

AN ENVIRONMENTAL JUSTICE ANALYSIS OF THE EXCLUSION OF FARMWORKERS FROM THE NATIONAL LABOR RELATIONS ACT

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The exclusion of farmworkers from the National Labor Relations Act has left workers in agriculture unprotected from essential labor rights including the right to organize, bargain with employers, and engage in collective action. These workers, unable to demand safer working conditions, may in turn be exposed to toxic pesticides, extreme heat, hazardous fumes, and deadly diseases. The harmful effects from modern agriculture extend beyond the workers, spreading through air and water to surrounding communities and ecosystems that are contaminated by the same toxic substances. In applying the environmental justice framework to these issues, I illuminate the environmental harms that result from the existing structure of labor and employment protections for farmworkers.

I propose expanding the National Labor Relations Act to protect farmworkers, with certain modifications to ensure that those protections effectively empower workers. By granting farmworkers new labor protections, those workers may be able to advocate for improved safety in their workplace, engage in key regulatory and legislative decision making, access legal assistance to vindicate their rights, and demand higher wages for their dangerous work. These efforts could in turn reduce or eliminate many of the harmful practices of modern agriculture as workers demand that safer methods be implemented to protect their health. I further recommend imposing a system of sectoral bargaining to facilitate such a transition by allowing workers to obtain industry wide minimum standards and to ease the burden of organizing the agricultural workforce.

To remedy the historical injustice of excluding farmworkers from the National Labor Relations Act, it is essential to enable those workers to advocate on their own behalf and give a voice to those that our system has long excluded.

TABLE OF CONTENTS

<i>Introduction</i>	310
<i>I. Racist Exclusions and Hazardous Results for Farmworkers</i>	312
<i>A. The Environmental Justice Framework</i>	312
<i>B. A Racist History Leaves Farmworkers Unprotected</i>	314
<i>C. Dangerous Working Conditions for Farmworkers</i>	317
<i>D. Poor Safety Protocols Deepen Issues for All Farmworkers</i>	321
<i>E. Complicating Issues for Farmworkers</i>	322
<i>F. How Industrial Agriculture Harms Surrounding Communities</i> ..	324
1. <i>Crop Production</i>	324
2. <i>CAFOs</i>	325
<i>II. Regulatory Structure</i>	327

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A.	<i>Crop Production</i>	327
B.	<i>CAFOs</i>	328
III.	<i>Granting Farmworkers NLRA Protections</i>	330
A.	<i>Bringing Farmworkers into the National Labor Relations Act</i> ..	330
1.	<i>Negotiating for Better Working Conditions</i>	331
a.	<i>Crop Production</i>	332
b.	<i>CAFOs</i>	332
2.	<i>Procedural Justice in Legislation and Rulemaking</i>	333
3.	<i>Litigation and Access to Justice</i>	335
4.	<i>Fair Wages for Farmworkers</i>	338
B.	<i>Shortcomings of the NLRA</i>	338
C.	<i>The Agricultural Industry's Structure Hampers Unionization Efforts</i>	339
D.	<i>Lessons from the California Agricultural Labor Relations Act</i> ...	340
IV.	<i>Sectoral Bargaining for Farmworkers</i>	342
A.	<i>Sectoral Bargaining in Practice</i>	342
B.	<i>Overcoming Organizing Challenges</i>	344
	<i>Conclusion</i>	345

INTRODUCTION

Since its passage, the National Labor Relations Act¹ (“NLRA”) has excluded farmworkers from its critical protections, a decision that was steeped in racism.² As a result of this exclusion, many farmworkers, who are historically people of color and immigrants, have been unable to take advantage of the legal protections for workers to elect a bargaining representative or engage in collective action to improve their working conditions.³ Without the legal protections of the NLRA, farmworkers that are already plagued by an array of legal and practical obstacles to obtaining better working conditions are unable to leverage their collective power to protect themselves from the harms of agricultural work. These harms include short-term injuries such as pesticide poisoning, harmful effects to fetuses in pregnant workers, exposure to dangerous diseases from livestock in close quarters, and long-term effects like skin disease, neurological deterioration, lung damage, kidney disease, and cancer.⁴ These impacts are not limited to farmworkers in direct contact with harmful chemicals or toxic

1. 29 U.S.C. §§ 151–169 (1935).

2. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1351–1354 (1987); Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 118–27 (2011).

3. Perea, *supra* note 2, at 118–27.

4. See FARMWORKER JUSTICE, EXPOSED AND IGNORED: HOW PESTICIDES ARE ENDANGERING OUR NATION’S FARMWORKERS 7 (2013), <https://perma.cc/YUC4-3HYD>; Frank

fumes, but also affect the surrounding communities through runoff of chemicals and waste into drinking water, and aerosolized pesticides and manure emissions spreading through the air.⁵ Workers and nearby residents throughout the country, whether exposed to crop production or livestock farming, suffer the consequences of the dangerous practices of modern agriculture.

To combat the extensive health harms affecting both farmworkers and surrounding communities from modern agricultural activity, it is necessary for Congress to extend NLRA protections to farmworkers, with certain critical modifications. Those modifications should address key failures of the NLRA and also institute a system of sectoral bargaining, which establishes a committee of representatives for workers and employers to negotiate contractual minimum standards and wages for all employees in an industry.⁶ Such a system would alleviate the burdens of organizing a largely transient workforce and give a critical boost to a labor movement whose strength has been declining for decades, while empowering farmworkers to fight for safer working conditions and better wages.

Under the current system, farmworkers have been left with limited rights and resources to advocate for themselves in the face of hazardous and exploitative working conditions. This has resulted in extensive health risks to those workers and surrounding communities. Granting important labor protections to these workers would allow workers to better access the legal and political levers to improve working conditions through labor unions acting as representatives for workers. Access to lawyers and advocates through unionization would ensure greater involvement in decision making by employers and legislators and could create greater accountability for bad actors. By enabling farmworkers to engage directly in improving their material conditions, agricultural workers may begin to achieve the distributive and procedural justice aims of the environmental justice movement through concrete redistribution of resources and power.

The failures of federal labor law to protect farmworkers grows out of a tradition of systemic racism and xenophobia that has led to substantial harms to farmworkers. This injustice can be rectified through considered legislation to extend labor protections to those excluded workers. This Note is divided into four parts. Part I establishes the analytical framework for the Note, traces the history of the exclusion of farmworkers from federal labor protections, and discusses the numerous health and environmental harms to workers and surrounding communities from the agricultural industry. Part II discusses the regulatory

M. Mitloehner & Michelle S. Calvo, *Worker Health and Safety in Concentrated Animal Feeding Operations*, 14 J. OF AGRIC. SAFETY & HEALTH 163 (2008).

5. See Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV'T HEALTH PERSPS. 182, 186–87 (2013). Cf. Clémentine Dereumeaux et al., *Pesticide Exposures For Residents Living Close to Agricultural Lands: A Review*, 134 ENV'T INT'L 1, 2, 12 (2020).
6. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 78–9 (2016).

structure that governs the agricultural industry and its shortcomings resulting from various exceptions for agriculture in critical environmental statutes. Part III argues that farmworkers should be brought under the NLRA and discusses the potential benefits to workers of such protections in obtaining safer working conditions and higher wages. Part III further discusses the shortcomings of existing labor law and notes necessary changes to ensure that farmworkers are effectively protected by the expanded NLRA. Part IV proposes a possible solution to some of the failings of labor law in the form of sectoral bargaining and discusses the implementation and possible benefits of such a system.

I. RACIST EXCLUSIONS AND HAZARDOUS RESULTS FOR FARMWORKERS

The environmental justice framework presents an effective lens for evaluating the impact of the exclusion of farmworkers from the NLRA and the resulting environmental harms to workers and nearby communities. Part I.A establishes the principles and analytical framework developed by environmental justice scholars to examine and tackle the disparate harms of environmental degradation, and which will guide the analysis throughout the Note. Part I.B outlines the racist history of the NLRA and the most important provisions of the NLRA for the protection of workers' rights. Part I.C explores the numerous environmental and health harms that farmworkers are subjected to in agricultural work due to dangerous working conditions. Part I.D considers how poor safety procedures in the agricultural industry exacerbate the already hazardous work that farmworkers undertake. Part I.E examines the complicating factors that many farmworkers face in obtaining safer working conditions because of their legal status, exclusion from key employment protections, and difficulty accessing resources for assistance. Part I.F details the ways in which environmental harms from agriculture extend beyond the farms to the surrounding communities, degrading air and water quality to the detriment of human health and nearby ecosystems.

A. *The Environmental Justice Framework*

It is impossible to evaluate the state of the agricultural industry without accounting for the disproportionate harm borne by people of color and immigrants throughout the history and development of agriculture in the United States. While the history of racism in farm work pervades American history, the challenges for modern farmworkers are in large part tied to the pervasive racial animus in Congress during the New Deal.⁷ The exclusion of farmworkers from the NLRA and other key employment protections left them at risk of dangerous working conditions.⁸ The environmental justice framework offers a

7. See Linder, *supra* note 2, 1341–42.

8. See discussion *infra* Part I.C.

valuable lens for evaluating the discriminatory history and resulting disproportionate harm on marginalized communities of the American agriculture industry. The environmental justice framework presents an opportunity to understand the disproportionate impacts of laws and policies and presents a means through which to evaluate possible solutions based on how effectively they redress the harms that result.

Environmental justice “means many things to many people.”⁹ Dr. Robert Bullard, the pioneer of environmental justice, “distilled the principles of environmental justice into a framework of five basic characteristics”:

- (1) protect all persons from environmental degradation; (2) adopt a public health prevention of harm approach; (3) place the burden of proof on those who seek to pollute; (4) obviate the requirement to prove intent to discriminate; and (5) redress existing inequities by targeting action and resources.¹⁰

In line with these core principles, Professor Robert Kuehn set out four central concepts of environmental justice: distributive justice, procedural justice, corrective justice, and social justice.¹¹ “Distributive justice has been defined as ‘the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given’”, with the primary aim of “fairly distributed outcomes, rather than on the process for arriving at such outcomes.”¹² Procedural justice is defined as “the right to treatment as an equal . . . not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decision”, and is intended to address “the fairness of the decision-making process.”¹³ Corrective justice demands “fairness in the way punishments for lawbreaking are assigned and damages inflicted on individuals and communities are addressed . . . and involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible.”¹⁴ Social justice is a more nebulous concept, but it generally contemplates “first, that the members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages.”¹⁵

Under the tenets of environmental justice, the agricultural industry and the regulatory structure that governs it have failed to protect the farmworkers that

9. Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681, 10681 (2000).

10. *Id.* at 10683.

11. *Id.* at 10683–98.

12. *Id.* at 10683 (quoting RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273 (1977)).

13. *Id.* at 10688.

14. *Id.* at 10693.

15. *Id.* at 10698.

enable the industry to exist. The failure to grant protections to those workers has left them in danger from a range of toxic substances. However, remedying these injustices by extending labor protections to farmworkers federally and implementing new models of organizing and bargaining may achieve the aims of procedural, distributive, and social justice.

