

*Appeal No. 20-1776 (L)*

---

*United States Court of Appeals for the Fourth Circuit*

---

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; CENTER  
FOR FOOD SAFETY; ANIMAL LEGAL DEFENSE FUND; FARM  
SANCTUARY; FOOD & WATER WATCH; GOVERNMENT  
ACCOUNTABILITY PROJECT; FARM FORWARD; and AMERICAN  
SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS,

*Plaintiffs-Appellees, Cross-Appellants*

v.

NORTH CAROLINA FARM BUREAU FEDERATION, INC.,

*Intervenor-Defendant-Appellant,  
Cross-Appellee*

And

JOSH STEIN, in his official capacity as Attorney General of the State of North  
Carolina; and DR. KEVIN GUSKIEWICZ, in his official capacity as Chancellor of  
the University of North Carolina-Chapel Hill,

*Defendants-Appellants,  
Cross-Appellees.*

---

**On Appeal from the United States District Court  
For the Middle District of North Carolina**

---

**BRIEF OF *AMICUS CURIAE* UNITED FARM WORKERS OF  
AMERICA IN SUPPORT OF PLAINTIFFS – APPELLEES**

---

*(Counsel listed on inside cover)*

---

MARIO MARTINEZ  
MARTÍNEZ AGUILASOCHO &  
LYNCH, APLC  
P.O. Box 1998  
Bakersfield, CA 93303  
(661) 859-1174  
[mmartinez@farmworkerlaw.com](mailto:mmartinez@farmworkerlaw.com)

*Counsel for Amicus Curiae*

CHRIS LIM  
LAW OFFICE OF R. CHRIS LIM  
2046 Hillhurst Avenue, # 13  
Los Angeles, CA 90027-2719  
[chris.lim@losfelizlaw.com](mailto:chris.lim@losfelizlaw.com)

*Counsel for Amicus Curiae*

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), and Local Rules of Fourth Circuit 26.1, United Farm Workers of America certifies that it does not have a parent corporation and that no publicly-held corporation owns 10% or more of its stock.

## CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* United Farm Workers of America certifies the following pursuant to Federal Circuit Rule 47.4:

1. The full name of every party or amicus represented by me is:

United Farm Workers of America

2. The name the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

As indicated in Item 1.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None

6. Organizational Victims and Bankruptcy Cases: Any information required under Fed. R. App. P. 26(1)(b) and 26.1(c).

None / Not Applicable

Dated: March 1, 2021

MARTÍNEZ AGUILASOCHO &  
LYNCH, APLC

By: /s/ Mario Martinez

MARIO MARTINEZ  
MARTÍNEZ AGUILASOCHO &  
LYNCH, APLC  
P.O. Box 1998  
Bakersfield, CA 93303  
(661) 859-1174  
[mmartinez@farmworkerlaw.com](mailto:mmartinez@farmworkerlaw.com)

By: /s/ Chris Lim

CHRIS LIM  
LAW OFFICE OF R. CHRIS LIM  
2046 Hillhurst Avenue, # 13  
Los Angeles, CA 90027-2719  
[chris.lim@loshelzlaw.com](mailto:chris.lim@loshelzlaw.com)

*Counsel for Amicus Curiae*

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT .....	I
CERTIFICATE OF INTEREST .....	I
STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(C)(5) .....	1
CONSENT OF THE PARTIES .....	1
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	3
I. INTRODUCTION .....	3
II. NORTH CAROLINA’S AG-GAG LAW INTERFERES WITH THE ABILITY OF UFW AND THE FARMWORKERS IT REPRESENTS TO ENAGE IN WHISTLEBLOWING ACTIVITIES .....	4
A. Farmworkers are among the most vulnerable and marginalized worker populations in the United States .....	4
B. Whistleblowing is a commonly used and important tool for farmworkers .....	8
C. North Carolina’s Ag-Gag Law effectively chills protected whistleblowing activities.....	10
D. The Ag-Gag Law’s narrow carveouts do not shield farmworkers from liability .....	13
E. UFW faces a threat of liability under subsection (c) if they assist whistleblowers .....	13
III. NORTH CAROLINA’S AG-GAG LAW VIOLATES UFW AND FARMWORKERS’ FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT .....	15

IV. NORTH CAROLINA’S AG-GAG LAW INCREASES  
FARMWORKERS’ RISK OF SERIOUS EXPLOITATION AND  
PHYSICAL DANGER IN THE WORKPLACE ..... 18

A. Risk of Health and Safety Violations..... 18

B. Risk of Sexual Harassment and Violence ..... 22

C. Risk of Labor Trafficking ..... 25

D. Risk of Wage Theft ..... 27

CONCLUSION..... 30

CERTIFICATE OF COMPLIANCE..... 33

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>ALDF v. Wasden</i> , 878 F.3d 1184 (9th Cir. 2018) .....	9
<i>Am. Civil Liberties Union of Ill. v. Alvarez</i> , 679 F.3d 583 (7th Cir. 2012) .....	9
<i>Arredondo, et al. v. Delano Farms Co.</i> , No. 1:09-cv-01247 (E.D. Cal. July 17, 2009).....	29
<i>Beliz v. W.H. McLeod &amp; Sons Packing Co.</i> , 765 F.2d 1317 (5th Cir. 1985) .....	6
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973) .....	4
<i>California Motor Transport Co. v. Trucking Unlimited</i> , 404 U.S. 508 (1972) .....	15
<i>Chavez v. IBP, Inc.</i> , No. 01- cv-5093, 2005 WL 6304840 (E.D. Wash. May 16, 2005) .....	29
<i>Citizens United. v. Fed. Election Comm’n</i> , 558 U.S. 310, 336 (2010) .....	15
<i>EEOC v. Giumarra Vineyards Corporation</i> , No. 1:09-cv-02255, 2009 WL 8747241 (E.D. Cal. Dec. 29, 2009).....	23
<i>Fields v. City of Philadelphia</i> , 862 F.3d 353 (3d Cir. 2017) .....	10
<i>Gable v. Lewis</i> , 201 F.3d 769 (6th Cir. 2000) .....	15
<i>Martin v. City of Del City</i> , 179 F.3d 882 (10th Cir. 1999) .....	15



