STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

CRISPIN HERNANDEZ, WORKERS' CENTER OF CENTRAL NEW YORK, and WORKER JUSTICE CENTER OF NEW YORK,

Plaintiffs,

Index No.: 02143-16
RJI: 01-16-121237

v.

McNally, J.

THE STATE OF NEW YORK and GOVERNOR ANDREW CUOMO, in his official capacity,

Defendants,

NEW YORK FARM BUREAU, INC.

Intervenor-Defendant.

BRIEF OF *AMICUS CURIAE* COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC IN SUPPORT OF PLAINTIFFS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, the Columbia Law School Human Rights Clinic, is an organization of lawyers and law students[1] working to advance respect for international human rights through fact-finding, reporting, litigation, media engagement, advocacy, training, and innovative methods. The Clinic works in partnership with advocates to promote human rights globally, including in the United States. The Clinic has deep expertise and experience in international human rights law, including a specialization in workers' human rights. *See, e.g.*, Columbia Law Sch. Human Rights Inst., "The More Things Change…" The World Bank, Tata and Enduring Abuses on India's Tea Plantations (2014). The Clinic thus additionally has a strong organizational interest in the subject matter of this case. The Clinic has contributed to other *amicus* briefs, including for example in *J.E.F.M. v. Lynch*, 837 F.3d 1026 (9th Cir. 2016) and *Mamani v. Sánchez-Berzaín*, 825 F.3d 1304 (11th Cir. 2016), to guide courts in the appropriate interpretation of international human rights norms and their applicability to the resolution of matters of U.S. domestic law.

Amicus Curiae submits this brief to inform the Court about international human rights law on freedom of association, which includes the rights to organize and collectively bargain, to guide the interpretation of the analogous N.Y. state constitutional rights at issue in the present case.

SUMMARY OF ARGUMENT

International human rights law, which includes specific labor protections, should inform the decision in this case. U.S. and N.Y. courts have a longstanding practice of looking to international law to guide interpretations of constitutional provisions. The international human

[1] Counsel gratefully acknowledge the contributions of the following law students to the preparation of this brief: Carina De La Paz, Joanne Kim, and María Emilia Mamberti.

right to freedom of association, which the United States has committed to uphold, requires governments to adopt laws and policies that prevent interference with workers' rights to organize and collectively bargain, and to provide adequate remedies when violations occur. International human rights law protects the right to freedom of association of all workers, including farmworkers. New York state's exclusion of farmworkers from the labor protections afforded other occupations is thus incompatible with international human rights law and the analogous N.Y. state constitutional protections for the rights to organize and collectively bargain.

International human rights law expressly protects the right to freedom of association, which in the labor context entails the rights to organize and collectively bargain.[2] Under such protections, workers must enjoy the rights both to form and join labor organizations, and to engage in collective action to advance workplace goals, free from retaliation or harassment. Freedom of association is essential for the protection of many other workers' rights, including the rights to fair wages and safe working conditions.

To ensure that freedom of association can be exercised in practice, human rights law requires governments to adopt laws and policies that prevent infringement upon, or interference with, that right and provide an adequate remedy when violations occur. At a minimum, domestic laws must: recognize workers' rights to organize and collectively bargain; prohibit acts of interference with those rights by third parties; and contain adequate mechanisms by which

[2] While outside the scope of the brief the right to strike is also enshrined in international law as a component of freedom of association in the workplace context. *See* International Covenant on Economic, Social and Cultural Rights art. 8, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (signed by U.S. in 1977); Charter of the Organization of American States art. 45(c), Apr. 30, 1948, 119 U.N.T.S. 3; U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 56, U.N. Doc. A/71/385 (Sept. 14, 2016) (by Maina Kiai). Also beyond the scope of this brief, though interrelated and interdependent with freedom of association, are the international human rights protections for freedom of expression and assembly. *See* Universal Declaration of Human Rights arts. 19 & 20, G.A. Res. 217 (III) A (Dec. 10, 1948); *see also* International Covenant on Civil and Political Rights arts. 19, 21, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by U.S. in 1992);

allegations of interference or infringement of the rights can be received, investigated, and remedied.

International human rights law is clear that the right to freedom of association accrues to all workers, including those engaged in agriculture, with only narrow exceptions not applicable here. The International Labour Organization (ILO), the United Nations agency that supervises compliance with international labor law protections, has repeatedly called on governments to remove exclusions of certain occupations, including farmworkers, from protections for the rights to organize and collectively bargain. Governments are only permitted to restrict the right to organize of those working in the armed services or police, and any such restrictions must be narrowly tailored to achieve the specific national security and public order interest at stake. Governments must additionally ensure that no law or policy causes or perpetuates discrimination against workers on the basis of race, ethnicity, national origin, language, citizenship, or immigration status, regardless of intent, and that all workers have equal protection in the exercise of the rights to organize and collectively bargain.

