the political processes that affect their legal rights while in the United States.[267] The very opportunity to participate in the legal process to vindicate their rights marks a significant shift for H-2A workers: they are having their voices and stories heard,[268] and, as civil litigants, are on an even playing field with some of the most powerful persons and entities in this country.[269]

Perhaps the value of litigation can best be understood when considering the potential costs of losing it. A recent article extensively details the use of mandatory

260. Cummings, *supra* note 177, at 1622–23.

261. White, *supra* note 202, at 545.

262. *See* Delgado, *supra* note 231, at 2437–40.

263. *See supra* Section III.A.

264. *See supra* note 188 and accompanying text.

265. *See supra* notes 175–76 and accompanying text. Similarly, in a forthcoming article, Jennifer Lee writes about "undocumented work resistance" and the value that such recognition and inclusion of undocumented workers can have on a group of individuals who are so often forced to operate at the margins of society. *See* Jennifer J. Lee, *Redefining the Legality of Undocumented Work*, 106 CALIF. L. REV. (forthcoming 2018) (manuscript at 25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040872 [https://perma.cc/YT8D-4Q46].

266. Smith, *supra* note 22, at 385 n.53.

267. *See, e.g.*, Lee, *supra* note 112, at 42 ("[S]ince H-2 visas are temporary and do not provide a path to lawful permanent residency, guest workers are a *de facto* underclass of immigrant workers who lack the benefits that come with integrating into U.S. society."); Smith, *supra* note 22, at 385 n.53 ("Guestworkers . . . cannot participate in the political process and the visa does not provide a means to ever gain citizenship.").

268. *See supra* notes 192–95 and accompanying text.

269. *See supra* note 226.

arbitration clauses in the guestworker context.[270] It goes without saying that the normative arguments for including and enforcing such clauses in contracts with H-2A workers deserve significant scrutiny: when workers do not bargain over the contractual terms, do not receive a contract in a language they understand (if they receive one at all), and are generally unfamiliar with the U.S. legal system, the notion that the workers have consented to any such terms borders on the absurd.[271] Regardless, if a mandatory arbitration term is to be included in a contract and enforced by an adjudicator, the consequences such a decision would have on the transparency of the process and, ultimately, the workers' ability to use their voice would be significant. Generally a "private process," the outcomes of arbitration proceedings "are not recorded, compiled, or publicly available."[272] Moreover, there is no guarantee the arbitrator will "produce written decisions explaining their reasoning," there are usually limitations on discovery, and decisions of arbitrators are open to judicial review in only "extremely narrow" circumstances, with any awards being "final and binding."[273] In other words, the legal violations are buried and the voices and stories of the workers are silenced. H-2A workers, in such a scenario, would be robbed of a chance to assert themselves and their status as outsiders on the fringes of society, reinforced by employers seeking to keep everything as quiet and hidden as possible.

IV.
CONCLUSION

H-2A workers, in many ways, represent the ultimate outsiders in the U.S. legal system: their presence and participation in U.S. society is limited to being temporary agricultural laborers, a role that is facilitated by a program, the very framework of which creates the conditions for the workers' exploitation. Mistreatment of workers is common, and the available legal remedies for such violations are limited. Litigation may not be a perfect solution to these problems. It is an unpredictable and often slow process, generally focused on remedying past harms instead of harnessing power to keep such harms from happening in the future. Nevertheless, because of their outsider status, both as a legal and as a practical matter, litigation often represents the only available avenue for H-2A workers to take legal action for violations of their rights. Despite it being the most viable option for H-2A workers to seek a remedy, litigation need not be the exclusionary, lawyer-dominated experience that it can so often become with marginalized communities as clients. Quite the opposite—it is possible for advocates representing H-2A workers to do so in a client-centered manner, taking care to ensure that H-2A workers understand the process of litigation and are given as many opportunities as possible to tell their story along the way. By focusing on amplifying worker

270. Smith, *supra* note 22.
271. *See id.* at 402–04 (discussing the "consent myth" in the guestworker context).
272. *Id.* at 394.
273. *Id.*

voice in the course of a lawsuit, an attorney representing such workers can empower the workers and also expose the abuses in and inherent flaws of the H-2A program as a whole. In so doing, the attorney can ensure that the workers are no longer nameless figures, asked to return home when this country no longer has any use for their labor, but empowered individuals, part of a broader community of workers standing up for their rights.