## TABLE OF AUTHORITIES (Continued)

	Page(s)
<i>People for the Ethical Treatment of Animals, Inc., et al. v. Josh Stein, et al.</i> , Case No. 1:16CV25, <i>slip op.</i> (M.D.N.C. June 12, 2020) .....	10
<i>Pickering v. Bd. of Educ. of Twp. High School Dist. 205</i> , 391 U.S. 563 (1968) .....	9
<b>STATUTES AND RULES</b>	
29 U.S.C. § 206 (“FLSA”).....	26, 27
29 U.S.C. § 207.....	27
29 U.S.C. §1802.....	6
29 U.S.C. § 1822.....	26
Ag-Gag Law .....	<i>passim</i>
Migrant Seasonal and Worker Protection Act .....	6
N.C. Gen Stat. §§ 14-43.11, 14-43.12 .....	25
N.C. Gen. Stat. §99A-2(c) .....	13
N.C. Gen Stat. § 99A-2(d).....	15
N.C. Gen. Stat. §99A-2(e) .....	13
North Carolina’s Ag-Gag Law .....	<i>passim</i>
RICO 18 U.S.C. § 1964(c).....	25
<b>OTHER AUTHORITIES</b>	
9 C.F.R. § 381.69(a) .....	19
9 C.F.R. § 381.69(b) .....	19
40 CFR Part 170 .....	20
83 Fed. Reg. 49,048 (Feb. 23, 2018) .....	19

# TABLE OF AUTHORITIES

## (Continued)

	Page(s)
First Amendment .....	<i>passim</i>
<i>Blood, Sweat, and Fear: Workers’ Rights in U.S. Meat and Poultry Plants</i> , Human Rights Watch (Jan. 24, 2005) .....	20
Brooke Rogers, <i>Cazorla v. Koch Foods of Mississippi, LLC: Where Discovery Issues Meet Current Immigration Policy</i> (2018), 50 Loy. U. Chi. L. J. 459, 477.....	22
Christopher Ryon, <i>H-2A Workers Should Not Be Excluded From The Migrant and Seasonal Agricultural Worker Protection Act</i> , 2 U. Md.L.J. Race Relig. Gender & Class 137 (2002).....	6
<i>Cultivating Fear</i> , Human Rights Watch (May 15, 2012) .....	6, 21, 22, 23
Dep’t of Labor, <i>A Demographic and Employment Profile of United States Farm Workers: Findings from the National Agricultural Workers Survey (NAWS)</i> 2015-2016, Research Report No. 13 (Jan. 2018) .....	5, 7, 22
Farmworker Justice, <i>Exposed and Ignored: How Pesticides are Endangering our Nation’s Farmworkers</i> (2011).....	18
Farmworker Justice, <i>U.S. Department of Labor Enforcement in Agriculture: More Must Be Done to Protect Farmworkers Despite Recent Improvements</i> (last visited Feb. 24, 2021).....	26, 27
Farmworkers, <i>Facts About North Carolina Farmworkers</i> (2012) .....	5
Farmworkers Justice, <i>Exposed and Ignored: How Pesticides Are Endangering our Nation’s Farmworkers</i> (2011).....	18, 19
“Farmworkers’ Low Wage Rates Have Risen Modestly; Now Congress May Pass a Law to Lower Them,” <i>Farmworker Justice</i> (accessed on Feb. 12, 2021).....	12
<i>Fewer Inspectors, Less Enforcement: OSHA Trend Raises Risks for Workers</i> , IBEW Media Center (Apr. 24, 2019).....	16

## TABLE OF AUTHORITIES

### (Continued)

	Page(s)
<i>Hidden Slaves: Forced Labor in the United States</i> , Human Rights Center, University of California, Berkeley (Sept. 2004) .....	5, 25
<i>Injustice on Our Plates</i> , Southern Poverty Law Center (Nov. 7, 2020) .....	7, 21
Jocelyn Sherman, <i>Seven More Dairy Workers Employed at Darigold Member Diaries File Complaints Regarding Sexual Harassment and Assault</i> (Jun. 24, 2019) .....	24, 25
Jocelyn Sherman, <i>Sexual harassment at Darigold</i> (Aug. 28, 2018) .....	24
Justice, <i>Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases</i> (April 2012) .....	5
Labor Trafficking, National Human Trafficking Resource Center .....	25
Leah Douglas, “Could the food system face a new Covid-19 wave?”, Food & Environment Reporting Network (Oct. 21, 2020) .....	11
Leah Douglas, “Mapping Covid-19 outbreaks in the food system,” Food & Environment Reporting Network (Apr. 22, 2020) .....	11
Marianne Levine, <i>Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law</i> (Feb. 18, 2018) .....	27
<i>OSHA Factsheet: OSHA Inspections</i> , Dep’t of Labor .....	16
<i>OSHA: Federal OSHA Complaint Handling Process</i> , Dep’t of Labor .....	16, 17
<i>OSHA Safety and Health Topics: Agricultural Operations, Hazards &amp; Controls</i> , Dep’t of Labor .....	18
Polaris Project, <i>2018 Statistics from the National Human Trafficking Hotline</i> .....	25
Polaris Project, <i>North Carolina Spotlight 2018 Statistics from the National Human Trafficking Hotline</i> .....	25
Press Release, EEOC, <i>Giumarra Vineyards Sued by EEOC for Sexual Harassment and Retaliation Against Farm Workers</i> (Jan. 13, 2010) .....	23

# TABLE OF AUTHORITIES

## (Continued)

	Page(s)
Roberto Ferdman, <i>‘I had to wear Pampers’: The cruel reality the people who bring you cheap chicken allegedly endure</i> , The Washington Post (May 11, 2016) .....	7
Salmonella Initiative Program (SIP) participants Table; United States Department of Agriculture Food Safety and Inspection Service, (last visited Feb. 24, 2021) .....	19
Stefan Milne, <i>Land of Milk and Money: Inside the Wild World of</i> .....	14
Stefan Milne, <i>Land of Milk and Money: Inside the Wild World of Washington Dairy</i> , SeattleMet (Feb. 26, 2019), .....	14
Student Actions with Farmworkers, <i>Facts About North Carolina Farmworkers</i> (2021) .....	5
U.S. Const. amend. I .....	15
UFW releases photos of Darigold’s sick cows, <i>The Stand</i> (May 2014) .....	14
<i>Unsafe at These Speeds</i> , Southern Poverty Law Center (Feb. 28, 2013) .....	7
<i>Weeding Out Abuses</i> , Farmworker Justice and Oxfam America (2010) .....	27
<i>Whole Foods Market, Inc.</i> , 363 NLRB No. 87 (Dec. 24, 2015) .....	29

**STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(C)(5)**

Counsel for the parties did not author this brief, nor have the parties contributed money intended to fund preparing or submitting this brief. No person other than *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting this brief.<sup>1</sup>

**CONSENT OF THE PARTIES**

Pursuant to Fed. R. of App. P. 29(a), counsel for the parties have consented to the filing of this brief.