The New York legislative scheme governing workers' rights excludes farmworkers from its protections for the right to organize and collectively bargain without providing adequate alternative protections, and is thus incompatible with international law and the analogous state constitutional protection for these rights. While both United States federal and N.Y. state constitutional law recognize the right to freedom of association and the rights of workers to organize and collectively bargain, farmworkers lack the legal protections necessary to exercise these rights, including specific procedures for receiving, investigating, and remedying complaints. N.Y. farmworkers who face harassment and retaliation by their employers for their efforts to organize and engage in collective bargaining are not afforded adequate legal recourse

and remedy. Such an exclusion is particularly concerning given the allegations of discriminatory motives surrounding the adoption of the relevant labor law provisions, and the ongoing disproportionate impact of the exclusion on a workforce composed predominantly of racial and ethnic minorities, non-English speakers, and individuals who lack citizenship or lawful immigration status. During periodic United Nations reviews of the United States' human rights record, reviews conducted on the basis of the United States' international commitments and obligations, the United States has been called upon to enact greater protections for the right of farmworkers to organize in line with the human rights framework. At present, twelve U.S. states offer protections for agricultural workers' rights to organize and collectively bargain. To give effect to the protection for the rights to organize and collectively bargain in its state constitution, New York should join them and invalidate the farmworker exclusion.

ARGUMENT

I. INTERNATIONAL HUMAN RIGHTS LAW, WHICH INCLUDES LABOR PROTECTIONS, SHOULD INFORM THE DECISION IN THIS CASE.

United States courts, including the U.S. Supreme Court, have a "longstanding practice" of considering international and foreign law to affirm and inform constitutional interpretation. *Graham v. Florida*, 560 U.S. 48, 80 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (characterizing international authority as "instructive for [the Court's] interpretation" of the Constitution in a case challenging the juvenile death penalty); *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing a European Court of Human Rights decision and an expert committee report to the British Parliament in finding that Texas law criminalizing certain consensual sexual activities was at odds with norms of Western civilization); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing to international disapproval of the practice of executing

individuals with developmental disabilities, as detailed in the filing of an *amicus* brief by the European Union); Sarah H. Cleveland, *Our Int'l Constitution*, 31 Yale J. Int'l L. 1, 88–100 (2006) (detailing the U.S. Supreme Court's "longstanding tradition of relying on international law to inform constitutional meaning").

New York courts have also looked to international law, and international human rights law in particular, to interpret claims in an array of substantive areas, which include the labor context. *See, e.g, Wilson v. Hacker*, 101 N.Y.S.2d 461, 472–73 (N.Y. Sup. Ct. 1950) (invoking the Universal Declaration of Human Rights' provisions on equality, and the right to just and favorable working conditions, in interpreting fundamental principles regarding discrimination, and finding no "legitimate and justifiable" argument for the exclusion of women from the bartending occupation); *Jamur Productions Corp. v. Quill*, 273 N.Y.S.2d 348, 356 (N.Y. Sup. Ct. 1966) (looking to the Universal Declaration as a source of authority in evaluating what constitutes actionable behavior in a case concerning the right to strike); *see also* The Opportunity Agenda et. al, *Human Rights in State Courts* (2014) (compiling state court judgments, including from New York, drawing upon international human rights law).

This turn to international law is particularly appropriate where the legal issue being addressed coincides with the United States' international human rights obligations and commitments. *See* U.S. Const. art. VI, cl. 2 ("The Supremacy Clause") ("all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations." (citations omitted)); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) ("International

law . . . is part of our law, and must be ascertained and administered by the courts of justice . . . .").

The right to freedom of association, which entails the right to form and join labor organizations to advance legitimate interests, is a foundational element of human rights law, accrues to everyone, and is a component of the United States' express human rights commitments. It is affirmed in the Universal Declaration of Human Rights and the American Declaration on the Rights and Duties of Man, both of which were adopted with the support of the United States and serve as the foundational articulations of fundamental rights to which every human being is entitled. Universal Declaration of Human Rights arts. 20, 23, G.A. Res. 217 (III) A (Dec. 10, 1948) [hereinafter UDHR]; Organization of American States, American Declaration of the Rights and Duties of Man art. 22, May 2, 1948, O.A.S. Res. XXX, OAS/Ser.L/V/I.4 rev. 9 [hereinafter ADRD]. The United States has also signed and ratified several international human rights treaties that protect freedom of association and the right of all workers to organize with only narrow exceptions inapplicable to farmworkers. *See* International Covenant on Civil and Political Rights art. 22, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by U.S. in 1992) [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(ix), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by U.S. in 1994) [hereinafter ICERD]. The United States has additionally signed—though not yet ratified—other human rights treaties containing analogous provisions.[3] *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, art. 8, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (signed by U.S. in 1977) [hereinafter ICESCR]; Organization of

[3] Through signature, the United States commits itself to refrain from action that defeats the object and purpose of such international agreements. Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (defining obligations of states that have signed but not yet ratified treaties).