B. A Racist History Leaves Farmworkers Unprotected

Farmworkers have been excluded from essential federal labor protections since Congress first addressed the issue. This section explores the history of the passage of the NLRA and other New Deal legislation, the racialized motivations in excluding farmworkers, the rights that the NLRA grants to covered workers, and the effect that the deprivation of those rights has on the power of farmworkers.

Since its passage in 1935, the NLRA has excluded farmworkers from its key protections. This exclusion represented a concession made by Northern Democrats to secure the votes of Southern Democrats.¹⁶ The decision was driven by racism intended to prevent Black workers from gaining economic and political power that would have undermined segregation in the Jim Crow South.¹⁷ Black employment from Reconstruction through the New Deal era was disproportionately concentrated in agriculture, and this system was continually reinforced through complex tactics employed by white landowners to keep those workers tied to the land with little to no economic freedom.¹⁸ Dedicated to their white supremacist regime, Southern Democrats dominated Congress during the New Deal, wielding their outsized power to maintain the Jim Crow system.¹⁹ While the legislative record of the NLRA does not explicitly include the issue of race, the motivations of Southern Democrats are clear from the exclusion of only farmworkers and domestic workers, areas of the Southern economy that were predominantly Black.²⁰ Congress created this carve out under the guise of concern over small businesses, but the final version of the act only excluded farmworkers and domestic workers, with no mention of small businesses.²¹ This exclusion also followed the pattern of racist legislation during the New Deal that explicitly left Black workers with little to no protections. This is apparent across other key pieces of New Deal legislation like the Fair Labor Standards Act and the Social Security Act, which similarly excluded farmworkers and domestic workers, and in the case of FLSA, Congress explic-

16. See Perea, *supra* note 2, at 102–03.

17. Linder, *supra* note 2, at 1342–50.

18. *Id.*

19. *Id.* at 1351–53.

20. See Perea, *supra* note 2, at 118–20.

21. *Id.*

itly discussed maintaining white supremacy disguised as preventing social unrest.²²

The exclusion of farmworkers from the NLRA left them without many of the critical protections necessary for workers to gain the power required to demand better working conditions from employers. The NLRA provides several critical protections to workers to effectively leverage their collective power and form a union without interference by an employer. However, as the Supreme Court has interpreted the NLRA, it has narrowed the benefits that undocumented workers may have under the Act, and held in *Sure-Tan, Inc. v. NLRB*²³ that although undocumented workers are entitled to NLRA protections, their remedies under the Act are limited due to their legal status. The Supreme Court in *Hoffman Plastics v. NLRB*²⁴ extended the reasoning in *Sure-Tan* to establish that undocumented workers could not recover back pay for violations of the Act by an employer due to contravening immigration law, defanging the remedial power of the National Labor Relations Board (“NLRB”), the federal agency that administers the NLRA.²⁵ Despite this decision, undocumented workers are still entitled to the core protections of two critical sections of the NLRA that outline the protections afforded to workers: Sections 7 and 8.²⁶

Section 7 of the Act provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”.²⁷ This language carries with it extensive protections, beyond the critical benefit of forming a union and designating a bargaining representative to negotiate better conditions and wages. These additional protections are contained within the term “concerted activities”, which has been broadly interpreted since the passage of the NLRA to include activities such as engaging in

22. “Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted; but the Federal Government knows no color line and of necessity it cannot make any distinction between the races. We may rest assured, therefore, that. . . it will prescribe the same wage for the Negro that it prescribes for the white man. . . . [T]hose of us who know the true situation know that it just will not work in the South. You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.” *Id.* at 1374 (quoting 82 CONG. REC. 1404 (1937)).

23. See 467 U.S. 883 (1984).

24. 535 U.S. 137 (2002).

25. See *id.* at 148–49.

26. 29 U.S.C. §§ 157–58.

27. *Id.* § 157.

strikes,²⁸ wearing buttons or other clothing with slogans protesting working conditions,²⁹ and lobbying legislators to change national policies that impact their job security.³⁰

Section 8 of the Act defines unfair labor practices as actions by an employer or union that serve “to interfere with, restrain, or coerce employees in the exercise of the rights” protected under Section 7.³¹ Unfair labor practices cover an array of actions that the NLRB may determine to be a violation of the law and for which the NLRB may impose remedies that are enforced by court order thereafter.³² Section 8(d) is of particular importance, as it requires employers to meet with the designated bargaining representative of employees and “confer in good faith with respect to wages, hours, and other terms and conditions of employment.”³³ This establishes an affirmative obligation for employers to bargain over key elements of the employment relationship. Employers, in turn, use a vast array of methods limited only by the extent of the human imagination to undermine these extensive employee rights.³⁴ In light of employers’ actions, Section 8 imposes both specific obligations on employers and broadly bars several forms of interference with employee rights, which the NLRB has applied to employers’ overt and covert interference.³⁵

Applied together, Sections 7 and 8 of the NLRA provide limited but significant protections to workers seeking to organize and fight for better working conditions and wages. The categorical exclusion of all farmworkers from these protections has left them exposed to the full array of methods that employers use to undermine worker solidarity and prevent workers from using their collective power to achieve better working conditions. For the many undocumented farmworkers, the lack of such protections poses an additional challenge to the

28. *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

29. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

30. *Kaiser Eng’rs v. NLRB*, 538 F.2d 1379 (9th Cir. 1976).

31. 29 U.S.C. § 158(a)(1).

32. *See* 29 U.S.C. § 160.

33. *Id.*

34. Section 8 of the NLRA sets out broad categories of violations which may be committed by either an employer or a union. Rather than listing all the possible ways in which the Act may be violated, the NLRB is tasked with determining what constitutes a violation of Section 8. When determining whether an employer has committed an unfair labor practice under Section 8, the NLRB will consider whether the actions or inactions at issue violate employee rights in some capacity on a case-by-case basis. These tactics can take on various forms including outright threats to workers seeking to unionize, and more discreet tactics such as offering non-union employees in a company higher wages or new benefits.

35. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (holding that employer’s threats of reprisal and force for unionization were impermissible); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) (ruling that conferral of employee benefits in the lead up to an election unduly influenced outcome of the election).

myriad barriers they already face in protecting themselves from unsafe working conditions.³⁶

Today, the over one million people that make up the agricultural workforce in the United States are left unprotected by essential rights that guarantee workers the power to come together to demand better wages and workplace protections.³⁷ Though these workers face different harms across the industry, all suffer from the absence of these critical protections in their workplace.

C. Dangerous Working Conditions for Farmworkers

The lack of labor protections has contributed to the hazardous working conditions that farmworkers now face. With no federal protections to organize and engage in collective action to fight for stronger workplace safety, workers are subject to long working hours exposed to toxic chemicals and extreme heat, with little to no workplace safety precautions. This section traces these dangers and explores the injustice of a system that exploits and harms its workers.

Legacies of racism and xenophobia in the exclusion of farmworkers from labor protections mean that modern farmworkers, who are now primarily immigrants from Mexico and Central America,³⁸ continue to face horrible working conditions, including exposure to dangerous chemicals and other hazardous conditions, long work hours, and low wages.³⁹ Workers in crop production who, according to the USDA, in 2019 numbered 888,872 and represented 75% of agricultural workers on larger farms,⁴⁰ are routinely exposed to toxic pesticides and extreme temperatures.⁴¹ Livestock workers, who in 2019 made up 25% of agricultural workers on larger farms at 295,707 workers,⁴² face acid fumes and emissions that endanger the respiratory health of workers and risk exposure to dangerous pathogens.⁴³ These workers are made to work in unsafe conditions without the proper training and protective equipment, leading to both short- and long-term harms.⁴⁴ An Oxfam America report from 2004 found that roughly 300,000 farmworkers suffer pesticide poisoning each year,

36. See discussion *infra* Part I.E.

37. *Farm Labor*, UNITED STATES DEP'T OF AGRIC. ECON. RSCH. SERV. (2022), <https://perma.cc/9A2D-5HCN>.

38. NAT'L CTR. FOR FARMWORKER HEALTH INC., FACTS ABOUT FARMWORKERS 1 (2020), <https://perma.cc/7BKS-RUWS>.

39. FARMWORKER JUSTICE, *supra* note 4, at 7.

40. *Farm Labor*, *supra* note 37.

41. See discussion *infra* Part I.D.

42. See *Farm Labor*, *supra* note 37.

43. See discussion *infra* Part I.D.

44. AnnMarie Lee Walton et al., *Benefits, Facilitators, Barriers, and Strategies to Improve Pesticide Protective Behaviors: Insights from Farmworkers in North Carolina Tobacco Fields*, 14 INT'L J. ENV'T RSCH. & PUB. HEALTH 677, 678 (2017).

with immediate injuries including nausea, vomiting, rashes, blindness, and even death.⁴⁵ The report also noted particularly acute harms to pregnant women, whose fetuses are at risk of “spontaneous abortion, growth retardation, structural birth defects, or functional deficits”.⁴⁶ Ongoing exposure can lead to severe health impacts— “[l]ong-term exposure to pesticides has been proven to cause skin disease, sterility, neurological damage, and cancer.”⁴⁷ Such long-term exposure is nearly inevitable for many workers, who “report working an average of 10 to 12 hours a day, 7 days a week, during the harvest”, including regular mandatory overtime hours.⁴⁸

As climate change exacerbates extreme temperatures around the world, farmworkers face the burden of intense heat in fields on a daily basis. Due to the nature of their work, farmworkers have an occupational heat-related mortality rate that is 35 times higher compared to workers from other industries.⁴⁹ Several factors have been identified as contributing to this issue including the physicality of the work, the piece-rate payment system that incentivizes workers to forego breaks,⁵⁰ the lack of control over workplace safety practices, and the lack of access to water and shade.⁵¹ Migrant workers in the United States are especially vulnerable to injuries due to heat because of a “lack of control over workplace conditions, poor work safety climate, and cultural and language barriers.”⁵² A common injury associated with heat is kidney damage, which presents a major concern. Research indicates that “each 5°F increase in mean heat index was associated with a 47% increase in the likelihood of [acute kidney injury] among migrant agricultural workers.”⁵³ With no adequate mechanisms to advocate for the necessary changes to ensure their safety, farmworkers remain especially vulnerable to the dangers of climate change.

45. OXFAM AM., *LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE* 16 (2004), <https://perma.cc/6XNX-5F3W>.

46. *Id.*

47. *Id.*

48. *Id.* at 13.

49. See Diane M. Gubernot, et al., *Characterizing Occupational Heat-Related Mortality in the United States, 2000–2010: An Analysis Using the Census of Fatal Occupational Injuries Database*, 58 AM. J. INDUS. MED. 203, 206 (2015).

50. “Piece rate or piece work is defined as ‘work paid for according to the number of units turned out.’ Piece rate compensation is based on paying a specified sum for completing a particular task or making a particular item.” John Christopher Matthes, *An Imperfect System: Piece Rate Employment and the Impact on California’s Central Valley Agricultural Industry*, 27 SAN JOAQUIN AGRIC. L. REV. 67, 67 (2018) (quoting *Piece work*, AMERICAN HERITAGE DICTIONARY, <https://perma.cc/2PS2-2PG2>).