**STATEMENT OF INTEREST OF *AMICI CURIAE***

Founded in 1962, the United Farm Workers of America (“UFW”) is the nation’s oldest and largest farmworkers’ union. To promote a just food supply, UFW works to protect the health and safety of farmworkers from occupational injuries due to unsafe working conditions, sexual harassment, physical violence, and violations of labor and human rights. UFW vindicates farmworkers’ rights through, among other things, assisting in investigating and documenting violations of the law, filing complaints with state and federal agencies, assisting farmworkers in finding

---

<sup>1</sup> Attorneys from Fenwick & West LLP prepared this brief *pro bono* for United Farm Workers of America.

attorneys to represent them in civil litigation against agricultural employers, assisting in organizing farmworkers for collective-bargaining purposes, educating the public regarding farm-related issues of public concern, and engaging with retailers regarding social-justice, food safety, and health issues affecting the food supply chain. UFW has thousands of members, many of whom are highly vulnerable migrant and seasonal farmworkers, and serves farmworkers across the country, including in North Carolina.

North Carolina General Statute § 99A-2 (the “Ag-Gag Law”) threatens the First Amendment rights of farmworkers in North Carolina and chills the ability of UFW and the farmworkers UFW represents from investigating, documenting, and, if necessary, filing formal complaints to vindicate their rights. The Ag-Gag Law also stifles the ability of UFW and farmworkers to investigate and document concomitant matters in the public interest, such as food safety and animal welfare. Accordingly, UFW and the farmworkers it represents have a significant interest in the outcome of this case.

## SUMMARY OF ARGUMENT

UFW joins the arguments of Plaintiffs-Appellees and other *amici curiae* that the Ag-Gag Law violates the First Amendment. In this brief, UFW shows how the Ag-Gag Law interferes with the ability of UFW and farmworkers to engage in protected whistleblowing activities and document evidence necessary for farmworkers to vindicate their constitutional rights. The Ag-Gag Law violates UFW's and farmworkers' First Amendment right to seek legal redress for unlawful workplace conditions. The Ag-Gag Law is facially invalid because it is unconstitutionally overbroad.

## ARGUMENT

### I. INTRODUCTION

Farmworkers are essential to the production and distribution of food. But lackluster enforcement of key regulations, not to mention isolation, educational and language barriers, and immigration status leave farmworkers uniquely vulnerable to employer mistreatment and exploitation. UFW helps farmworkers identify labor law and health and safety violations and helps them enforce their rights. UFW also assists farmworkers in self-organization and collective bargaining and provides education to the public and retailers about the dangers to public health and welfare associated with unsafe work conditions.

North Carolina's Ag-Gag Law subjects farmworkers to harsh civil penalties if they engage in protected speech such as investigating and documenting evidence

of unsafe working conditions and unethical or illegal employer conduct. For example, the Ag-Gag law provides for exemplary damages of \$5,000 per day as well as the award of costs and attorneys' fees against farmworkers who merely capture photographic evidence of health and safety violations in their place of employment and provide them to the press. For this reason, among others, it is overbroad and violates the First Amendment rights of UFW and the farmworkers it represents. and further highlights the Law's unconstitutional overbreadth. UFW and farmworkers are but one example of the parties that the overbreadth doctrine seeks to protect: those not before the court for whom the very existence of the statute restricts their constitutionally protected speech or expression. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

## **II. NORTH CAROLINA'S AG-GAG LAW INTERFERES WITH THE ABILITY OF UFW AND THE FARMWORKERS IT REPRESENTS TO ENAGE IN WHISTLEBLOWING ACTIVITIES**

### **A. Farmworkers are among the most vulnerable and marginalized worker populations in the United States**

Farmworkers face formidable impediments in enforcing their rights under federal and state statutes. According to the Department of Labor, approximately 76 percent of farmworkers were born outside the United States, and 30 percent of



farmworkers do not speak any English.<sup>2</sup> In North Carolina, 94 percent of farmworkers are native Spanish speakers.<sup>3</sup>

Farmworkers, on average, have only an eighth-grade education.<sup>4</sup> Approximately 19 percent are foreign migrant workers, and 49 percent are undocumented immigrants.<sup>5</sup> As a result, when farmworkers do submit formal complaints, authorities often discount or disregard them, viewing them as complicit because of their immigration status.<sup>6</sup> And even foreign migrant workers who come to the United States under the H-2A guest worker program could face deportation, as they are authorized to work for only the specific employer on their H-2A visas and cannot seek other employment if they are fired for complaining about work

---

<sup>2</sup> Dep't of Labor, *A Demographic and Employment Profile of United States Farm Workers: Findings from the National Agricultural Workers Survey (NAWS) 2015-2016*, Research Report No. 13 (Jan. 2018), at 2, 10, [https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS\\_Research\\_Report\\_13.pdf](https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf).

<sup>3</sup> Student Actions with Farmworkers, *Facts About North Carolina Farmworkers* (2012), at 1, <https://saf-unite.org/wp-content/uploads/2020/12/nc-farmworkers-2012.pdf>.

<sup>4</sup> See *NAWS*, *supra* note 2, at 12.

<sup>5</sup> *Id.* at 52. UFW's own estimates place the undocumented farmworker population at much higher rates.