American States, American Convention on Human Rights art. 16, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (signed by U.S. in 1977) [hereinafter ACHR]. The United States is also a member of the United Nation's International Labour Organization (ILO)—an agency composed of governments, employers' organizations, and worker representatives, with the mandate to set international labor standards and policies—and, as a member, must respect, promote, and realize the core principles and rights addressed in the "fundamental" ILO conventions, including freedom of association and the effective recognition of the right to collective bargaining. *See* International Labour Conference, *ILO Declaration on Fundamental Principles and Rights at Work*, ¶ 2, (June 18, 1998) (extending obligations to "all Members, even if they have not ratified the Conventions in question"); Rep. of the Working Group on the Universal Periodic Review, United States of America, Addendum Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review ¶ 22, U.N. Doc. A/HRC/16/11/Add.1 (Mar. 8, 2011) (quoting United States' expression of support for the 1998 ILO Declaration on Fundamental Principles and Rights at Work).[4] As discussed herein international human rights law encompasses these global and regional human rights agreements, which protect freedom of association, as well as more specific ILO conventions and jurisprudence that articulate the rights, freedoms, and obligations of employers, employees, and governments in greater detail. *See* International Labour Conference, *Rep. III (Part 1A): Rep. of*

[4] The United States has committed to "advance respect for workers' rights" by "working with . . . the International Labor Organization," and to "promot[e] the adoption and implementation of policies, regulations and laws to achieve respect for internationally recognized worker rights." *See* Permanent Mission of the U.S. to the U.N. and Other Int'l Orgs. in Geneva, Human Rights Commitments and Pledges of the United States of America: Commitment to Advancing Human Rights, Fundamental Freedoms, and Human Dignity and Prosperity Internationally, ¶ 7 (2016). While the United States has not ratified ILO Conventions 87 (Freedom of Association and Protection of the Right to Organize) and 98 (Right to Organize and Collective Bargaining), the United States submits itself to review by the ILO Committee on Freedom of Association (CFA), the ILO body with the mandate to receive complaints under, and monitor state compliance with, Conventions No. 87 and 98. *See, e.g.* Case No. 2547 (United States), Rep. No. 350 ¶ 732 (CFA 2008); Case No. 2227 (United States), Rep. No. 332 ¶ 551 (CFA 2003).

the Comm. of Experts on the Application of Conventions and Recommendations: General Report and Observations Concerning Particular Countries, ¶¶ 56–58 (1998).[5]

This Court is well within established practice in considering international human rights law to inform its assessment of the constitutionality of a statutory framework that fails to ensure the ability of farmworkers to organize and pursue collective workplace aims.

II. THE INTERNATIONAL HUMAN RIGHT TO FREEDOM OF ASSOCIATION REQUIRES A LEGAL FRAMEWORK THAT PREVENTS AND REMEDIES INFRINGEMENTS OF THE RIGHTS TO ORGANIZE AND COLLECTIVELY BARGAIN.

The right to freedom of association is articulated in numerous international instruments, and explicitly protects the rights of workers to organize and collectively bargain. Freedom of association has been held to be fundamental for the protection of many other rights, including rights to fair wages and safe working conditions. International human rights law requires governments "to respect and to ensure" human rights, including the right to freedom of association, through "laws or other measures as may be necessary to give effect to the rights," and by ensuring "an effective remedy" where rights are violated. *See* ICCPR, arts. 2, 22. To comply with international human rights law, governments must adopt a legal framework that recognizes the rights of all workers to organize and collectively bargain; prohibits acts of interference by third parties; and provides mechanisms by which allegations of interference with

[5] As the ILO stated in this 1997 report: "The Universal Declaration . . . is generally accepted as a point of reference for human rights throughout the world. . . . The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the Declaration . . . . [T]he ILO's standards on human rights along with the instruments adopted in the UN and in other international organizations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document."

or infringement of these rights can be received, investigated, and remedied when the rights are found to be violated.

A. International human rights law underscores the fundamental nature of the right to freedom of association, which includes the rights to organize and collectively bargain.

International human rights law guarantees the right to freedom of association as articulated in a range of international instruments and agreements. *See*, *e.g.*, UDHR art. 20; ICERD art. 5(ix); ICCPR art. 22; ICESCR art. 8; ADRD art. 22; *see also* ILO, Freedom of Association and Protection of the Right to Organise Convention (No. 87), art. 2, *adopted* July 9, 1948 [hereinafter ILO Convention No. 87]; ILO, Right to Organise and Collective Bargaining Convention (No. 98), *adopted* July 1, 1949 [hereinafter ILO Convention No. 98].[6] Collectively, these agreements protect the right of individuals to come together "to collectively act, express, promote, pursue or defend a field of common interests." U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, *First Thematic Rep. to the Human Rights Council*, ¶ 51, U.N. Doc. A/HRC/20/27 (May 21, 2012) (by Maina Kiai) [hereinafter Kiai, 2012 Rep.].