51. El Khayat et al., *Impacts of Climate Change and Heat Stress on Farmworkers’ Health: A Scoping Review*, 10 FRONTIERS IN PUB. HEALTH 2 (2022).

52. *Id.* at 12.

53. *Id.* at 10.

For their arduous and dangerous work, farmworkers are “among the most economically disadvantaged working groups in the United States”,⁵⁴ receiving deeply inadequate wages. While recent shifts in the labor market have led to a small boost in wages, the issue of low pay persists.⁵⁵ The average wage of farmworkers was \$14.62 in 2020, which means that “farmworkers earned just under 60% of what production and nonsupervisory workers outside of agriculture earned.”⁵⁶ Compounding the issue of low wages is the insecurity of farm work, as “[m]ost jobs are temporary, and often [workers] can only find work during the harvest.”⁵⁷ Workers also report massive swings in hours, sometimes working “7 days a week, 10-11 hours a day”.⁵⁸ Yet “[w]hen there isn’t much work, [they] only work 3-4 days a week for up to 4 hours a day.”⁵⁹ The issue is not evenly distributed by gender, as disparities in employment for women, who are more likely to be part-time workers than men, mean that women have lower weekly median incomes than men and fewer employment protections in part because of their part-time status.⁶⁰ These factors combine to render farmworkers an especially vulnerable group. There are significant social and distributive concerns in the crop production context, where dangerous work is offloaded onto vulnerable groups working for substandard pay and with few if any safety precautions.

Concentrated Animal Feeding Operations (“CAFOs”) represent another major agricultural activity. CAFOs pose a significant threat to the health and safety of workers and to nearby communities surrounding such operations, with particular impact on marginalized communities.⁶¹ CAFOs are intensive animal feedlots where hundreds or even thousands of livestock are held for long periods in close quarters while feeding before they are ready for slaughter.⁶² CAFOs

54. WILLIAM KANDEL, U.S. DEP’T OF AGRIC., PROFILE OF HIRED FARMWORKERS, A 2008 UPDATE 1 (2008), <https://perma.cc/P2PY-4CF6>.

55. See Marcelo Castillo, *U.S. Farm Employers Respond to Labor Market Changes with Higher Wages, Use of Visa Program, and More Women Workers*, UNITED STATES DEP’T OF AGRIC. ECON. RSCH. SERV. (2020), <https://perma.cc/2KVA-CFLL>.

56. Daniel Costa, *The Farmworker Wage Gap Continued in 2020*, ECON. POL’Y INST. (2021), <https://perma.cc/PKQ3-BCQ8>.

57. OXFAM AM., *supra* note 45, at 13.

58. *Id.* at 14.

59. *Id.*

60. *Id.*

61. See discussion *infra* Part I.F.2.

62. The relevant regulations define CAFOs as: “an animal feeding facility in which animals are confined for 45 days or more out of a 12 month period, over which no crops or forage growth is sustained and that meets one of the following conditions: (1) it contains 1,000 animal units and has potential to discharge pollutants into water by any means; (2) it contains over 300 animal units and is discharging pollutants through a manmade device directly into a water body; or (3) it is designated as a CAFO after a site inspection determines that the operation is or has the potential to be a significant polluter, no matter what its size.” FRANK P. GRAD, 4 TREATISE ON ENVIRONMENTAL LAW § 7.02 (2022).

subject workers to distinct harms from crop production, which are explored below.

CAFOs house massive numbers of cattle, hogs, or chickens in close quarters, where they are fed in massive troughs in an effort to maximize the efficiency of the land used for raising livestock.⁶³ As the economic pressure mounts to reduce the cost of food, producers are incentivized to become larger and concentrate more animals in their feedlots in order to extract as much as possible from their facilities, and as a result, “the numbers of animal units per worker . . . and management practices change . . . which might result in altered exposure to health risks for this industry’s working population.”⁶⁴

CAFOs pose a significant threat to the health of workers due to the animal waste generated through the process of raising livestock. “CAFO airborne exposures are complex mixtures of gases and [particulate matter], including allergens, microorganisms, antibiotics, and pulmonary irritants.”⁶⁵ Common chemicals found in CAFOs like hydrogen sulfide, ammonia, and volatile organic compounds may independently or synergistically result in inflammation of airways and eyes, shortness of breath, nausea, decrease in pulmonary function, damage to the liver, kidney and central nervous system, cancer, and, in extreme cases, death.⁶⁶ Particulate matter also presents substantial health risks, with studies showing “elevated ambient [particulate matter] . . . associated with increased mortality and morbidity . . . [and] implicated in the onset of asthma, bronchitis, and chronic obstructive pulmonary disease, as well as the development of pneumonia.”⁶⁷ One major concern is that particulate matter often contains “viable bacteria, molds, antigens, glucans, endotoxins, and antibiotics,” which are associated with numerous negative long-term health effects related to persistent inflammation and greater risk of respiratory illnesses.⁶⁸ Finally, persistent, close contact with highly concentrated animals is associated with an increased risk of infection with novel strains of zoonotic diseases like the H5N1 avian influenza.⁶⁹ Influenza is of particular concern in CAFOs due to its ability to “jump” between species, allowing these illnesses to consistently mutate and spread throughout the worker population, even making the leap back and forth between workers and animals in these facilities, and eventually spreading to

63. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS 1–2 (2008).

64. Mitloehner & Calvo, *supra* note 4, at 163.

65. *Id.* at 173.

66. *Id.* at 173–4.

67. *Id.* at 174.

68. *Id.* at 175.

69. See Roberto A. Saenz, et al., *Confined Animal Feeding Operations as Amplifiers of Influenza*, 6 VECTOR-BORNE AND ZOOLOGICAL DISEASES 338, 338–39 (2006).

surrounding communities and society at large.⁷⁰ Given the racial, economic, and social characteristics of many of these workers and nearby communities, the dangers from CAFOs, which most harshly affect these groups, raise significant concerns of social justice.

D. Poor Safety Protocols Deepen Issues for All Farmworkers

Farmworkers, both in crop production and CAFOs, are in danger of exposure to a range of toxic chemicals and dangerous substances in their workplaces. Inadequate safety procedures and training exacerbate the risks of their dangerous workplaces by inadequately preparing workers to protect themselves from these dangers. Workers already vulnerable due to their exposure to such dangerous conditions are placed at elevated risk and lack the proper mechanisms to learn about these dangers and obtain stronger protections due to the lack of federal labor protections.

Workers are often inadequately trained and workplaces rarely follow the recommended safety protocols for pesticides.⁷¹ EPA is responsible for administering the Worker Protection Standard (“WPS”), which establishes regulations and rules for training workers on the application of pesticides and sets out certain safety measures to be taken when applying pesticides.⁷² Despite the WPS issued by EPA, “[s]everal studies of self-reported protective behaviors among farmworkers have found limited adherence to these behaviors.”⁷³ Generally, this is because of poor training that includes issues like language barriers and a lack of uniformity, but other factors that contribute to the lack of adoption of safety practices by workers include “financial pressure to work quickly”, “employer failure to provide personal protective equipment (PPE)”, and “pressure from employers not to use safety equipment.”⁷⁴ Notably, one study found a strong relationship between “farmworkers’ motivation to engage in protective behaviors. . . [and] the availability of the supplies needed to conduct the behaviors.”⁷⁵ While making PPE available remains important, many workers reported that part of the reason they did not use PPE when it was provided was the substantial inconvenience and discomfort of using PPE on hot days.⁷⁶ The issue of heat cannot be overstated—with increasing temperatures due to climate change, workers who are already “20 times more likely to die from heat-related illness than any other worker” will bear the brunt of rising temperatures, and as tem-

70. Thomas C. Moore et al., *CAFOs, novel influenza, and the need for One Health approaches*, 13 ONE HEALTH 1, 1 (2021).

71. Walton et al., *supra* note 44, at 678.

72. *Agricultural Worker Protection Standard (WPS)*, EPA, <https://perma.cc/H76L-BJAZ>.

73. Walton et al., *supra* note 44, at 677.

74. *Id.*

75. *Id.*

76. *See id.* at 683.

peratures rise due to climate change, it is predicted that “[b]y the end of the century . . . American crop workers will labor, on average, for 62 days in unsafe conditions.”⁷⁷ Increasing temperatures and their impact on PPE use will invariably lead to more dangerous conditions for farmworkers as climate change progresses.

CAFOs similarly face a lack of safety protocols to protect workers.⁷⁸ Workers are not properly trained, or sometimes not trained at all, in occupational risks in CAFOs, and often do not receive PPE to protect them from hazards in the workplace.⁷⁹ Like farmworkers in crop production, CAFO workers face hurdles to training and safety protocols from language barriers, given the increasing proportion of immigrant workers in the industry.⁸⁰ As a result, two thirds of surveyed workers in a pilot study mistakenly believed that their workplace was not dangerous, and are consequently at risk of injury and harm from hazardous conditions.⁸¹

The challenges of worker safety, therefore, are complex and interrelated, and all vectors of harm must be considered. Workers in crop production have offered several potential solutions for protecting workers against their dangerous working conditions. These recommendations included stopping or reducing the use of pesticides, as well as minor changes, including better communication channels for workers to raise concerns and suggest safety improvements like bringing extra supplies in case others break, changing clothes at mid-day, and providing ointments and medication for rashes.⁸² Workers’ recommendations are rarely put into practice, but procedural justice demands that workers’ have the opportunity to meaningfully engage in decision making on issues that affect their day to day work.⁸³ Instead, the shortcomings of existing training and PPE distribution mean that workers are regularly exposed to toxic chemicals and extreme heat, leading to the short- and long-term harms previously mentioned.

E. Complicating Issues for Farmworkers

In addition to the challenges that workers currently face, there are also a range of issues that render it more difficult for workers to combat dangerous

77. Sam Boch, *Florida Farm Workers Endure 116 Dangerously Hot Working Days Every Growing Season. Laws to Protect Them Have Failed Three Years in a Row.*, COUNTER (July 7, 2020), <https://perma.cc/YVK4-GS6W>.

78. See Athena K. Ramos et al., *Perception of Job Related Risk, Training, and Use of Personal Protective Equipment (PPE) Among Latino Immigrant Hog CAFO Workers in Missouri: A Pilot Study*, 2 SAFETY 1 (2016).

79. *Id.*

80. *Id.* at 1–2.

81. *Id.* at 5–8.

82. Walton, *supra* note 44, at 677–78, 683–84.

83. *Id.*

workplace practices such as exclusion from other New Deal employment protections, lack of immigration documents for many workers and the problems inherent in H-2A visas, inability to access legal assistance, and language and cultural barriers. Each of these issues renders it more difficult for workers to combat dangerous workplaces. They prevent workers from knowing their rights, accessing mechanisms for vindicating their rights, keep them economically and legally vulnerable to exploitation and employer retaliation, and generally keep workers from advocating for themselves.