<sup>6</sup> See National Institute of Justice, *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases* (April 2012), at 184, <https://www.urban.org/sites/default/files/publication/25526/412593-Identifying-Challenges-to-Improve-the-Investigation-and-Prosecution-of-State-and-Local-Human-Trafficking-Cases.PDF>.

conditions.<sup>7</sup> Complicating matters, the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), the only federal law allowing farmworkers to sue in court for violations of their rights, specifically *excludes* H2-A guest workers from its coverage, thus severely limiting their right to seek the assistance of the courts. *See* 29 U.S.C. §§1802(8)(B)(ii) and 10(B)(ii).<sup>8</sup>

These barriers are exacerbated as farmworkers have no or limited access to resources for vindicating their rights. Fear of retaliation—in the form of termination, harassment, or violence—strongly discourages farmworkers from reporting violations by their employers. *See, e.g., Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1332 (5th Cir. 1985) (“[F]arm workers who attempt to assert their rights must overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations.”). Retaliation is a formidable threat, as few safety nets exist for those who lose their jobs. Only 39 percent of farmworkers are eligible for unemployment insurance, and

---

<sup>7</sup> *See Hidden Slaves: Forced Labor In The United States*, Human Rights Center, University of California, Berkeley (Sept. 2004), at 16 <http://www.freetheslaves.net/wp-content/uploads/2015/03/Hidden-Slaves.pdf> (hereinafter, “Hidden Slaves”).

<sup>8</sup> *See also* Christopher Ryon, *H-2A Workers Should Not be Excluded From The Migrant and Seasonal Agricultural Worker Protection Act*, 2 U. Md.L.J. Race Relig. Gender & Class 137 (2002). Available at: <http://digitalcommons.law.umaryland.edu/rrgc/vol2/iss1/8>.

fewer than 50 percent of farmworkers are eligible for workers' compensation.<sup>9</sup> Sixteen percent of farmworkers live in employer-provided housing; for them, losing their job could mean immediate homelessness or housing insecurity for their entire family.<sup>10</sup>

These factors leave agricultural workers in a "climate of fear,"<sup>11</sup> feeling "disposable," and often reluctant to report injuries or health or safety violations.<sup>12</sup> They fear being fired for work-related injuries or even for seeking medical treatment from someone other than the company nurse or doctor.<sup>13</sup> One report describes supervisors discouraging workers from reporting work-related injuries, even if the worker are in constant pain.<sup>14</sup> Several news outlets have covered the common

---

<sup>9</sup> *Cultivating Fear*, Human Rights Watch (May 15, 2012), at 18 [https://www.hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf).

<sup>10</sup> *NAWS*, *supra* note 2, at ii.

<sup>11</sup> *Unsafe at These Speeds*, Southern Poverty Law Center (Feb. 28, 2013), at 4, 38, [https://www.splcenter.org/sites/default/files/Unsafe\\_at\\_These\\_Speeds\\_web.pdf](https://www.splcenter.org/sites/default/files/Unsafe_at_These_Speeds_web.pdf).

<sup>12</sup> *Injustice on Our Plates*, Southern Poverty Law Center (Nov. 7, 2010), at 23, [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/Injustice\\_on\\_Our\\_Plates.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf) (reporting based on interviews of approximately 150 women who were either undocumented or had spent time in the U.S. as undocumented immigrants, and who worked in the U.S. food industry in Arkansas, California, Florida, Iowa, New York or North Carolina.).

<sup>13</sup> *Unsafe at These Speeds*, *supra* note 11, at 15.

<sup>14</sup> *Id.* at 4-5.

practice of poultry processing facilities denying farmworkers restroom breaks—forcing them to urinate and defecate while standing, or wear diapers to work.<sup>15</sup>

The vulnerability of farmworkers underscores the critical need for organizations like UFW. Its work vindicates worker and human rights by providing aid in investigating and documenting workplace violations and highlighting data to support petitions and legislation for legal redress.

**B. Whistleblowing is a commonly used and important tool for farmworkers**

Like Plaintiffs-Appellees, UFW and the farmworkers it represents routinely document evidence of conditions harmful to the employment relationship, and harmful to public safety and in violation of the public interest. Photography and recording are standard practices in farmworker advocacy and are used to document violations of farmworkers' rights and other illegal or unethical employer conduct. Photos, videos, and audio recordings are critical tools in bringing to light employer misconduct because they increase the credibility of whistleblower claims and are more likely to generate higher levels of public attention. Without the ability to document such activity, many valid employee claims of misconduct will lack the credibility required to spur investigation and change, particularly in light of the fact

---

<sup>15</sup> See, e.g., Roberto Ferdman, *'I had to wear Pampers': The cruel reality the people who bring you cheap chicken allegedly endure*, The Washington Post (May 11, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/11/i-had-to-wear-pampers-many-poultry-industry-workers-allegedly-cant-even-take-bathroom-breaks/>.

that the whistleblowers reporting this misconduct are members of a vulnerable population, as discussed *supra*. It is therefore crucial that whistleblowing reports are as comprehensive and detailed as possible, ideally through the inclusion of pictures and/or videos.

There is inherent value in exposing employers' unethical or illegal behavior to public scrutiny. Conduct harmful to the public interest, including threats to human health and safety, must not remain hidden, else employers engaged in such conduct will have little incentive to change their practices. UFW's and farmworkers' whistleblowing activities fall squarely within the realm of speech protected by the First Amendment and promote its core value of ensuring "[t]he public interest in having free and unhindered debate on matters of public importance." *Pickering v. Bd. of Educ. of Twp. High School Dist. 205*, 391 U.S. 563, 573 (1968).

First Amendment protection extends to the predicate conduct of gathering information, for example, via the acts of recording, capturing a photo, etc. As the District Court correctly noted, several courts have recognized that making an audio or video recording or taking a picture falls within the scope of the First Amendment because such actions are "either expressive conduct warranting First Amendment protection" (citing *Animal Leg. Def. Fund v. Wasden*, 878 F.3d 1184, 1203(9th Cir. 2018) ("[t]he act of recording is itself an inherently expressive activity")) or "conduct essentially preparatory to speech" (citing *Am. Civil Liberties Union of Ill.*

*v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech ... as a corollary of the right to disseminate the resulting recording.”)). *People for the Ethical Treatment of Animals, Inc., et al. v. Josh Stein, et al.*, Case No. 1:16CV25, *slip op.* at 22-23 (M.D.N.C. June 12, 2020); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010) (“Laws enacted to control or suppress speech may operate at different points in the speech process”); *Fields v. City of Philadelphia*, 862 F.3d 353, 358 (3d Cir. 2017) (“The First Amendment protects actual photos, videos, and recordings ... and for this protection to have meaning the Amendment must also protect the act of creating that material.”).