In the labor context, freedom of association explicitly includes the right to both form and join unions, ICCPR art. 22; ICESCR art. 8; ICERD art. 5; ADRD art. 22,[7] and the right to collectively bargain "the terms and conditions of employment," *see* ILO Convention No. 98, art. 4; Charter of the Organization of American States art. 45(c), Apr. 30, 1948, 119 U.N.T.S. 3; *see*

[6] Other human rights treaties recognize the right to freedom of association for specifically vulnerable populations. *See* Convention on the Rights of the Child art. 15, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (signed by U.S. in 1995) [hereinafter CRC]; Convention on the Elimination of All Forms of Discrimination against Women art. 7, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (signed by U.S. in 1980) [hereinafter CEDAW]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 26, *opened for signature* Dec. 18, 1990, G.A. Res. 45/158 [hereinafter ICMW].

[7] The right to establish and join organizations consists of the additional rights to "draw up their constitutions and rules," "elect their representatives," "formulate their programmes," and "join federations and confederations." ILO Convention No. 87, arts. 3(1), 5.

also Case No. 1928 (Canada), Rep. No. 310 ¶¶ 134, 175 (CFA 1998) (describing collective bargaining "to seek to improve the living and working conditions" as an "essential element" of freedom of association). In order to exercise the rights to organize and collectively bargain, workers must be able to meet and discuss workplace concerns without the threat of interference or harassment. *See* ILO Convention No. 87, art. 3; ILO Convention No. 98, art. 2; *Huilca-Tecse v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H. R. (ser. C) No. 121, ¶ 77 (Mar. 3, 2005); *Baena-Ricardo et al. v. Panama*, Inter-Am Ct. H. R. (ser. C) No. 72, ¶ 156 (Feb. 2, 2001). All workers must also have the ability to present complaints and pursue remedies if their rights are denied. *See* ICCPR art. 2; ILO, Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO ¶¶ 817, 819–20, 822 (5th rev. ed. 2006) [hereinafter ILO 2006 Digest].

Freedom of association is an inalienable right and "a key component in the empowerment of marginalized individuals." *See, e.g.*, Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 157 (Sept. 17, 2003) [hereinafter Advisory Opinion OC-18/03]; U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 15, U.N. Doc. A/HRC/26/29 (Apr. 14, 2014) (by Maina Kiai) [hereinafter Kiai, 2014 Rep.]. Indeed, freedom of association is an essential prerequisite for the realization of all other human rights. U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 2, U.N. Doc. A/71/385 (Sept. 14, 2016) (by Maina Kiai) [hereinafter Kiai, 2016 Rep.]. For workers, the ability to organize and take collective action is essential to pursue collective workplace goals and to protect rights and legitimate interests, including safe working conditions, fair wages, and avenues to redress workplace abuses. *See* Comm. on Economic, Social, and Cultural Rights, General Comment No.

23 on the Right to Just and Favourable Conditions of Work, ¶ 1, U.N. Doc. E/C.12/GC/23 (Apr. 27, 2016) (noting that freedom of association is a "crucial means of introducing, maintaining and defending just and favourable conditions of work"); Advisory Opinion OC-18/03, at ¶¶ 157-58; *Baena-Ricardo et al. v. Panama*, Inter-Am Ct. H. R. (ser. C) No. 72, ¶ 158 (Feb. 2, 2001) ("[F]reedom of association is of the utmost importance for the defence of the legitimate interests of the workers . . . ."); Kiai, 2016 Rep., at ¶ 54 ("[T]rade unions . . . are fundamental tools to achieving workers' rights . . . .").

B. Governments must adopt laws and policies that recognize the rights to organize and collectively bargain, and prohibit interference by third parties.

A fundamental element of ensuring that workers can exercise the rights to organize and collectively bargain is a legal framework that recognizes the right and prohibits interference or infringement by third parties. *See* ILO Convention No. 98, art. 1; Comm. on Economic, Social, and Cultural Rights, Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights, ¶ 5, U.N. Doc. E/C.12/2011/1 (July 12, 2011) [hereinafter CESCR 2011 Statement on Obligations of State Parties]; Kiai 2016 Rep. ¶¶ 55, 73. Governments must expressly prohibit actions that disadvantage workers who organize, or discourage workers from organizing. *See* ILO Convention No. 98, art. 1(1). Such actions include the conditioning of employment on the workers' forbearance from organizing activity, dismissal or other prejudicing of a worker due to participation in organizing activities (whether inside or outside the workplace), and "acts of harassment and intimidation." *See id.* at art. 1(2); Case No. 2172 (Chile), Rep. No. 329 ¶¶ 316, 351 (CFA 2002); Case No. 1826 (Philippines), Rep. No. 302 ¶¶ 386, 411 (CFA 1996); *see also Cantoral-Huamaní and García-Santa Cruz v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.

167, ¶ 146 (July 10, 2007) (holding that governments must ensure that workers are able to freely exercise their freedom of association and right to form labor unions without fear of retaliation, or being subject to violence).

C. Governments must provide mechanisms to investigate alleged infringements of the rights to organize and collectively bargain, and ensure access to effective remedies where the rights are violated.