As discussed, the racism that drove the exclusion of farmworkers from the NLRA was pervasive during the New Deal and led to the exclusion of farmworkers from more than just the NLRA; they were also excluded from several of the employment protections and benefits of the Social Security Act and the Fair Labor Standards Act, including qualification for overtime pay.⁸⁴

For undocumented farmworkers, immigration status represents a massive challenge to vindicating their injuries because the “fear of retribution and deportation. . . suppresses reporting of pesticide poisoning”⁸⁵, which is particularly problematic given that “at least half of the farmworker population is undocumented.”⁸⁶ Even where workers are documented through programs like H-2A visas, the programs are set up in such a way that employers have extensive power to depress wages and degrade working conditions, with very few checks on their efforts to create an exploitative employment relationship by federal agencies like the Department of Labor.⁸⁷

Finding and accessing legal assistance to combat poor working conditions is complicated by factors like “language barrier[s], the farmworkers’ usual lack of a stable address or telephone number, and the farmworkers’ financial situation”, which make it exceedingly difficult for farmworkers to access legal aid.⁸⁸ Moreover, even where there are legal aid services that might otherwise seek to help these workers, federal law renders undocumented workers ineligible for assistance from Legal Services Corporation-funded legal aid services.⁸⁹ When legal services do attempt to reach farmworkers where they live, they are often barred by employers who refuse to allow outreach workers to enter their property to speak with farmworkers needing assistance, sometimes even threatening

84. See generally Perea, *supra* note 2, at 100–17 (2011).

85. *Id.* at 411.

86. Elizabeth Lincoln, *Accountability for Pesticide Poisoning of Undocumented Farmworkers*, 24 HASTINGS W.N.W. J. ENV'T L. & POL'Y 383, 384 (2018).

87. See Jennifer J. Lee, *U.S. Workers Need Not Apply: Challenging Low-Wage Guest Worker Programs*, 28 STAN. L. & POL'Y REV. 1, 9–17 (2017).

88. Michael Holley, *Disadvantaged By Design: How The Law Inhibits Agricultural Guest Workers From Enforcing Their Rights*, 18 HOF. LAB. & EMP. L.J. 575, 579 (2001).

89. See Rebekah Diller & Emily Savner, *A Call To End Federal Restrictions On Legal Aid For The Poor*, BRENNAN CENTER FOR JUSTICE 1 (2009), <https://perma.cc/BY7T-VYBE>.

those outreach workers.⁹⁰ Given these overlapping and compounding factors, farmworkers face serious difficulties in accessing the legal system and vindicating their rights.

Taken together, these challenges, along with the exclusion from the NLRA, have made it difficult for farmworkers to advocate for themselves and effectively protect themselves against the many harms of modern agricultural practices.

F. *How Industrial Agriculture Harms Surrounding Communities*

While farmworkers bear the brunt of the harms from modern agricultural practices, residents of surrounding communities are also impacted by the toxic chemicals and hazardous emissions from aerosolized pesticides, contaminated soil, fertilizer, and manure.⁹¹ While the impacts of each form of agriculture differ, the concern for short- and long-term impacts on residents is consistent and represents a disproportionate burden borne by those that live near the nation's agricultural activities.⁹² Moreover, the release of chemicals and contaminants into the air and water sources harms wildlife, contributes to climate change, and reduces the already shrinking supply of clean drinking water.⁹³

1. *Crop Production*

The communities surrounding crop production are exposed to higher levels of pesticides than communities further away, which may contribute to higher rates of illness.⁹⁴ While there are studies showing that pesticides have carcinogenic and endocrine-disrupting effects in laboratory settings, scientific uncertainty of the individual and synergistic effects of pesticides in real-life, long-term exposure requires more study.⁹⁵ A potential significant harm from

90. See Reena K. Shah, *Access to Justice and Healthcare for Migrant Farmworkers in the United States: A Shadow Report*, MD. LEGAL AID BUREAU 1–2 (2013), <https://perma.cc/8XCL-UZ4F>; *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (holding that a provision of the California Agricultural Labor Relations Act requiring farmers to allow labor organizers to access workers “constituted a *per se* physical taking” of employers’ property).

91. See *How Industrial Agriculture Affects Our Water*, FOODPRINT (2019), <https://perma.cc/DS74-VTQ6>.

92. See generally Dereumeaux et al., *supra* note 5; Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV'T HEALTH PERSPS. (2013).

93. See generally FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, MORE PEOPLE, MORE FOOD, WORSE WATER? A GLOBAL REVIEW OF WATER POLLUTION FROM AGRICULTURE (2018), <https://perma.cc/DP84-MB8Q>; CARRIE HRIBAR, NAT'L ASSOC. OF LOC. BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES (2010), <https://perma.cc/AT38-56J8>.

94. See Dereumeaux et al., *supra* note 5, at 2.

95. See Nicolopoulou-Stamati et al., *Chemical Pesticides and Human Health: The Urgent Need for a New Concept in Agriculture*, 4 FRONTIERS IN PUB. HEALTH 1, 4 (2016).

industrial agriculture derives from the use of pesticides, as discussed above, and those pesticides have been found to spread to nearby communities due to the method of dispersal and accumulation in the environment.⁹⁶ A comprehensive review of studies on the impacts of pesticides on populations near agricultural production found that those communities were “exposed to higher levels of pesticides than residents not living in proximity to agricultural lands.”⁹⁷ This occurs through two mechanisms: spray drift, which is the spread that occurs when pesticides are first applied, and volatilization drift, which occurs later when pesticides evaporate into the air and spread over a period of days.⁹⁸ While the concentrations of pesticides are less substantial than those impacting the farmworkers applying the chemicals or working in the fields after dispersal, health impacts on surrounding communities are similar, and “[r]ural and agricultural communities have been found to experience higher rates of leukemia, non-Hodgkin lymphoma, multiple myeloma, and soft tissue sarcoma, as well as cancers of the skin, lip, stomach, brain, and prostate.”⁹⁹

Another major issue is agricultural runoff, which involves the washing away of soil that contains “pollutants like fertilizers, pesticides, and heavy metals” into surface and groundwater.¹⁰⁰ This issue is so widespread that a 2018 report by the Food and Agriculture Organization of the UN (“FAO”) and the International Water Management Institute (“IWMI”) found that “[i]ndustrial agriculture is among the leading causes of water pollution, especially in most high-income countries”.¹⁰¹ The spread of these chemicals into sources of drinking water can render it dangerous to consume, and often has widespread negative impacts on surrounding ecosystems and wildlife.¹⁰² Through these varied pathways, modern agricultural practices have a detrimental effect not only on workers, but also on the rural communities that reside nearby.

2. CAFOs

As in the case of crop production, the harms resulting from exposure to CAFOs are not limited only to workers—the waste generated by livestock deteriorates the air, water, and soil quality of the surrounding communities.¹⁰³

96. Dereumeaux *supra* note 5, at 2, 11.

97. *Id.* at 12.

98. Roddy Scheer & Doug Moss, *How Dangerous Is Pesticide Drift?*, *SCI. AM.* (2012), <https://perma.cc/5HB5-FUZJ>.

99. FARMWORKER JUSTICE, *supra* note 4, at 8.

100. EPA, PROTECTING WATER QUALITY FROM AGRICULTURAL RUNOFF (2005), <https://perma.cc/LR6G-BASF>. See generally Sandra S. Batie, *Agriculture as the Problem: The Case of Groundwater Contamination*, 3 CHOICES 4, 7 (1988) (discussing early evidence of groundwater contamination from agriculture and efforts to address the issue).

101. See FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, *supra* note 93, at 4.

102. See FOODPRINT, *supra* note 91.

103. See Nicole, *supra* note 92, at 186.

Through these channels, residents of communities near CAFOs are “exposed to multiple chemicals: hydrogen sulfide, particulate matter, endotoxins, nitrogenous compounds.”¹⁰⁴ For those living in surrounding communities, these exposures were associated with “increased respiratory difficulty, sore throat, chest tightness, nausea, and eye irritation. . . [and] blood pressure increases.”¹⁰⁵ Children appear to suffer disproportionately from the deterioration of air quality near CAFOs because “children take in 20-50% more air than adults, making them more susceptible to lung disease and health effects.”¹⁰⁶ The populations most affected by CAFOs are predominantly non-white, with the major growth in CAFOs since the 1980s occurring primarily in North Carolina, “squarely in the so-called Black Belt, a crescent-shaped band throughout the South where slaves worked on plantations.”¹⁰⁷ That the majority of the growth in CAFOs in North Carolina has been in low-income, Black communities raises significant environmental justice concerns.

CAFOs also have broader impacts on climate change due to the emissions associated with their operations. The process of raising large quantities of livestock in close proximity necessarily creates a challenge for CAFOs in managing and storing manure, and poor management practices contribute extensively to greenhouse gas emissions.¹⁰⁸ As a result, the United States cattle industry is one of the greatest emitters of methane, and CAFOs represent a major contributor to the issue.¹⁰⁹ CAFOs not only directly harm neighboring communities, but also produce outsized impacts through greenhouse gas emissions that contribute to climate change, which most burdens poorer communities and people of color around the world and implicates global environmental justice concerns.

CAFOs also have a detrimental effect on wildlife because of runoff from facilities into local surface water. Manure presents a significant risk of contamination for local waterways, with studies showing that “states with high concentrations of CAFOs experience on average 20 to 30 serious water quality

104. *Id.* (quoting Sacoby Wilson, a University of Maryland environmental health professor).

105. *Id.* at 187.

106. Hribar, *supra* note 93, at 5.

107. Nicole, *supra* note 92, at 183.

108. Depending on the size of a facility and the types of animals, “manure production can range between 2,800 tons and 1.6 million tons a year.” Hribar, *supra* note 93, at 2. That manure in turn “emits methane and nitrous oxide which are 23 and 300 times more potent as greenhouse gases than carbon dioxide, respectively”, with manure management recognized by EPA as “the fourth leading source of nitrous oxide emissions and the fifth leading source of methane emissions”. *Id.* at 7. The storage methods of manure can have a significant impact on the amount of greenhouse gasses emitted. Unfortunately, “[m]any CAFOs store their excess manure in lagoons or pits, where they break down anaerobically . . . which exacerbates methane production.” *Id.* There are more sustainable ways to store manure, however, including exposing it to more oxygen by applying it to land or soil, which reduces the amount of methane emitted. *Id.*

109. Hribar, *supra* note 93, at 7.

problems per year as a result of manure management problems.”¹¹⁰ Agricultural runoff to both fresh and sea water may carry ammonia that reduces oxygen in the water and can kill aquatic life, excessive nutrient concentrations that can make the water inhospitable for animals or cause fatal algal blooms that out-compete plants and animals, or hormones that disrupt the reproductive habits of aquatic life.¹¹¹ CAFOs represent a real danger to plants and animals already imperiled by human development, invasive species, and climate change.

II. REGULATORY STRUCTURE

Agriculture is governed by an array of environmental statutes, but due to agricultural exceptionalism, the industry remains underregulated despite the widespread environmental harms that it produces.¹¹² The fragmented nature of the statutory schemes and general hesitance to regulate agriculture has left many loopholes and weak points in federal legislation and administrative structures. Understanding the structure and failings of the existing statutes and regulations can help us to understand why farms present such an extensive threat to workers, the environment, and nearby communities, and can help to guide advocacy for reforms by workers.