**C. North Carolina’s Ag-Gag Law effectively chills protected whistleblowing activities**

North Carolina’s Ag-Gag Law disincentivizes the essential investigation and documentation of workplace conditions, chilling farmworker speech by creating civil liability for employees who engage in protected whistleblowing activities. Specifically, subsections (b)(1) and (b)(2) of the Ag-Gag Law create liability for employees who set out to collect “data, paper, records, or any other documents” or who make a recording, and “us[ing],” *i.e.*, communicating, that information in “breach [of] the person’s duty of loyalty to the employer.” Subsection (b)(3) creates liability for people who purposefully seek to record activities at a business, plainly

in order to communicate what they uncover. And subsection (b)(5) creates liability for “substantially interfer[ing] with the ownership or possession of real property,” seeming to address the harm to property that could be caused from an individual gathering information in order to release it. Thus, an employee will meet the requirements of subsections (b)(1)-(3) and (5) by collecting information for the purpose of communicating it (a protected predicate to speech), or by actually engaging in expression (protected speech).

While subsections (b)(1) and (b)(2) penalize only unauthorized activities, an employer is unlikely to provide the consent required to exempt the employee from liability. *See id.* at §§ 99A-2(b)(1)-(b)(2). This puts farmworkers and advocates in the difficult position of complying with the Ag-Gag Law and refraining from documenting illegality or conditions harmful to public safety or violating the Ag-Gag Law by undertaking covert methods to document these conditions in the workplace. This chilling of farmworker speech is even more concerning during the COVID-19 pandemic, which has seen numerous outbreaks across various sectors of the food system in the past several months.<sup>16</sup> Farmworkers reporting on regulatory

---

<sup>16</sup> Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, Food & Environment Reporting Network (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/>; *see also* Leah Douglas, *Could the food system face a new Covid-19 wave?*, Food & Environment Reporting Network (Oct. 21, 2020),

violations are a critical tool in preventing and mitigating future outbreaks of covid in the food supply network.

The Ag-Gag Law disincentivizes this protected speech by imposing harsh penalties that include attorneys' fees and \$5,000 per day punitive damages.<sup>17</sup> While the North Carolina law does not include the criminal penalties that helped to invalidate similar laws in other jurisdictions, the civil liability that farmworkers face under North Carolina's Ag-Gag Law is equally chilling, and no less a deterrent than those criminal statutes. "About 30% of farmworker families live below the poverty line"<sup>18</sup>, and the average annual total family income for farmworkers ranges from \$20,000 to \$24,999, not taking into account the even lower incomes of unauthorized workers.<sup>19</sup> The possibility of being subject to the Ag-Gag Law's harsh penalties thus creates a prohibitively high risk for employees already struggling to provide for

---

<https://thefern.org/2020/10/could-the-food-system-face-a-new-covid-19-wave-ahead/>.

<sup>17</sup> N.C. Gen. Stat. §99A-2(d).

<sup>18</sup> *Farmworkers' Low Wage Rates Have Risen Modestly; Now Congress May Pass a Law to Lower Them*, Farmworker Justice (last visited Feb. 12, 2021), <https://www.farmworkerjustice.org/blog-post/farmworkers-low-wage-rates-have-risen-modestly-now-congress-may-pass-a-law-to-lower-them/#:~:text=Average%20and%20median%20farmworker%20household%20income%20ranged%20from%20%2420%2C000%20to%20%2424%2C999.&text=By%20comparison%2C%20the%20median%20US,average%20household%20income%20exceeded%20%2476%2C000.&text=Farm%20work%20is%20among%20the%20lowest%20paid%20jobs>.

<sup>19</sup> *Id.*



themselves and their families and significantly decreases the likelihood that these employees will risk their families' well-being to participate in whistleblowing activities, allowing illegal or unethical conduct by their employers to remain hidden.

**D. The Ag-Gag Law's narrow carveouts do not shield farmworkers from liability**

Section (e) of the Ag-Gag Law creates narrow exemptions from liability for state employees who offer legislative testimony on matters of public concern (Article 14 of Chapter 126) or employees engaged in certain types of formal whistleblowing to state agencies (Article 21 of Chapter 95).<sup>20</sup> Many farmworkers who participate in legitimate whistleblowing activities during their employment will not fall within either of these narrow categories and would be subject to liability for entering non-public areas and documenting evidence on farm-related issues of public concern, such as food safety, animal welfare, and unlawful employment conditions.

**E. UFW faces a threat of liability under subsection (c) if they assist whistleblowers**

As the lower court's decision currently stands, only those who assist Plaintiffs-Appellees ALDF and PETA in their investigative activities are protected from liability under the Ag-Gag Law. Others, such as UFW, face a threat of joint

---

<sup>20</sup> N.C. Gen. Stat. §99A-2(e) ("Nothing in this section shall be construed to diminish the protections provided to employees under Article 21 of Chapter 95 or Article 14 of Chapter 126 of the General Statutes, nor may any party who is covered by these Articles be liable under this section.").

liability under subsection (c) for assisting whistleblowers in documenting and reporting on matters of public concern.<sup>21</sup> However, organizations like UFW are more crucial than ever in educating the public about farm-related issues because, as discussed *supra*, the farmworkers that it represents are a highly vulnerable and marginalized worker population in the United States. The vulnerability of farmworkers underscores the critical need for organizations like UFW. UFW's work vindicates worker and human rights by providing aid in investigating and documenting workplace violations and highlighting data to support petitions and legislation for legal redress.

The Ag-Gag Law chills the ability of UFW to participate in these efforts and diminishes its capacity to educate the public and retailers about features of the food-supply system. UFW and the farmworkers it represents have investigated and documented unlawful and unsafe working conditions and poor animal welfare. For example, UFW's current dairy worker campaign has revealed unsafe manure lagoons that workers have died in, and milking operations where cows with bloody udders continue to be milked.<sup>22</sup> These conditions impact both workers' rights and

---

<sup>21</sup> N.C. Gen. Stat. §99A-2(c) ("Any person who intentionally directs, assists, compensates, or induces another person to violate this section shall be jointly liable.").