Legal recognition of the rights to organize and collectively bargain, and a prohibition on interference with and harassment of worker associations, while necessary, are insufficient to adequately protect workers' rights; it is also essential to take measures to ensure accountability in law and in practice. International human rights law calls for judicial and/or administrative mechanisms to promptly, efficiently, and impartially investigate violations of workers' rights to organize and collectively bargain, and access to remedies and redress when these rights are infringed upon. *See* ICCPR art. 2; CESCR 2011 Statement on Obligations of State Parties, at ¶ 5; Kiai, 2016 Rep., at ¶ 83; ILO 2006 Digest, at ¶¶ 813–22; Case No. 2126 (Turkey), Rep. No. 334 ¶ 67, 73 (CFA 2004); s*ee also* Case No. 2227 (United States), Rep. No. 332 ¶¶ 551, 608 (CFA 2003) (emphasizing that prohibitions on anti-union discrimination "are inadequate when they are not accompanied by procedures to ensure that effective protection against such acts is guaranteed" (citation omitted)).[8]

[8] Governments are also called upon to prevent interference of workers' rights by establishing both civil and criminal sanctions that are "sufficiently dissuasive" to check anti-union discrimination, ensuring that employers and other private actors cannot threaten or assault workers involved in organizing with impunity. *See* ILO 2006 Digest, at ¶ 862; Case No. 2186 (China/Hong Kong), Rep. No. 333 ¶¶ 334, 358 (CFA 2004) (holding that governments must establish efficient procedures coupled with sanctions against private employers committing acts of intimidation and harassment against unions, to ensure non-interference).

III. INTERNATIONAL HUMAN RIGHTS LAW GUARANTEES THE RIGHT TO FREEDOM OF ASSOCIATION TO AGRICULTURAL WORKERS, AND PROHIBITS THEIR EXCLUSION FROM LEGAL PROTECTIONS NECESSARY TO EXERCISE THIS RIGHT.

A. International human rights law expressly protects farmworkers' freedom of association.

International law protects the right to associate of all workers, including farmworkers, regardless of occupation, with very few exceptions not applicable in this case. Since the 1920s, an ILO convention (now ratified by 123 countries) has expressly guaranteed freedom of association to "all those engaged in agriculture," and has committed state parties to "repeal any statutory or other provisions restricting such rights." ILO, Right of Association (Agriculture) Convention (No. 11) art. 1, *adopted* Oct. 25, 1921. All subsequent international human rights and labor law agreements to address the issue have specifically recognized the right to freedom of association as applying to all workers, drawing no limitation for those engaged in agriculture. *See, e.g.*, UDHR art. 23 ("Everyone" has the right to form and join unions); ICCPR art. 22 (same); ICESCR art. 8 (same); ILO Convention No. 87, art. 2 (stating that "[w]orkers and employers, without distinction whatsoever" have the right to establish and join organizations of their choosing); ILO Convention No. 98, art. 1 (applying convention to "workers," and drawing no additional distinctions). Indeed, the Human Rights Committee—the body with the mandate to interpret and monitor compliance with the International Covenant on Civil and Political Rights (of which the United States is a party)—has specifically emphasized that the protections for freedom of association apply to all workers, *including* agricultural workers. *See, e.g.*, Human Rights Comm., Concluding Observations: Costa Rica, ¶ 17, U.N. Doc. CCPR/C/79/Add.107 (Apr. 8, 1999). Underscoring the scope of protection, the ILO adopted a convention that specifically articulates that labor rights accrue to "rural workers"—defined as those engaged in

agriculture in rural areas—and confirmed that these aforementioned treaties collectively "affirm the right of all workers, including rural workers, to establish free and independent organizations." ILO, Rural Workers' Organisations Convention (No. 141), preamble & arts. 1–3, *adopted* June 23, 1975.

B. International human rights law prohibits the exclusion of farmworkers from legislative protections for the rights to organize and collectively bargain.

Decisions of the ILO Committee on Freedom of Association (CFA)—the ILO body with the mandate to interpret the freedom of association conventions and monitor state compliance—have affirmed that all workers, "including without discrimination in regard to occupation," have the right to form and join labor organizations. *See* Case No. 2113 (Mauritania), Rep. No. 326 ¶¶ 363, 372 (CFA 2001); *see also* Case No. 1285 (Chile), Rep. No. 241 ¶¶ 156, 213 (CFA 1985). The CFA has thus consistently found freedom of association violations where laws exclude or restrict workers in specific occupations from the full exercise of the right to organize. *See, e.g.*, Case No. 2299 (El Salvador), Rep. No. 333 ¶¶ 543, 562 (CFA 2004) (private security agents); Case No. 1865 (Republic of Korea), Rep. No. 309 ¶¶ 120, 143 (CFA 1998) (teachers); Case No. 1902 (Venezuela), Rep. No. 308 ¶¶ 685, 701 (CFA 1997) (firefighters); Case No. 1792 (Kenya), Rep. No. 295 ¶¶ 519, 541 (CFA 1994) (hospital personnel); Case No. 1175 (Pakistan), Rep. No. 238 ¶¶ 173, 186 (CFA 1985) (airline employees). The CFA has specifically held restrictions on agricultural workers' right to organize to be an impermissible infringement on freedom of association. *See* Case No. 1900 (Canada), Rep. No. 308 ¶¶ 139, 181–182 (CFA 1997) (rejecting Canadian government's arguments that labor protections are "inappropriate for agricultural work and non-industrial workplaces," and affirming right of agricultural workers to form and join labor organizations); Case No. 144 (Guatemala), Rep. No. 24 ¶¶ 223, 234–240, (CFA 1956) (finding imposition of literacy requirement exclusively for agricultural worker associations—