A. Crop Production

EPA regulates the use of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).¹¹³ Since 1970, FIFRA has been administered by EPA, and now, after the 2003 amendments, includes stronger enforcement mechanisms and more of an emphasis on health and the environment than the original Act, and expanded the mandate to include regulation of the use of pesticides.¹¹⁴ To that end, EPA has been charged with establishing several programs to ensure the protection of farmers, surrounding communities, and the environment from harmful pesticides. Generally, FIFRA requires that any pesticide be registered with EPA before it can be sold or distributed, which requires a showing that it “will not generally cause unreasonable adverse effects on the environment.”¹¹⁵ It also, in relevant part, establishes the Worker Protection Standard.¹¹⁶ EPA seeks to protect users of pesticides through “[p]esticide-

110. *Id.* at 4.

111. *Id.* at 4–5.

112. See GRAD, *supra* note 62, at § 8.04.; Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENV'T L. & POL'Y REV. 935, 935–36 (2010).

113. 7 U.S.C. §§ 136–136y.

114. See *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, EPA, <https://perma.cc/UFJ3-YSDN>.

115. 7 U.S.C. § 136a(c)(5)(D).

116. See 40 C.F.R. § 170 (2022).

specific restrictions and label requirements” and “[b]roadly applicable Worker Protection Standards,” which “address how to reduce the risk of illness or injury resulting from occupational exposures to pesticides.”¹¹⁷ Though these efforts provide some protection, FIFRA’s grossly inadequate enforcement provisions render it “the weakest federal environmental statute” and leave workers largely at risk of injury from pesticide use.¹¹⁸

The Clean Water Act (“CWA”)¹¹⁹ does not generally apply to the use of pesticides. Despite pesticides posing a threat to the health of surface and groundwater, except in the case of aquatic pesticides, they are generally not regulated under the CWA.¹²⁰ The “enduring myth of the noble family farm” has led to special treatment for the agricultural industry that has led to “fewer requirements or excusing compliance completely.”¹²¹ Hidden under this narrative is the practical reality that powerful lobbying by the agricultural industry ensures that agriculture remains excluded from key environmental regulation.¹²² This includes excluding irrigated agriculture as a point source under the CWA, “thus exempting agricultural pollution from the Act.”¹²³ As a result, EPA has limited authority in regulating the use of pesticides and preventing water pollution by modern crop production practices.

B. CAFOs

EPA is responsible for regulating CAFOs under the CWA, where CAFOs are explicitly listed within the definition of point sources.¹²⁴ The CWA requires that all new feedlots, like CAFOs, comply with standards set by EPA, and both may be subject to the National Pollutant Discharge Elimination System (“NPDES”) permit system, under EPA Administrator’s general power to regulate CAFOs as a point source for water pollution.¹²⁵ The Administrator is further empowered to set “effluent limitations making use of the ‘best available

117. *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, *supra* note 114.

118. Lincoln, *supra* note 86, at 402 (citing Michael J. McClary & Jessica B. Goldstein, *FIFRA at 40: The Need for Felonies for Pesticide Crimes*, 47 ENV’T L. RPT’R. 10767, 10770 (2017)).

119. 33 U.S.C. §§ 1251-1387.

120. GRAD, *supra* note 62, § 8.04.

121. *Id.*

122. See, e.g., Georgina Gustin, *Big Agriculture and the Farm Bureau Help Lead a Charge Against SEC Rules Aimed at Corporate Climate Transparency*, INSIDE CLIMATE NEWS (Aug. 22, 2022), <https://perma.cc/37C5-QC4G>; Dan Charles, *Farmers Are Warming Up to the Fight Against Climate Change*, NPR (Nov. 20, 2020), <https://perma.cc/JL72-XM2B>.

123. GRAD, *supra* note 62. *But cf.* Am. Farm Bureau Fed’n v. EPA, 792 F.3d 281 (3d Cir. 2015) (holding EPA did not exceed its powers by indirectly regulating agricultural runoff when setting total maximum daily load for certain waters).

124. 33 U.S.C. § 1362(14).

125. GRAD, *supra* note 62, § 7.02(1)(b)(ii)(A).

technology' . . . standards of performance for new sources; and pretreatment standards for new sources."¹²⁶ CAFOs are also subject to the Safe Drinking Water Act, under which "animal feeding operations that are identified as a source of groundwater contamination, are within a designated wellhead protection area, or are located near public water systems may be subject to additional discharge limitations or management practices."¹²⁷

The NPDES system is the primary program for regulating the discharge of pollutants into waters in the United States. In relevant part, this system generally requires that any CAFO seeking to operate must obtain a permit in order to discharge pollutants that will contaminate water, verifying compliance with the CWA's provisions.¹²⁸ As of 2012, only 8,000 of the projected 20,000 CAFOs operating in the United States had obtained NPDES permit coverage.¹²⁹ CAFOs may still operate without an NPDES permit, however, if they qualify for an exemption through a comprehensive nutrient management plan.¹³⁰ For facilities with NPDES permits, EPA has found that 20.3% were in noncompliance in 2018, which was reduced to 10.6% in 2021.¹³¹ Administering and ensuring compliance with such a decentralized program, particularly one that permits exceptions for many CAFOs, raises concerns over the true success of the program in preventing contamination of water by feedlots.

The Clean Air Act largely does not govern CAFOs. Although CAFOs emit a wide range of dangerous chemicals and fumes,¹³² they are almost entirely excluded from federal standards for air quality, with only explicit regulation of the production of nitric and sulfuric acid.¹³³ Instead, the regulation of air emissions by CAFOs is primarily left to the states.¹³⁴ Because states set their own standards and are responsible for monitoring and verifying compliance, attainment of national standards has been low in many states.¹³⁵ Efforts to compel EPA to categorize ammonia and hydrogen sulfide and list animal feeding operations as stationary sources under the Clean Air Act have been unsuccessful. Presented with such an effort, the D.C. Circuit held that EPA has no affirmative duty to do so.¹³⁶ The current framework therefore fails to adequately regu-

126. *Id.*

127. *Id.*; see Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (codified as amended in scattered sections of 42 U.S.C.).

128. See generally 40 C.F.R. § 122 (2022).

129. EPA, NPDES PERMIT WRITERS' MANUAL FOR CAFOs 1-2 (2012).

130. *Id.*

131. *National Compliance Initiative: Reducing Significant Non-Compliance with National Pollutant Discharge Elimination System (NPDES) Permits*, EPA, <https://perma.cc/2SC5-T6NX>.

132. See discussion *supra* Part I.C.

133. GRAD, *supra* note 62, § 7.02(1)(b)(i).

134. *Id.*

135. See Adam Babich, *The Unfulfilled Promise of Effective Air Quality and Emissions Monitoring*, 30 GEO. ENV'T L. REV. 569, 578-81 (2018).

136. See *Zook v. McCarthy*, 52 F. Supp. 3d 69 (D.D.C. 2014).

late and prevent the emission of dangerous chemicals from CAFOs, leaving both workers and residents surrounding feedlots in danger of short- and long-term harms to their health.

The failures of environmental statutes to properly regulate crop production and CAFOs has left many workers in danger of exposure to toxic chemicals and dangerous emissions. By granting workers organizing and bargaining rights, they can be empowered to advocate for stronger protections through legislative and administrative reforms to impose stronger regulations.¹³⁷

III. GRANTING FARMWORKERS NLRA PROTECTIONS

Given that farmworkers currently face substantial harms and barriers to protecting themselves, an immediate solution would be to amend the National Labor Relations Act to include and protect farmworkers, with several key modifications to those protections. Simply bringing farmworkers under the NLRA's protection would improve the current state of affairs for farmworkers, but doing so would not address the various limitations of existing labor protections. By making modifications in line with improvements made by the California Agricultural Labor Relations Act and implementing sectoral bargaining, a new model for federal labor protections could more effectively protect farmworkers, ease the burden of organizing, and more quickly obtain safer working conditions. Part III.A discusses the potential benefits of granting NLRA protections to farmworkers including negotiating for safer working conditions, participating in legislation and rulemaking to protect workers' interests, accessing the courts to vindicate workers' rights, and obtaining higher wages. Part III.B outlines the shortcomings of the NLRA and its protections as they have evolved since the Act's passage and recommends modifications to address those failings. Part III.C considers how the structure of the agricultural industry hampers traditional organizing and renders unionization difficult. Part III.D looks to the California Agricultural Labor Relations Act to understand how labor law can be tailored to the needs of farmworkers and to determine what provisions should be translated in federal protections.

A. *Bringing Farmworkers into the National Labor Relations Act*

Protected workers would quickly gain several advantages that would facilitate advocacy for better conditions. First, organized workers would be able to bargain with employers to demand changes to safety procedures, require the provision of safety equipment, and halt or reduce the prevalence of dangerous practices altogether.¹³⁸ Second, workers would be able to negotiate for better wages, which is critical to developing the financial power necessary to engage in

137. See discussion *infra* Part III.A.2.

138. Cf. discussion *supra* Part I.C.

collective action. Third, a bargaining representative could advocate for legislative reforms that could establish better working conditions as a matter of law, rather than contractual agreement.¹³⁹ Finally, protected workers could enjoy greater access to legal services through union counsel or union partnerships with outside counsel to more effectively vindicate their rights or challenge existing regulations and laws to advance their interests. These key mechanisms of access and power for workers would help further the aims of procedural and distributive justice by giving those marginalized groups the ability to engage in decision-making in the workplace and to impose better workplace safety requirements that would diminish the environmental and health harms of farming.

1. Negotiating for Better Working Conditions

Whether negotiating directly with an employer or through a bargaining representative, NLRA protections would empower farmworkers to demand safer working conditions. Section 7 of the NLRA guarantees workers the right “to bargain collectively through representatives of their own choosing,” typically a union, but the representatives could be the workers themselves.¹⁴⁰ Employers are then obligated by Section 8(d) to meet and bargain in good faith with the workers’ designated representative on several mandatory subjects of bargaining, which include wages, hours, and working conditions.¹⁴¹ Given this duty to bargain, a group of organized farmworkers could require their employer to meet and negotiate over issues including safety equipment and procedures, maximum working hours, mandatory breaks, the use of pesticides and other chemicals, providing vaccinations or healthcare, and a range of other matters relating to the conditions of employment. Workers would be able to raise concerns over the short- and long-term harms they suffer as a result of exposure to pesticides, excessive heat, toxic fumes from manure, zoonotic diseases, and other workplace dangers, and bring their experience and knowledge to the bargaining table to demand safer conditions.

The following proposals are not comprehensive but are instead intended to illustrate the types of reforms that may be achieved through an organized agricultural workforce. The intent of granting labor protections to farmworkers is first and foremost to empower workers to advocate for themselves and to give them a voice in the decision-making process. In line with the aims of the environmental justice movement the aim of this section is not to speak on behalf of these workers but to present examples of possible solutions to the challenges

139. See, e.g., Kevin Smith, *Los Angeles Votes to Adopt Hotel Worker Protections*, L.A DAILY NEWS, June 21, 2022.

140. 29 U.S.C. §§ 151–169, 157.