<sup>22</sup> Stefan Milne, *Land of Milk and Money: Inside the Wild World of Washington Dairy*, SeattleMet, (Feb. 26, 2019), <https://www.seattlemet.com/news-and-city-life/2019/02/land-of-milk-and-money-inside-the-wild-world-of-washington-dairy>.

public health and safety. As agricultural producers seek to obfuscate violations of the law to extract greater profits, the public's only insight into the unscrupulous origin of the food supply is through the light that farmworkers can shine on those operations.

North Carolina's Ag-Gag Law subjects UFW to joint liability for these efforts, to the detriment of public health and wellness. By imposing exemplary, punitive damages and enabling the complainant to recover attorneys' fees and costs – on top of equitable relief and any compensatory damages otherwise available under the law – the objective of the Ag-Gag Law is to deter organizations like UFW and the farmworkers it represents from initiating and reporting on important investigations into matters of clear public interest. *See* N.C. Gen Stat. § 99A-2(d).

### **III. NORTH CAROLINA'S AG-GAG LAW VIOLATES UFW AND FARMWORKERS' FIRST AMENDMENT RIGHT TO PETITION GOVERNMENT**

UFW and farmworkers are unable to seek legal redress for unlawful workplace conditions without collecting evidence of underlying violations. But the Ag-Gag Law creates civil liability for such investigation and documentation. As a

---

(describing death of dairy worker by drowning in manure lagoon and describing animal abuse against dairy cows);

*UFW releases photos of Darigold's sick cows*, The Stand, (May 2014), <https://www.thestand.org/2014/05/ufw-releases-photos-of-darigolds-sick-cows/>.

result, the Ag-Gag Law violates the First Amendment by impermissibly restricting the ability to petition government.

The Petition Clause provides that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” U.S. Const. amend. I. This includes the right to seek redress for harms by petitioning courts and government agencies. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Gable v. Lewis*, 201 F.3d 769, 772 (6th Cir. 2000); *Martin v. City of Del*, 179 F.3d 882, 887 (10th Cir. 1999).

The right to redress is essential for vindication of farmworkers’ rights. Documentary evidence is critical to convincing government regulators and other fact-finders about the urgency and credibility of farmworker petitions. For example, Occupational Safety and Health Administration (“OSHA”), a part of the United States Department of Labor, has primary responsibility for enforcing federal laws requiring employers to provide a workplace free of known health and safety hazards. But OSHA is responsible for inspecting 7 million workplaces, lacks the resources to do so effectively, and cannot adequately protect workers on its own.<sup>23</sup> Deborah Berkowitz, National Employment Law Project’s Worker Health and Safety Program

---

<sup>23</sup> *OSHA Factsheet: OSHA Inspections*, Dep’t of Labor, [https://www.osha.gov/OshDoc/data\\_General\\_Facts/factsheet-inspections.pdf](https://www.osha.gov/OshDoc/data_General_Facts/factsheet-inspections.pdf) (last visited February 24, 2021).

Director, who previously was Senior Policy Advisor for OSHA for six years, stated it would take OSHA 150 years to inspect each workplace in the country just once.<sup>24</sup> Because of its limited resources, OSHA relies heavily on employees to report credible workplace hazards; namely, it prioritizes complaints that demonstrate reasonable grounds to believe that there is a violation of an OSHA standard.<sup>25</sup> This can often be done through the taking of pictures or videos. The more credible the complaint, the more likely OSHA is to investigate the workplace at issue.<sup>26</sup> Further, OSHA ranks the complaints based on severity where low priority violations are not even handled in person but are often handled via facsimile or telephone instead.<sup>27</sup> As a result, it is crucial that the initial complaint be as comprehensive and detailed as possible.

But the Ag-Gag Law undermines the ability of UFW and farmworkers to obtain and document evidence of violations of farmworkers' rights before filing a formal petition or otherwise seeking resolution of grievances. For already-vulnerable

---

<sup>24</sup> *Fewer Inspectors, Less Enforcement: OSHA Trend Raises Risks for Workers*, IBEW Media Center, (Apr. 24, 2019), [http://www.ibew.org/media-center/Articles/19Daily/1904/190424\\_FewerInspectors](http://www.ibew.org/media-center/Articles/19Daily/1904/190424_FewerInspectors).

<sup>25</sup> *OSHA: Federal OSHA Complaint Handling Process*, Dep't of Labor, <https://www.osha.gov/as/opa/worker/handling.html> (last visited February 24, 2021).

<sup>26</sup> *Id.*

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

farmworkers, this chilling effect has serious consequences, implicating both the livelihood and physical safety of farmworkers and their families.

#### **IV. NORTH CAROLINA’S AG-GAG LAW INCREASES FARMWORKERS’ RISK OF SERIOUS EXPLOITATION AND PHYSICAL DANGER IN THE WORKPLACE**

The Ag-Gag Law applies to a broad spectrum of farmworkers, whether engaged in planting and harvesting crops, dairy operations, egg farms, animal slaughter, or carcass-processing. Without the Ag-Gag Law, workers in these environments already face serious risk of health and safety violations, sexual abuse, labor trafficking, and wage theft. With the Ag-Gag Law in place, these risks only fester.