which had effect of excluding some agricultural associations from labor protections afforded to other trade unions—to be contrary to principle of guaranteeing freedom of association to all workers without distinction). The CFA has additionally emphasized that the right to association applies whether workers are permanent, fixed term, or contract employees. *See, e.g.* Case No. 2158 (India), Rep. No. 330 ¶¶ 835, 846 (CFA 2003); Case No. 2083 (Canada), Rep. No. 324 ¶¶ 235, 253 (CFA 2001).

Further, excluding certain occupations from *affirmative protections* for the right to organize is incompatible with international human rights law, which consistently has been interpreted to prohibit such exclusions where there is no alternative regime that provides equivalent protections. *See, e.g.*, Case No. 144 (Guatemala), Rep. No. 24 ¶¶ 188, 237, 258 (CFA 1956) (finding exclusions of certain agricultural worker associations from the legislative protections for the right to negotiate collective employment agreements to be "incompatible" with freedom of association, and calling for abolition of such restrictions).

In an analogous case from Canada regarding the Government of Ontario's exclusion of agricultural and domestic workers (as well as select other professions) from the province's legislative protections for the rights to organize and collectively bargain, the CFA criticized the exclusion for introducing impermissible discrimination on the basis of occupation. *See* Case No. 1900 (Canada), Rep. No. 308 ¶¶ 139, 181–184 (CFA 1997). The CFA called on the Ontario Government to "take the necessary measures to ensure that [such workers] enjoy the protection necessary, either through the [existing Labour Relations Act] or by means of occupationally specific regulations, to establish and join organizations of their own choosing." *Id.* at ¶ 184. The CFA additionally emphasized the need for the Government "to ensure by specific provisions, accompanied by civil remedies and sufficiently dissuasive sanctions, the protection of workers

against acts of anti-union discrimination at the hands of the employer." *Id.* at ¶ 186. In light of concerns expressed by workers that, in the absence of a statutory framework to turn to, the "common law" provided inadequate protection, the Committee concluded:

> "The Committee therefore considers that the absence of any statutory machinery for the promotion of collective bargaining and the lack of specific protective measures against anti-union discrimination and employer interference in trade union activities constitutes an impediment to one of the principle objectives of the guarantee of freedom of association, that is the forming of independent organizations capable of concluding collective agreements. It requests the Government to take the necessary measures so that agricultural and horticultural workers . . . have access to machinery and procedures which facilitate collective bargaining and to ensure that these workers enjoy effective protection from anti-union discrimination and employer interference."

Id. at ¶ 187. When the Supreme Court of Canada addressed a similar challenge under the Charter of Rights and Freedoms, drawing upon international human rights law to inform its analysis, the Court held that the exclusion of agricultural workers from the protections for the right to organize in the Ontario Labour Relations Act, in the absence of any alternative protections, violated the Charter's protection for freedom of association. *See Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016, ¶¶ 2, 20, 27, 45–48, 67 (Can.). In reaching such a conclusion, the court found that "the ability of agricultural workers to associate is only as great as their access to legal protection." *Id.* at ¶ 45.

C. The narrow permissible restrictions on the right to organize under international human rights law do not apply to farmworkers.

International human rights law permits only narrow restrictions on workers' right to organize that are inapplicable to farmworkers. To be compatible with human rights law, limits on protections for freedom of association must be "necessary" to serve state interests related to "national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." *See* ICCPR art. 22. In the labor

context, such restrictions are permissible exclusively for the police and armed forces. *See* ILO Convention No. 87 art. 9; ICCPR art. 22 (scope aligned with ILO Convention No. 87); ICESCR art. 8 (same); Case No. 1285 (Chile), Rep. No. 241 ¶¶ 156, 213 (CFA 1985) (defining carve-out for armed forces and police as "the sole exception" to right of all workers to form and join trade unions).[9] Nothing in these narrow permissible restrictions has ever justified, nor would justify, the exclusion of agricultural workers from protections for freedom of association.

Human rights law additionally requires that restrictions designed to meet the enumerated state interests must be narrowly tailored to be both necessary and "proportionate" to achieve those aims. *See* Human Rights Comm., General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 6, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). The CFA has thus consistently rejected expansive interpretations of the exception for "armed services and the police" that would sweep in other occupations. *See* Case No. 2288 (Niger), Rep. No. 333 ¶¶ 805, 829 (CFA 2004) (customs officials); Case No. 2229 (Pakistan), Rep. No. 330 ¶¶ 918, 941 (CFA 2003) (civilian staff working in manufacturing or providing other services to armed forces); Case No. 1588 (Guatemala), Rep. No. 284 ¶¶ 721, 732 (CFA 1992) (civilian staff working in an army bank). Broad restrictions on associations, such as limits on geographic scope or types of activity, have been interpreted as "inherently suspicious," *prima facie* violations of international law. *See* U.N. Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 46,

[9] Labor law conventions apply to all workers in all other sectors, without distinction, including on the basis of employee functions or workplace hierarchies. However, some limits on the ability of executive level staff and managers to form trade unions are considered consistent with freedom of association where the category of employee is narrowly defined and the employees retain the ability to form organizations to assert their interests. *See* Case No. 1591 (India), Rep. No. 284, ¶¶ 943, 959 (CFA 1992); Case No. 1534 (Pakistan), Rep. No. 281 ¶¶ 160, 170–72 (CFA 1991).