141. 29 U.S.C. § 158.

facing farmworkers. Fundamentally, the goal of granting labor protections to workers is to advance the aims of procedural justice and give workers an opportunity to speak for themselves and demand the protections that they believe are necessary.

a. Crop Production

NLRA protections would permit workers to advocate for better workplace safety and more sustainable farming practices. While workers may lack the power to immediately change operating practices such as halting the use of pesticides, they may be able to effectively obtain safety measures that increase the cost of those practices and render it cost prohibitive for employers to continue to use such dangerous methods. Unions and advocacy organizations could present solutions for protecting farmworkers. Workers could also propose alternative chemicals or pest treatment practices that are less harmful to their health.¹⁴² Finally, workers could demand safety precautions for rising temperatures including shaded areas, frequent water breaks, and better access to medical care,¹⁴³ in order to mitigate the escalating challenges posed by climate change.

Farmworkers armed with the legal power to organize and bring employers to the bargaining table would be able to use their collective power and knowledge to demand that employers protect them from their harmful practices and help both workers and surrounding communities to minimize the damaging effects of pesticides and other agricultural chemicals. As discussed, when asked for potential ways to reduce harm from pesticide use, workers came up with several small but important changes, and NLRA protections could help to increase adoption of those ideas.¹⁴⁴ Workers who are protected can engage in “concerted activity” to come together to ask their employers for those practices to be put into place or demand that those be included directly in contractual negotiations to ensure that stronger safety precautions are consistently implemented.

b. CAFOs

Workers in CAFOs would also be able to demand stronger workplace protections with NLRA coverage. Demanding better training and ensuring the availability of personal protective equipment can help to address low rates of adoption in CAFOs today, where “more than one third of workers . . . reported not receiving any job-related training from their current employers,” which is particularly problematic in CAFOs where “50% of respondents . . . reported no

142. See Jane M. Caldwell, *Alternatives to Conventional Pesticides*, 74 FOOD TECH. MAG. (May 1, 2020), <https://perma.cc/AGX6-YXGS>.

143. See Walton, *supra* note 44.

144. See *id.*

previous experience.”¹⁴⁵ Lack of experience for workers in such dangerous conditions can increase the risk of injury and means that many are not familiar with the many possible harms from their working conditions. Workers can also advocate for the implementation of new safety technology like ventilated heating systems that help to significantly reduce the presence of dust particles in the air that lead to respiratory problems for workers.¹⁴⁶ To effectively address the spread of zoonotic diseases, workers can advocate for employers to offer vaccinations against diseases like influenza, which “studies have found . . . would effectively prevent diseases from spreading.”¹⁴⁷ Finally, CAFO workers could push their employers to reduce the concentration of animals to help reduce the emission of toxic fumes and reduce the risk of transmission of infectious diseases among animals and to workers.¹⁴⁸ As CAFOs increase in concentration and continue to pose a threat to workers, surrounding communities, and the environment, workers organizing to demand safer conditions can in turn minimize those harms.

2. *Procedural Justice in Legislation and Rulemaking*

Granting labor protections to farmworkers would facilitate connections between workers’ unions and other advocacy organizations to allow those workers to engage in legislative and rulemaking processes directly and indirectly. Either speaking for themselves or through representatives, workers with labor protections would be able to come together to raise their suggestions, concerns, and objections to and support for policies that impact their workplace, and further achieve the procedural tenet of environmental justice.

Organized farmworkers could advocate for legislative and administrative action through unions to obtain higher baseline protections above which workers could negotiate for even better conditions. As an extension of their role as representatives and advocates for workers, “[u]nions have historically been involved in creating healthy and safe workplaces, advocating regulations that are monitored and enforced by public health entities.”¹⁴⁹ In the same way that corporations advocate for their own interests, unions are able to lobby on behalf of

145. See Ramos, *supra* note 78.

146. See T. Renée Anthony et al., *Use of Recirculating Ventilation with Dust Filtration to Improve Wintertime Air Quality in a Swine Farrowing Room*, 12 J. OCCUPATIONAL & ENV’T HYGIENE 635 (2015).

147. Helena Masiello, *CAFOs Are a Public Health Crisis: The Creation of COVID-19*, 76 U. MIA. L. REV. 900, 927 (2022).

148. See generally Mary J. Gilchrist et al., *The Potential Role of Concentrated Animal Feeding Operations in Infectious Disease Epidemics and Antibiotic Resistance*, 115 ENV’T HEALTH PERSPS. 313 (2007).

149. Jenn Hagedorn et al., *The Role of Labor Unions in Creating Working Conditions that Promote Public Health*, 106 AM. J. PUB. HEALTH 989, 989 (2016).

workers, and can combat the influence that businesses have in legislation and government activities. Unions such as United Farm Workers currently advocate for workers around the country across a range of issues and methods, including litigating to prevent the Department of Labor from lowering farmworker wages,¹⁵⁰ supporting the passage of legislation for the protection of workers during the COVID-19 pandemic,¹⁵¹ and lobbying for safety standards to protect workers against extreme heat.¹⁵²

By giving farmworkers a voice in the political process that they often are not afforded due to their economic position and legal status, farmworkers would be able to convey to legislators and administrative agencies the need for stronger protections. Given the extensive regulatory regime surrounding agriculture, unions could lobby Congress to pass legislation strengthening EPA's legal authority and providing greater funding to better enforce compliance with the relevant statutes. Under FIFRA, either through a legislative act of Congress or through EPA regulations, government can place more substantive burdens on employers to train their workers, who under current WPS rules are primarily required to maintain records proving that they have provided training and to post information for workers about the dangerous nature of the chemicals with which they work.¹⁵³ Legislative measures could even permit workers to bring claims in court or through administrative procedures to challenge inadequate training, given the difficulty facing EPA to effectively inspect farms and ensure compliance under WPS.

The CWA has failed to adequately regulate CAFOs, and unionized workers could advocate for legislative and administrative reforms to reduce the harmful effects of CAFOs. One key measure would be to require all CAFOs to obtain NPDES permits, given that currently less than half of CAFOs hold such permits,¹⁵⁴ to better monitor and control the discharge of toxic chemicals into local surface and groundwater. Many citizen organizations have petitioned EPA to close its regulatory loopholes, recommending a slew of changes, including revising the agency's interpretation of the Agricultural Stormwater Exemption to ensure proper regulation of CAFOs and strengthening the requirements under the NPDES permit system.¹⁵⁵ Others have recommended a more com-

150. Jocelyn Sherman, *UFW Applies to Intervene in Ag Lobby Lawsuit Against U.S. Department of Labor Seeking to Lower Pay for Farm Workers*, UNITED FARM WORKERS (Jan. 9, 2019), <https://perma.cc/N33J-QEBQ>.

151. Jocelyn Sherman, *'Uniquely Vulnerable' Farm Workers on Frontline of COVID-19 Deserve Protections of FARM Laborers Protection Act*, UNITED FARM WORKERS (Jun. 23, 2020), <https://perma.cc/2MYD-TWDC>.

152. *As Climate Heats Up, Public Calls for Worker Protections from Heat*, PUB. CITIZEN (Sep. 18, 2018), <https://perma.cc/4JTP-UYC5>.

153. 40 C.F.R. §§ 170.120, 170.401 (2022).

154. EPA, *supra* note 129, at 2.

155. *Dozens of Advocacy Groups Challenge EPA on Factory Farm Pollution*, FOOD & WATER WATCH (Mar. 8, 2017), <https://perma.cc/AH8C-DPHT>.

prehensive federal enforcement scheme that demands better information and more strict oversight of CAFOs to prevent discharges into local water sources.¹⁵⁶ Allowing workers to directly engage with legislators and agencies to address flaws in existing regulatory frameworks would offer a key avenue to farmworkers newly empowered by the right to organize to address many of the key obstacles to achieving safer working conditions that they face.

Beyond federal legislative and rulemaking measures, union representatives could also engage in public comments and hearings on behalf of farmworkers who, either due to legal status, limited language access, or lack of time or resources, are unable to engage in public hearings by state and local governments. By giving those farmworkers that are often most impacted by local government decisions a voice in those processes, unions may aid workers to change policies before they are formed.

Whatever the pathway to greater protections, unions would be able to more concretely distill worker concerns and deliver them to the critical decisionmakers to institute critical reforms to a food system that often ignores its most vulnerable members. Allowing direct input from workers, who intimately understand the challenges of their working conditions, better serves workers, those in nearby communities, and the environment by ensuring more comprehensive solutions to longstanding problems.

3. *Litigation and Access to Justice*

Given the significant difficulties facing farmworkers in accessing legal assistance, granting farmworkers NLRA protections and permitting them to unionize could allow workers to vindicate their rights, challenge inadequate laws, and press for systemic reforms. Congress and federal agencies can achieve greater accountability and better enforce existing regulations by offering workers a pathway to pass information to outside organizations about potential violations of federal laws in their workplace. Such expanded access to justice can help to further the goals of corrective justice, fairly compensate workers for the harms that they have suffered, and reform the agricultural system away from its harmful practices. As it stands, many farmworkers are unable to access legal aid to effectively pass information to advocates that could otherwise inform them of their rights and whether their employer may be violating the law, allowing employers to operate with near impunity.¹⁵⁷ Access to the courts may also allow workers to shed light on an employer's failure to comply with federal environ-

156. See Catherine Groves, *To Promote Compliance with the Clean Water Act, the EPA Should Pursue a National Enforcement Initiative to Regulate Concentrated Animal Feeding Operations*, 39 *ECOLOGY L.Q.* 321 (2012).

157. See discussion *supra* Part I.E.

mental statutes or to challenge federal, state, and local laws to advance the law through strategic legal challenges.

Challenges to federal rulemaking that harms farmworkers by rolling back protections can serve as a crucial backstop to protect workers against administrations who show little regard for the health and safety of those working in dangerous conditions. A coalition of organizations representing farmworkers brought a challenge to a new WPS rule promulgated by EPA in 2020 that rolled back critical protections that had been extended under FIFRA in 2015, in recognition of the ongoing threat of pesticides to workers and the inadequacy of existing protections.¹⁵⁸ The 2015 Rule put into place by EPA was promulgated to reduce the harms from pesticide drift that studies had found accounted for “14-24% of total occupational pesticide poisoning, [and] that over half of drift-related cases were non-occupational.”¹⁵⁹ Recognizing that the existing WPS regulations were inadequate, EPA implemented a new provision that created an application exclusion zone to protect workers and bystanders from poisoning.¹⁶⁰ Under the 2020 Rule, the Trump EPA sought to relax the 2015 requirements over significant objections by groups representing farmworkers, who noted the high likelihood of harm to both workers and bystanders from such a rule.¹⁶¹ Numerous organizations representing the affected workers stepped in, however, and were able to successfully stay the rule and ensure that those stronger protections remained in place.¹⁶² By engaging throughout the rulemaking process and bringing legal challenges to halt these new rules, organizations and unions can fight on behalf of workers to protect farmworkers. A more organized workforce would be better able to pass along information about injuries and lack of safety in the workplace to allow those outside groups to advocate more effectively to increase or retain existing protections.