##### **A. Risk of Health and Safety Violations**

The First Amendment right to free speech and right to petition government are essential to offset the risk of health and safety violations to which farmworkers are subject. At the outset, agricultural work is among the most dangerous occupations in the country. Farmworkers are at high risk for fatalities and injuries, work-related lung diseases, noise-induced hearing loss, skin diseases, and certain cancers associated with chemical use and prolonged sun exposure.<sup>28</sup> Because farmworkers regularly experience exposure to high levels of pesticides and

---

<sup>28</sup> *OSHA Safety and Health Topics: Agricultural Operations, Hazards & Controls*, Dep’t of Labor, <https://www.osha.gov/agricultural-operations/hazards> (last visited February 24, 2021).

disinfectants without proper training or protective equipment, they suffer more chemical-related injuries and illnesses than any other workforce nationwide.<sup>29</sup>

Meat and poultry processing is dangerous, due to close proximity with hooks and knives, coupled with high-speed carcass processing lines. The Ag-Gag law would make it harder to document abuses, which are well known to exist in this industry, in particular violations related to the speed of processing lines. Higher line speeds generally result in greater numbers of injuries.<sup>30</sup> Under federal law, the maximum line speed for chicken slaughter under the New Poultry Inspection System (“NPIS”) is 140 birds per minute. 9 C.F.R. § 381.69(a).<sup>31</sup> The United States Department of Agriculture’s Food and Safety Inspection Service (“USDA-FSIS”) provided waivers to 20 young poultry establishments that participated in the Hazard Analysis and Critical Control Point (“HACCP”)-Based Inspection Models Project (“HIMP”) pilot study, to operate maximum line speeds at 175 birds per minute after

---

<sup>29</sup> Farmworker Justice, *Exposed and Ignored: How Pesticides are Endangering our Nation’s Farmworkers* (2011), at 5-6, <http://www.farmworkerjustice.org/wp-content/uploads/2012/05/aExposed-and-Ignored-by-Farmworker-Justice-singles-compressed.pdf>.

<sup>30</sup> See Petition To Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken Establishments To Operate at Line Speeds of Up to 175 Birds per Minute, 83 Fed. Reg. 49,048 (Feb. 23, 2018).

<sup>31</sup> The maximum line speed for turkey slaughter establishments that operate under the New Poultry Inspection System is 55 birds per minute. 9 C.F.R. § 381.69(b).

converting to NPIS.<sup>32</sup> USDA-FSIS published a notice in the February 23, 2018 *Constituent Update* outlining the criteria for other NPIS young poultry establishments to petition for waivers to operate at increased line speeds of 175 birds per minute.<sup>33</sup> As of June 3, 2020, 54 establishments have been granted waivers to slaughter young chickens at 175 birds per minute.<sup>34</sup> It is no surprise, then, that poultry workers are injured at a rate more than double the average for all private industries, and that one out of every seven poultry workers is injured on the job.<sup>35</sup> Unchecked, these problems will only worsen.

The Ag-Gag law will also stunt UFW in its efforts to reduce the high risk of health and safety violations to farmworkers. For example, UFW is currently in the

---

<sup>32</sup> Petition To Permit Waivers of Maximum Line Speeds for Young Chicken Establishments Operating Under the New Poultry Inspection System; Criteria for Consideration of Waiver Requests for Young Chicken Establishments To Operate at Line Speeds of Up to 175 Birds per Minute, 83 Fed. Reg. 49,048 (Feb. 23, 2018).

<sup>33</sup> *Id.* at 49,050.

<sup>34</sup> *Salmonella Initiative Program (SIP) Participants Table*, United States Department of Agriculture Food Safety and Inspection Service, [https://www.fsis.usda.gov/wps/wcm/connect/188bf583-45c9-4837-9205-37e0eb1ba243/waiver\\_table.pdf?MOD=AJPERES](https://www.fsis.usda.gov/wps/wcm/connect/188bf583-45c9-4837-9205-37e0eb1ba243/waiver_table.pdf?MOD=AJPERES) (last visited Feb. 24, 2021).

<sup>35</sup> *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, Human Rights Watch (Jan. 24, 2005), at 36, <https://www.hrw.org/sites/default/files/reports/usa0105.pdf>. Of course, these statistics under-represent the actual rate of injury, due to pattern and practice of under-reporting. And, while the industry itself is inherently dangerous, the incidence of injury is exacerbated, as employers exploit the leverage they hold over marginalized workers by setting (or failing to set) policies that increase risk.



midst of a nationwide dairy worker campaign designed to improve the working and living conditions of dairy, including dairy workers and other farmworkers in North Carolina. Through education, organizing, litigation, and legislation, including online or virtual organizing, UFW's work in North Carolina is an important part of its organizing mission. Indeed, in 2014 and 2015, UFW conducted outreach work to farmworkers in North Carolina and across the United States regarding the dangers of pesticide exposure. This larger effort led to the EPA amending its Worker Protection Standards to create stronger protections for farmworkers handling pesticides. 40 CFR Part 170 (Agricultural Worker Protection Standard Revisions) (Revised Nov. 2, 2015). The rules for the first time prohibit children from handling pesticides, and require workers to be at least 18 years old to mix, load or apply the chemicals on fields. The revisions also require mandatory pesticide training for farmworkers each year instead of every five years. Training now must include information on how workers can avoid bringing home pesticide residue on clothing, boots and other items. The Ag-Gag law will stunt UFW's efforts to effectively advocate for improvements in farmworker safety by preventing farmworkers from documenting regulatory violations for fear of being subject to excessive civil liability.

## **B. Risk of Sexual Harassment and Violence**

The Ag-Gag law can only work to protect abusers and silence the abused. Indeed, the First Amendment right to free speech and right to petition government is essential to offset the rampant sexual abuse and harassment against farmworkers.<sup>36</sup> Complaints to the Equal Employment Opportunity Commission (“EEOC”) lodged by farmworkers commonly refer to agricultural fields as the “field de calzon” [field of panties] and the “green motel” due to supervisors’ routine rape of female farmworkers in the fields.<sup>37</sup> Migrant workers and undocumented immigrants across the United States report the risk of sexual harassment and violence is so pervasive that they believed it was standard practice to exchange sex for job security in the United States.<sup>38</sup>

The nature of the work also heightens the vulnerability of animal facility workers, as they face geographic isolation in vast rural farms, fields, and plants contributing to a culture of fear and lawlessness.<sup>39</sup> For example in *Cazorla v. Koch*

---

<sup>36</sup> While sexual abuse is generally under-reported, the rate of reporting rape or sexual assault is particularly low in the Latino community; a recent survey reported only 6.6 percent of Latinas who had experienced sexual victimization reported that they had contacted the police, and only 21 percent reported that they had sought formal help of any kind. *Cultivating Fear*, *supra* note 9, at 77.

<sup>37</sup> *Injustice on Our Plates*, *supra* note 12, at 46; *see also Cultivating Fear*, *supra* note 9, at 23.