U.N. Doc. A/70/266 (Aug. 4, 2015) (by Maina Kiai) [hereinafter Kiai, 2015 Rep.]. A broad exclusion covering the entire agricultural sector of the workforce would thus be doubly prohibited.

D. Governments must ensure that no law or policy has the purpose or effect of discriminating against protected groups in their exercise of the right to freedom of association.

International human rights law provides that the right to associate must be guaranteed on an equal basis, regardless of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *See* ICCPR art. 2.1. Governments are obligated to refrain from introducing any such distinction in law, as well as to take measures to eradicate laws and policies that cause or perpetuate discrimination in the equal exercise of rights in practice, regardless of intent. ICERD arts. 1-2, 5; ICCPR art. 26; CEDAW art. 1; Undocumented Workers, United States, Case 12.834, Inter-Am. Comm'n H.R. Rep. No. 50/16, OEA/Ser.L/V/II.159, doc. 59 ¶¶ 73, 75 (Nov. 30, 2016) [hereinafter Undocumented Workers Report]; Kiai 2016 Report, at ¶ 63.

Furthering principles of equality and non-discrimination, international human rights protections for the right to freedom of association apply regardless of a worker's citizenship or immigration status. *See* Human Rights Comm., General Comment No. 15, The Position of Aliens Under the Covenant ¶¶ 2, 6, U.N. Doc. HRI/GEN/1/Rev.1 at 18 (Apr. 11, 1986) (guaranteeing freedom of association "without discrimination between citizens and aliens"); Advisory Opinion OC-18/03, at ¶ 160 ("[U]ndocumented migrant workers . . . possess the same labor rights as those that correspond to other workers . . . ."); U.N. Special Rapporteur on the Human Rights of Migrants, Promotion and Protection of All Human Rights, Civil, Political, Social and Cultural Rights, Including the Right to Development, U.N. Doc. A/HRC/7/12, ¶ 14 (Feb. 25,

2008) (by Jorge Bustamante) ("States have . . . the obligation to respect and protect the human rights of all those within its territory, nationals and non-nationals alike, regardless of mode of entry or migratory status"); *see also* Case No. 2620 (Republic of Korea), Rep. No. 374 ¶¶ 286, 301 (CFA 2015) (recognizing right to organize of "migrant workers in an irregular situation"); Case No. 2121 (Spain), Rep. No. 327 ¶¶ 548, 560–61 (CFA 2002) (same). While international human rights law recognizes that there may be some permissible distinctions among workers related to eligibility to work (*i.e.*, requiring non-citizens to obtain work permits), the right to organize accrues equally once an employment relationship has been initiated and until it is terminated. *See* Undocumented Workers Report, at ¶ 76; Comm. on the Elimination of Racial Discrimination, General Recommendation 30, Discrimination Against Non-Citizens, ¶ 35, U.N. Doc. CERD/C/64/Misc.11/rev.3 (2004). Indeed, the United States has emphasized that the right to form and join labor unions applies to workers regardless of their immigration of status. *See* Case No. 2227 (United States), Rep. No. 332 ¶¶ 551, 603 (CFA 2003).

IV. A LEGISLATIVE SCHEME THAT FAILS TO ENSURE THE RIGHTS OF FARMWORKERS TO ASSOCIATE, ORGANIZE, AND COLLECTIVELY BARGAIN IS INCOMPATIBLE WITH INTERNATIONAL HUMAN RIGHTS LAW.

The U.S. constitution protects freedom of association and the right to organize, *see, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460–62 (1958); *Thomas v. Collins*, 323 U.S. 516, 532 (1945) (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939)), and the New York state constitution explicitly recognizes the rights of all workers to organize and collectively bargain, N.Y. Const., art. 1, §17. However, the exclusion of farmworkers from the affirmative protections of the N.Y. State Employment Relations Act (SERA) renders their right to freedom of association insufficiently protected because they lack adequate avenues to assert or review