Federal permit programs also offer an important lever for advocates to hold employers accountable for their environmentally destructive activities. Under the Clean Water Act, the NPDES permit system offers a mechanism through which to challenge farms’ compliance with federal restrictions on discharges of waste into water.¹⁶³ Citizen organizations often challenge agency rules and permits that may result in the discharge of pollutants by CAFOs in an effort to minimize the harms resulting from their operations and push for systemic change, with varying success.¹⁶⁴ In 2021, Food & Water Watch success-

158. See *Rural & Migrant Ministry v. EPA*, 510 F. Supp. 3d 138 (S.D.N.Y. 2020).

159. *Id.* at 146.

160. *Id.* at 145–47.

161. *Id.* at 147–50.

162. *Id.* at 165.

163. See discussion *supra* Part II.B.

164. See *e.g.*, *Blackmon v. S.C. Dep’t of Health & Env’t Control*, 873 S.E.2d 774 (S.C. Ct. App. 2022) (holding that issuance of a permit was improper due to the risk for discharge of pollutants into waters of the state); see also *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486 (2d Cir.

fully challenged the issuance of an NPDES permit that they alleged lacked sufficient monitoring and reporting as required under the Clean Water Act to ensure compliance with the permit.¹⁶⁵ The Ninth Circuit held that the permit at issue was in violation of the law because although it “forb[ade] underground discharges from production areas and dry weather discharges from land-application areas . . . the Permit contain[ed] no monitoring requirements for either kind of discharge.”¹⁶⁶ Thus, as a result of the challenge to the permit, NPDES permits must now provide for more substantial monitoring and reporting that ensures proper compliance with the CWA. By giving advocates a window into more feedlots to detect potentially violative operators, organized workers can share information with outside organizations to carry out similar challenges to both enforce existing standards and require more stringent requirements.

Farmworkers can work to achieve greater distributive justice through enhanced access to the legal system by challenging unjust laws that discriminate against farmworkers. Farmworkers in Washington state achieved a major victory in 2020 in a landmark case that struck down a state law that exempted farmworkers from receiving overtime pay, a law that the challengers noted was underpinned by the same racial prejudices as the federal Fair Labor Standards Act.¹⁶⁷ A group of 300 farmworkers came together to file a class action lawsuit that led to the Washington Supreme Court recognizing the law as unconstitutional under the Washington Constitution, and leading to the passage of SB 1572, a new law that creates a path toward overtime pay for all farmworkers in the state.¹⁶⁸ Washington farmworkers, empowered by the state’s protection of concerted activity that mirrors federal NLRA protections, were able to successfully eliminate and replace the racist legislation that unjustly denied them rights granted to other workers in their state.¹⁶⁹ Creating a pathway for more workers to challenge economically unjust laws can prove to be another key mechanism for strengthening farmworkers in their fight for fair wages and better working conditions.

2005) (invalidating EPA rule that inadequately regulated CAFOs to avoid discharges). *But see e.g.*, *Assateague Coastkeeper v. Md. Dep’t of the Env’t*, 28 A.3d 178 (2011) (upholding a discharge permit issued for a poultry animal feeding operation); *Env’t Integrity Project v. McCarthy*, 139 F. Supp. 3d 25 (D.D.C. 2015) (unsuccessfully challenging EPA rescission of rule requiring CAFOs to provide information to facilitate EPA regulation of discharges).

165. *See generally* *Food & Water Watch v. EPA*, 20 F.4th 506 (9th Cir. 2021).

166. *Id.* at 518.

167. *See* *Martinez-Cuevas v. DeRuyter Bros. Dairy*, 475 P.3d 164 (Wash. 2020).

168. Washington State Governor’s Office, *Inslee Signs Worker Protection Legislative Package in Yakima*, MEDIUM (May 11, 2021), <https://perma.cc/W68E-FVMT>.

169. *See* *Bravo v. Dolsen*, 888 P.2d 147 (Wash. 1995).

4. Fair Wages for Farmworkers

Finally, if farmworkers had NLRA protections, they would also be able to bargain over wages. Like working conditions, under Section 8(d) of the NLRA, wages are a mandatory subject of bargaining.¹⁷⁰ As such, workers who engage in collective bargaining could negotiate for better wages for their workplace and likely derive substantial increases in pay and further pursue distributive justice. In fact, unionized workplaces earn an average “10.2% more in wages than . . . a nonunionized workplace in the same industry.”¹⁷¹ Unionization in agriculture could not only raise wages relative to other farms, but it could also close the gap to other similar industries, given that “[w]hen union density is high, nonunion workers benefit, too.”¹⁷² Higher wages may, in turn, empower workers to engage in political activity and become more involved in local decision-making.¹⁷³ By ensuring farmworkers have an opportunity to negotiate higher pay, NLRA protections could ensure greater economic power for workers currently receiving inadequate wages for their essential work.

B. Shortcomings of the NLRA

There are certainly limitations within the NLRA and arising from Supreme Court and NLRB decisions interpreting the NLRA that have rendered the Act less effective in protecting and empowering workers. The first such limitation as it relates to farmworkers is the decision in *Hoffman Plastics*, which prevents undocumented immigrants from recovering back pay.¹⁷⁴ This decision guts the already weak remedial powers of the Act as it relates to undocumented workers, who make up more than half of farmworkers, and allows employers to violate worker NLRA rights with near impunity.¹⁷⁵ As the Clean Slate for Worker Power Report suggests, it is crucial that under any reform “all remedies . . . be available to all workers regardless of immigration status.”¹⁷⁶ Another critical challenge is the bar in the NLRA on secondary boycotts.¹⁷⁷ In the agri-

170. 29 U.S.C. §§ 151–169, 158.

171. ASHA BANERJEE ET AL., ECON. POL’Y INST., UNIONS ARE NOT ONLY GOOD FOR WORKERS, THEY’RE GOOD FOR COMMUNITIES AND FOR DEMOCRACY 2 (Dec. 15, 2021).

172. *Id.* at 2–3.

173. A study has found that higher minimum wages increase voter turnout. See Zachary Markovich & Ariel White, *More Money, More Turnout? Minimum Wage Increases and Voting*, 84 J. POL’Y 1834 (2022). Although non-citizens cannot participate in elections, a similar result may be foreseeable in other areas of advocacy and political mobilization among workers receiving higher wages.

174. *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 148–49 (2002).

175. *Immigration and Labor*, FARMWORKER JUST., <https://perma.cc/25DD-FSA5>.

176. SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 25 (2020).

177. 29 U.S.C. § 158(b)(4).

cultural industry, this means that coverage under the NLRA for farmworkers would bar unions from encouraging or engaging in consumer boycotts of food retailers, such as grocery stores or restaurants, which has proven to be an effective tactic for the Coalition of Immokalee workers in advocating for stronger worker protections for tomato farmers in Florida.¹⁷⁸ Historically, secondary boycotts have been successful, with farmworkers in California in 1965 engaging in the first of many successful consumer boycotts of grape growers.¹⁷⁹ Bringing farmworkers under NLRA protections could prove to undermine these successful tactics, and any legislative act to provide labor protections to farmworkers would need to establish an exception for agriculture to permit secondary boycotts. In extending NLRA protections to farmworkers, secondary boycotts must be permitted to avoid depriving these workers of one of their strongest weapons against their employers, and efforts must be made to extend full protection to undocumented workers.

C. The Agricultural Industry's Structure Hampers Unionization Efforts

Agriculture is a bedrock industry in the United States. In 2021, crop and livestock production accounted for \$440 billion of revenue or 16% of total revenue in the agribusiness industry.¹⁸⁰ While the industry has historically been very decentralized, with “[t]he four largest companies in the Agribusiness industry account[ing] for less than 10.0% of industry revenue,” there are indications of growing centralization.¹⁸¹ In fact, “[t]he corporatization of farms . . . has been a major feature of the industry over the past decade.”¹⁸² A model of contract farming has been employed by larger processors who buy the products that farms produce.¹⁸³ This model sees “larger businesses enter into contracts with farmers to operate farms they own,” allowing those large businesses to more

178. See generally *Coalition of Immokalee Workers*, NAT'L FARM WORKER MINISTRY, <https://perma.cc/G77B-WYT3>.

179. Farmworkers from grape farms in Delano, California, went on strike in 1965 to demand higher wages. The National Farmworkers Association (“NFWA”) called for a consumer boycott of all products from the second-largest farm in the area, Schenley Industries, which had a national profile for the liquor it produced. Consumers boycotted grocery stores, bars, and liquor stores that sold Schenley products. This brought a wave of negative publicity that eventually brought the company to the bargaining table to sign an agreement with NFWA. NFWA would go on to use the secondary boycott over the next decade in later fights with other employers, to great success. See *Workers United: The Delano Grape Strike and Boycott*, NAT'L PARKS SERV., <https://perma.cc/WD5A-SE4W>.

180. JOHN MADIGAN, IBISWORLD, AGRIBUSINESS IN THE US INDUSTRY REPORT NN004, 7–8 (2021).

181. *Id.* at 25.

182. *Id.*

183. *Id.*

easily take ownership of farms.¹⁸⁴ While this is a trend to watch, crop and live-stock production is likely to remain decentralized for the foreseeable future, with noncorporate-owned farms continuing to be characteristic of the majority of agricultural production.¹⁸⁵ The current decentralized structure of the industry poses a challenge to organizing efforts, given that the dominant model of unionization generally restricts the bargaining unit for which an election is held to the individual employer.¹⁸⁶ Even if organizers were able to operate under the existing NLRA structure, it is unlikely that the current state of the industry would permit largescale unionization throughout the sector. As such, a more comprehensive model of sectoral bargaining would prove more effective for organizing the industry.¹⁸⁷

D. Lessons from the California Agricultural Labor Relations Act

In the void left by the NLRA, states like California have legislated to provide a state analog to the federal statute for farmworkers, with several key differences from which a federal effort to reform the NLRA could draw lessons. In 1975, California enacted the Agricultural Labor Relations Act (“ALRA”), which largely mirrored the federal NLRA, and granted farmworkers “the right to form or join unions and to bargain collectively with farm employers . . . without interference from employers.”¹⁸⁸ While there are some small differences between the two laws, there are a few important distinctions that could help to guide federal reform efforts. Professor Philip L. Martin’s comparison of the NLRA and ALRA highlights some of the key differences that future federal protections for farmworkers can draw upon.

The first key difference is that the ALRA clearly states that the Agricultural Labor Relations Board (“ALRB”), which administers the ALRA, has the power to impose make-whole remedies for all unfair labor practices, especially where employers fail to bargain in good faith.¹⁸⁹ This means that when an employer bargains in bad faith, they “may be required to make employees whole by paying them the difference between the wage that would have been negotiated if the employer had bargained in good faith.”¹⁹⁰ This remedial power drastically changes the incentives for employers who under the NLRA can delay bargain-

184. *Id.*

185. *Id.*

186. “[T]he NLRA is designed to channel organizing drives between groups of employees and single employers—not to facilitate collective action across multiple employers.” Kate Andrias, *The New Labor Law*, 126 *YALE L.J.* 2, 30 (2000).

187. See discussion *infra* Part IV.

188. Philip L. Martin, *A Comparison of California’s ALRA and the Federal NLRA*, 37 *CAL. AGRIC.* 6, 6 (1983); Agricultural Labor Relations Act, *CAL. LAB. CODE* §§ 114–1166.3.