V.
APPENDIX

Table 1: Number of H-2A Visas Granted by the State Department, 1986–2016[274]

YEAR	# OF VISAS		YEAR	# OF VISAS
1987	44		2002	31,538
1988	2,612		2003	29,882
1989	3,965		2004	31,774
1990	5,318		2005	31,892
1991	6,847		2006	37,149
1992	6,445		2007	50,791
1993	7,243		2008	64,404
1994	7,721		2009	60,112
1995	8,379		2010	55,921
1996	11,004		2011	55,384
1997	16,011		2012	65,345
1998	22,676		2013	74,192
1999	28,568		2014	89,274
2000	30,201		2015	108,144
2001	31,523		2016	134,368

274. For the data from 1987 to 1991, see *Nonimmigrants Issued Visas 1987–1991*, *supra* note 27. For the data from 1992 to 1996, see *Classes of Nonimmigrants Issued Visas (Detailed Breakdown) (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 1992–1996*, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssuedDetailed/NIVClassIssued-DetailedFY1992-1996.pdf [https://perma.cc/XYZ2-YDTA] (last visited Mar. 16, 2018). For the data from 1997 to 2001, see *Classes of Nonimmigrants Issued Visas (Detailed Breakdown) (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 1997–2001*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/Non-Immigrant-Statistics/NIVClassIssuedDetailed/NIVClassIssued-DetailedFY1997-2001.pdf [https://perma.cc/WCD5-VKXA] (last visited Mar. 16, 2018). For the data from 2002 to 2006, see *Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 2002–2006*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/FY06AnnualReportTableXVIB.pdf [https://perma.cc/T32M-LH3A] (last visited Mar. 16, 2018). For the data from 2007 to 2011, see *Table XVI(B), Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards), Fiscal Years 2007–2011*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP'T OF STATE, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2011AnnualReport/FY11AnnualReport-Table%20XVI(B).pdf [https://perma.cc/YE82-HDBU] (last visited Mar. 16, 2018). For the data from 2012 to 2016, see *Nonimmigrant Visas Issued 2012–2016*, *supra* note 28.

Table 2: Top 10 States by Number of H-2A Positions Certified, 2010–2017

STATE	**FY2010**		**FY2014**			**FY2017**		
	Cert.[275]	*R*	*Cert.*[276]	*R*	*Change*	*Cert.*[277]	*R*	*Change*
N. Carolina	9,387	1	14,502	1	54%	20,713	3	121%
Louisiana	6,981	2	7,222	5	3%	8,875	6	27%
Georgia	5,561	3	10,387	3	87%	23,421	2	321%
Kentucky	5,455	4	6,755	6	24%	7,403	7	36%
Florida	4,510	5	13,544	2	200%	25,303	1	461%
Arizona	4,309	6	3,745	9	-13%	6,060	10	41%
New York	3,858	7	4,676	8	21%	6,870	8	78%
Washington	3,014	8	9,077	4	201%	18,535	4	515%
Arkansas	3,006	9	2,519 [278]	*	-16%	*[279]	*	*
California	2,629	10	6,043	7	130%	15,232	5	479%
Virginia	2,455	*	3,216	10	31%	*	*	*
Michigan	277[280]	*	1,317 [281]	*	375%	6,432	9	2222%
National	*79,011* [282]	*	*116,689*	*	*48%*	*200,049*	*	*153%*
Cert. = Number of Positions Certified / R = Rank, out of Top 10 Change = Percentage Change in Number of Positions Certified since 2010								

275. Unless otherwise noted, data in this column is from NEWMAN, *supra* note 21, at 19 fig.2.

276. Unless otherwise noted, data in this column is from FY 2014, *supra* note 29.

277. Unless otherwise noted, data in this column is from FY 2017, *supra* note 29.

278. *See 2014 Annual Report, Appendix A: State Employment-Based Immigration Profiles, Arkansas*, OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, https://www.foreignlaborcert.doleta.gov/map/2014/AR.pdf [https://perma.cc/T3ZM-7LL4] (last visited Nov. 27, 2017).

279. State-by-state individual summaries for 2017 are not yet available for states that are not in the top ten.

280. *See* OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, FOREIGN LABOR CERTIFICATION ANNUAL REPORT, OCTOBER 1, 2009 – SEPTEMBER 30, 2010, at A-24 (2010), https://www.foreignlaborcert.doleta.gov/pdf/OFLC_2010_Annual_Report_Master.pdf [https://perma.cc/A5PA-H23X] (last visited Nov. 27, 2017) [hereinafter OFLC 2010 ANNUAL REPORT].

281. *See 2014 Annual Report, Appendix A: State Employment-Based Immigration Profiles, Michigan*, OFFICE OF FOREIGN LABOR CERTIFICATION, U.S. DEP'T OF LABOR, https://www.foreignlaborcert.doleta.gov/map/2014/MI.pdf [https://perma.cc/A5PA-H23X] (last visited Nov. 27, 2017).

282. *See* OFLC 2010 ANNUAL REPORT, *supra* note 280, at 31. Of note, 2010 represented a slight drop in the increase of positions certified from the 82,099 in 2008 and the 86,014 in 2009. *Id.* In light of this, the results are certainly different than if the comparisons had been based on 2009 data, though the increases seen by 2014 and 2017 are so great, the overall trend is clear.