violations of their rights to organize or collectively bargain. As alleged in the Complaint, SERA's exclusion of farmworkers from legislative protections available to practically every other class of worker has the effect of denying agricultural workers the ability to exercise their rights in practice. Complaint ¶¶ 133–49. New York farmworkers are denied the ability to access mechanisms that address infringement of workers' rights to organize and collectively bargain, including the New York Public Employment Relations Board (PERB).[10] The patchwork of statutory regimes at the federal level also fail to provide sufficient avenues to take action against employers who interfere with or deny farmworkers' rights to organize and collectively bargain.[11] The exclusion of farmworkers from access to the labor protections afforded to those of other occupations is particularly concerning given the alleged discriminatory motivations surrounding the adoption of the relevant labor law provisions, and the disproportionate negative impact of the exclusion on a workforce composed predominantly of racial and ethnic minorities, non-English speakers, and individuals who lack citizenship or lawful immigration status. Complaint ¶¶ 17–25, 62–66. SERA's farmworker exclusion, which denies farmworkers basic legislative and administrative protections to ensure the rights to associate, organize, and collectively bargain without interference, is thus fundamentally incompatible with international human rights law and the analogous constitutional protections for the rights to organize and collectively bargain.

[10] PERB is responsible for administering SERA provisions. N.Y. Civil Service L. § 205. PERB can conduct hearings on charges of unfair labor practice, and order remedies such as back pay or employee reinstatement. N.Y. Labor Law § 706.

[11] *See e.g.* National Labor Relations Act, 29 U.S.C. §§ 151-153, 158 (1935) (excluding "any individual employed as an agricultural laborer" from the affirmative protections provided by the act for the rights to organize and collectively bargain, including the ability to present claims to the National Labor Relations Board, an independent U.S. government agency that investigates charges of unfair labor practices, facilitates settlements, and adjudicates cases); Migrant and Seasonal Agricultural Workers Protection Act of 1982, 96 Stat. 2583, 29 U.S.C. §§ 1801–1872 and Temporary Employment of Farmworkers in the United States, 20 C.F.R. § 655 (making no reference to the rights to organize and collectively bargain, nor providing legal protection or remedies related to infringements of rights to organize and collectively bargain).

Consistent with this conclusion, United Nations reviews of the U.S. human rights record have culminated in recommendations to the United States to ensure that agricultural workers have a legally protected right to freedom of association. *See* Rep. of the Working Group on the Universal Periodic Review: United States of America, ¶ 92.192, U.N. Doc. A/HRC/16/11 (Jan. 4, 2011). The human rights experts mandated to interpret the Covenant on Civil and Political Rights have also expressed concern that the exclusion of farmworkers from labor law protections renders them vulnerable to trafficking and forced labor, and called for more robust workplace oversight and protections. *See* Human Rights Comm., Concluding Observations of the Fourth Periodic Report of the United States of America, ¶ 14, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

Eleven U.S. states provide agricultural workers statutory protection for the right to collectively bargain.[12] New Jersey's Supreme Court has interpreted its constitutional right to organize and collectively bargain in private employment to apply to farmworkers. *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 552 A.2d 1003 (N.J. 1989). Invalidating the farmworker exclusion in SERA will bring New York State in line with this growing trend, and closer to fulfilling its constitutional promise for all workers.

[12] State legislative schemes vary in the level and scope of protections, and enforcement schemes. California's Agricultural Labor Relations Act (ALRA) recognizes workers' right to self-organize and bargain collectively, and also creates the Agricultural Labor Relations Board to *enforce* these rights. *See* Cal. Lab. Code §§ 1141–1153. The Board can investigate charges of interference with labor organizations, conduct hearings, and issue orders to cease interfering or to provide other appropriate relief. *See id*. at §§ 1160.2–1160.3. Similarly, Arizona's Agricultural Employment Relations Act (AERA) recognizes the right of farmworkers to organize, and empowers the Agricultural Employment Relations Board to investigate charges and issue orders to prevent and/or remedy unfair labor practices. *See* A.R.S. Tit. 23, §§ 1386–1392; *see also* Haw. Rev. Stat. § 377(1)–(4) (2011); Kan. Stat. Ann. §§ 44-818–44-830 (prohibiting employer practices that interfere, restrain, or coerce agricultural employees in exercising their labor rights); La. Rev. Stat. Ann. §§ 23.883, 23.885(B), 23.886 (prohibiting the conditioning of employment on abstaining and refraining from membership in a union); Mass. Gen. Laws 150A § 5A; Neb. Rev. Stat. §§ 48(901)–(911) (providing for workers' right to strike and boycott) ; Or. Rev. Stat. §§ 662.805–662.825, 652.630–652.640 (guaranteeing the right of agricultural employees to organize and bargain collectively with employers); Wis. Stat. §§ 111.02–111.15, 111.81 (protecting the right of employees to self-organize and bargain collectively, and laying out processes for workers to challenge unfair labor practices by submitting complaints to the Labor Relations Board); Ind. Stat. Tit. 22 §§ 5–7; Maine Rev. Stat. Tit. 26 §§ 1321–1334.

CONCLUSION

International human rights law underscores that the right to freedom of association requires that workers, including farmworkers, have the ability to exercise their rights to organize and collectively bargain in practice, with adequate legal protection, accountability mechanisms, and remedies. A statutory scheme that fails to protect these rights for farmworkers, where no adequate alternative scheme exists, is fundamentally incompatible with the rights to organize and collectively bargain.

Dated: January 20, 2017

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