189. *Id.* at 7.

190. *Id.*

ing for many years with only minor consequences, as the NLRB has never attempted to impose such a strong remedy under its broad but vague remedial powers.¹⁹¹ By explicitly stating the availability of strong remedies, the ALRA ensures that employers are less able to violate workers' rights without commensurate economic consequences.

The second important difference between the ALRA and NLRA is that while they both bar a traditional secondary boycott, in which a union pressures a buyer of the primary employer's product, i.e., a supermarket, to no longer carry their product, the ALRA permits "a consumer boycott of the supermarket chain."¹⁹² While this does not broadly permit a secondary boycott, this compromise solution ensures that workers can put pressure on their employer through the market to concede to their bargaining demands. As discussed above, the power of consumer boycotts has been a critical tool for gaining protections for farmworkers, and therefore this exception for secondary consumer boycotts in the ALRA is an important element to bring to any federal movement for farmworker labor protections.

Finally, the ALRA addresses a key issue with the NLRA in how it defines an employer and assigns responsibility for unfair labor practices. The NLRA defines an employer as anyone that employs workers, a vague definition that would require the NLRB in each case to decide "whether a farm labor contractor [i]s an independent business or the employer's agent."¹⁹³ Under this conception, landowners could escape liability for violations of labor law by their contractors, which would deny workers access to the individual most able to prevent such violations and best able to compensate workers for any violations. The ALRA avoids this issue by making "the grower or landowner the employer and therefore responsible for unfair labor practices committed by foremen and supervisors as well as by farm labor contractors," with a few minor exceptions.¹⁹⁴ This definition therefore ensures that the ultimate responsibility and liability lie with the landowner, who derives the greatest benefit from any violations of labor law. This broad definition of employer better protects workers from employers, who could otherwise use contractors that have few resources and tend to be a transient workforce to evade liability for violations of labor law. Using the ALRA as a reference, a federal solution to farmworker labor protections could right the sins of the New Deal while developing a more robust set of protections for the workers who have been long harmed by exclusionary federal laws. Those protections would in turn serve the environmental justice communities that surround agricultural production in this country.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

IV. SECTORAL BARGAINING FOR FARMWORKERS

Granting NLRA protections to farmworkers would be an incomplete solution without also creating a sectoral bargaining system for agriculture that would allow representatives for farmworkers and farm owners to negotiate and establish minimum standards for the entire industry. While NLRA protections would be an important step toward protecting workers, the current state of the labor movement in the United States would likely undermine the full potential of those protections. In 2021, unionization rates in the United States were only 10.3%, tying the record lowest rate of unionization since the passage of the NLRA.¹⁹⁵ With such a weak labor movement, unions and workers would face a massive challenge in effectively organizing farmworkers and developing the power necessary to gain the advantages of unionization, even with the core protections of the NLRA and the reforms noted above.

Sectoral bargaining, which is defined as “a form of collective bargaining that provides contract coverage and sets compensation floors for most workers in a particular occupation, industry, or region,” could help to address these issues.¹⁹⁶ While the definition highlights wages as the key element of bargaining, the system could also permit bargaining over working conditions and safety standards.¹⁹⁷ In the agricultural context, sectoral bargaining could help to set the minimum wage and could contractually define worker protection standards across a range of issues that would apply to all farms and farmworkers in the United States. The framework of sectoral bargaining would also help to mitigate the difficulties that labor organizers face with a largely transient workforce with high workplace turnover rates. It would require a statute to implement sectoral bargaining, either through an amendment to the NLRA, or through the enactment of a new statute intended to revitalize labor law.

A. Sectoral Bargaining in Practice

Sectoral bargaining presents several advantages over traditional bargaining in the current labor context and could be effectively implemented in the agricultural industry. The model suggested by the Clean Slate for Worker Power

195. Josh Eidelson, *U.S. Labor's Watershed Year Failed to Boost Union Memberships*, BLOOMBERG L. (Jan. 20, 2022), <https://perma.cc/KN5G-7AHS>.

196. David Madland, *What Is Sectoral Bargaining?*, CTR. FOR AM. PROGRESS ACTION FUND (Mar. 2, 2020), <https://perma.cc/MP9Z-CHWY>.

197. In Europe, many countries have some form of sectoral or cross-sectoral bargaining in place. In response to the COVID-19 pandemic, bargaining was largely focused on health and safety concerns for workers. Particularly in frontline industries like healthcare, retail, and education workers were able to achieve better workplace safety precautions through health and safety committees in place under national, sectoral, and company bargaining agreements. See generally Óscar Molina & Roberto Pedersini, *Collective Bargaining in Seven European Countries Throughout the Pandemic* (Int'l Lab. Org., Working Paper No. 74, 2022), <https://perma.cc/F2G8-3YU9>.

Report presents a practical system that would provide immediate benefits to workers, while simultaneously building employee power in the transition to a more powerful labor movement.¹⁹⁸ The Clean Slate Report suggests the passage of a new statute that requires “a sectoral bargaining panel . . . be established by the Secretary of Labor upon the request of a worker organization when that worker organization has a membership of at least 5,000 workers in the sector or 10 percent of the workers in the sector, whichever number is lower.”¹⁹⁹ This system would then allow representatives of farmworkers including selected workers, union leaders, and federal government officials to bargain with designated industry representatives.²⁰⁰ Given the different demands and challenges that workers and employers face in crop production and livestock agriculture, each segment of the industry would establish its own representatives and bargain on behalf of the Secretary of Labor’s designated cohort of employees.²⁰¹

As with the NLRA, there would be mandatory subjects of bargaining covering wages and conditions relating to the wages, hours, and working conditions. This would allow the sectoral bargaining panel to establish minimum standards for the industry that could protect workers from dangerous pesticides and other chemicals through mandatory safety protocols, protective equipment, and even leverage the aggregate power of workers across the industry to reduce or stop the use of pesticides, or at least move away from the most harmful chemicals. For CAFOs, safety protocols could include the provision of PPE, requiring employers to set up water treatment plants, or setting maximum animal concentrations in feedlots. Any resulting reductions in harmful chemicals and emissions from these reforms would also benefit neighboring communities that currently suffer the negative health effects of these practices.

Above and beyond the standards set by the sectoral bargaining panel, individual work sites that organize and select a bargaining representative could establish contractual agreements through their own bargaining process that impose even stronger workplace protections and higher wages. Working in tandem, the general protections of the NLRA and a system of sectoral bargaining could empower workers to achieve meaningful improvements in their working conditions.

Such a system is particularly valuable in the agricultural industry due to the significantly decentralized structure of the market. With even the largest companies in the agribusiness industry making up only a fraction of the market share, workers and organizers face a substantial challenge in successfully pushing for industry-wide solutions under a standard union structure.²⁰² Whereas

198. BLOCK & SACHS, *supra* note 176.

199. *Id.* at 41.

200. *Id.*

201. *Id.* at 40–41.

202. See discussion *supra* Part III.C.

under the traditional model, each individual workplace would have to achieve a majority support for a union and elect a union, a task which in the agricultural industry means reaching countless separate and remote farms to organize workers; sectoral bargaining eases that burden. Though the initial challenge of organizing workers remains relatively unchanged, once the requirements for sectoral bargaining are met, all workers would reap the benefits of an organized workforce. Farmworkers could more quickly see their conditions improve by obviating the need to organize a significantly greater proportion of the industry before seeing systemic improvements in conditions through contracts negotiated farm by farm.

B. *Overcoming Organizing Challenges*

Labor organizers face some significant challenges to organizing farmworkers and achieving the requisite support in a workplace to win a vote for unionization under the current NLRA framework. In order to unionize a workplace, an organizer must first establish that at least 30% of a workplace supports a vote for unionization, typically achieved through signing authorization cards, which are then used to petition for an election with the NLRB.²⁰³ Once the Board sets an election, the NLRA requires a simple majority of voting workers in a given bargaining unit, typically a single workplace, to vote to approve a union as the exclusive bargaining representative for that bargaining unit.²⁰⁴ Achieving this majority is challenging in any workplace, but even more so where there is high employee turnover, eroding union support.²⁰⁵ Agriculture has notoriously high turnover, with 81% of farmworkers working as seasonal employees, and nearly one-fifth of the workforce identifying as migratory.²⁰⁶ These data illustrate the temporary nature of employment for farmworkers and the inherent inconsistency of the workforce that organizers must reach. The Supreme Court has made efforts to reach workers even more challenging by invalidating a part of the California ALRA that allows organizers to access farms for limited periods to organize farmworkers that often live in inaccessible areas.²⁰⁷

Across each of these issues, a system that enables sectoral bargaining can mitigate the challenges and shortcomings of traditional organizing under the NLRA. First, by precluding the need for traditional NLRB elections, sectoral bargaining renders it easier to begin bargaining for improved working condi-

203. *Your Right to Form a Union*, NLRB, <https://perma.cc/Y5ET-D9ZW>.

204. *Id.*

205. See Dave Jamieson, *Amazon's Greatest Weapon Against Unions: Worker Turnover*, HUFFPOST (June 17, 2021), <https://perma.cc/QJ7N-LURR>.

206. NAT'L CTR. FOR FARMWORKER HEALTH INC., *supra* note 38, at 1.

207. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2080 (2021) (holding that the provision "constituted a *per se* physical taking" of the employers' property).

tions more quickly, without the initial challenge of needing to organize a majority of workers on countless individual farms. Second, because workers could begin deriving benefits without having to be unionized in their own workplace, those workers that are increasingly more difficult to reach due to distance and limits on the legal rights of union organizers to enter workplaces can still derive the benefits of unionization, and representatives for workers could seek to establish contractual measures to permit organizers to reach those inaccessible workers. Finally, by leveraging the collective power of a large portion of the industry's workforce, rather than individual worksites with relatively less power, sectoral bargaining could achieve more substantial concessions from employers who would otherwise use their power to undermine worker demands on individual farms. By implementing sectoral bargaining, farmworkers could more quickly begin to derive the benefits of organization and simultaneously help organizers to overcome existing challenges. As workers improve their working conditions and implement stronger safety protocols, surrounding communities would enjoy the downstream benefits of less harmful agricultural practices.

CONCLUSION

Racist and xenophobic policies have left agricultural workers and communities surrounding farms to bear the burden of a food system that recklessly employs toxic chemicals and dangerous workplace practices. To remedy these injustices, legislators ought to implement policies that empower agricultural workers to advocate for themselves in their workplace, in the political sphere, and in the courts. While expanding labor organizing protections and sectoral bargaining to farmworkers is not a panacea for the challenges that farmworkers face, it would be a significant step toward combating the environmental harm borne by environmental justice communities and would begin to finally shift the balance of power toward these communities that have been historically ignored and marginalized. By providing NLRA protections to farmworkers and establishing sectoral bargaining within the agricultural industry, farmworkers may gain the economic and political power necessary to eliminate the dangerous practices that imperil the health and longevity of workers, nearby communities, and the natural resources upon which we all rely. Uniting the labor movement and the environmental justice movement, activists can harness synergies in organizing and advocacy to achieve the goals of environmental justice for marginalized communities around the country.