<sup>38</sup> *Injustice on Our Plates*, *supra* note 12, at 46.

<sup>39</sup> Brooke Rogers, *Cazorla v. Koch Foods of Mississippi, LLC: Where Discovery Issues Meet Current Immigration Policy*, (2018), 50 Loy. U. Chi. L. J. 459, 477.

*Foods of Mississippi, LLC*, many women reported their attacks took place in remote parts of the plants and that supervisors would make offers of payment for sex and engage in unwanted touching in plain view of plant's cameras.<sup>40</sup> Moreover, reports indicate that foremen commonly view the possibility of sexual relations with subordinates as a perk of the job.<sup>41</sup>

But farmworkers who lodge complaints of abuse often experience retaliation in the form of job loss, more difficult or dangerous job assignments, lower pay, or even more violence.<sup>42</sup> Fifteen percent of workers live in employer-provided housing and also face potential homelessness for their families.<sup>43</sup> Moreover, survivors of sexual assault face significant barriers to justice.<sup>44</sup> Law enforcement and prosecutors may opt not to pursue investigations and prosecutions, whether due to prejudice or other difficulties such as lack of evidence.<sup>45</sup>

Unable to rely on authorities, farmworkers often turn to UFW to investigate claims and assist in filing civil suits. For example, in *EEOC v. Giumarra Vineyards Corporation*, a teenage female farmworker experienced sexual harassment,

---

<sup>40</sup> *Id.*

<sup>41</sup> *Cultivating Fear*, *supra* note 9, at 33.

<sup>42</sup> *Id.* at 46-48.

<sup>43</sup> *NAWS*, *supra* note 2, at 15.

<sup>44</sup> *Cultivating Fear*, *supra* note 9, at 77 .

<sup>45</sup> *Id.* at 77-79.

including sexual advances, abusive sexual comments, and inappropriate touching, at Giumarra Vineyards, one of the largest growers of table grapes in the nation.<sup>46</sup> A group of farmworkers intervened and complained to their employer about the abuse. Only one day after lodging the complaint, the vineyard retaliated and fired the teenage victim and each worker who filed the complaint.<sup>47</sup> UFW representatives investigated the claims and referred the victims to a local attorney. The EEOC later brought an action against the vineyard, securing a settlement to resolve the case and implementing preventative measures, such as sexual harassment training and notices of workers' rights.<sup>48</sup>

Moreover, in August 2018, the EEOC reached a settlement in the amount of \$100,000 for a female dairy worker at a Darigold member dairy, DeRuyter Brothers, who suffered gross sexual harassment.<sup>49</sup> UFW investigated the egregious sexual harassments conducted at Darigold member dairies in Washington and hosted a sexual harassment forum in Pasco, Washington in April 2019. There, UFW

---

<sup>46</sup> Complaint at 4-5, No. 1:09-cv-02255, 2009 WL 8747241 (E.D. Cal. Dec. 29, 2009); *see also*, Press Release, EEOC, Giumarra Vineyards Sued by EEOC for Sexual Harassment and Retaliation Against Farm Workers (Jan. 13, 2010), <https://www.eeoc.gov/eeoc/newsroom/release/1-13-10.cfm>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Jocelyn Sherman, *Sexual harassment at Darigold*, (Aug. 28, 2018), <https://ufw.org/darigoldsexualharassment/>.

facilitated meetings between representatives of the EEOC and Washington Attorney General's office with dairy and other farmworkers about sexual harassment.<sup>50</sup> Following the forum, in June 2019, seven male dairy workers filed a complaint of sexual harassment and sexual assault with the EEOC against Washington Darigold member dairies.<sup>51</sup> UFW's investigations and referrals were vital to enforce the rights of these vulnerable workers, and as discussed above, UFW would be severely hampered in investigating such claims under North Carolina's Ag-Gag Law. Nor could workers experiencing repeat harassment or retaliation record such interactions.

### **C. Risk of Labor Trafficking**

The Ag-Gag law also threatens efforts to curtail human trafficking. Although labor trafficking is prohibited under federal and North Carolina statute,<sup>52</sup> it remains a serious problem in the United States. From December 7, 2007 to December 31, 2019, 9,123 instances of labor trafficking were reported in the United States, involving from 18,792 to 20,215 victims.<sup>53</sup> Just in 2018, 3,218 individual trafficking

---

<sup>50</sup> Jocelyn Sherman, *Seven More Dairy Workers Employed at Darigold Member Dairies File Complaints Regarding Sexual Harassment and Assault*, (Jun. 24, 2019), <https://ufw.org/darigold62419/>.

<sup>51</sup> *Id.* The case is now pending in federal court.

<sup>52</sup> *See id.*; RICO 18 U.S.C. § 1964(c); N.C. Gen Stat. §§ 14-43.11, 14-43.12.

<sup>53</sup> *See Labor Trafficking*, National Human Trafficking Resource Center, <https://traffickingresourcecenter.org/type-trafficking/labor-trafficking> (last visited Feb. 22, 2021).

survivors contacted the U.S. National Human Trafficking Hotline 7,838 times.<sup>54</sup> In North Carolina, 287 trafficking cases and 853 victims were identified in 2018 alone.<sup>55</sup> The agricultural industry is especially susceptible to labor trafficking, and it ranks as one of the top five sectors for forced labor in the United States.<sup>56</sup>

UFW investigates labor-trafficking operations around the country, and in 2015, launched a Forced Labor Program to address labor trafficking, debt peonage, and slavery in United States agriculture. This program uses education, outreach, and collaboration with law enforcement to support reporting, investigation, and prosecution of labor and human rights violations (including activities proscribed by the Ag-Gag law). One of UFW's first documented labor trafficking cases involved a group of dairy workers in rural Idaho. UFW investigated the allegations and referred the victims to attorneys who have since prosecuted their case. But UFW would face civil liability for investigating those claims under North Carolina's Ag-Gag Law.

---

<sup>54</sup> Polaris Project, *2018 Statistics from the National Human Trafficking Hotline*, [https://humantraffickinghotline.org/sites/default/files/Polaris\\_National\\_Hotline\\_2018\\_Statistics\\_Fact\\_Sheet.pdf](https://humantraffickinghotline.org/sites/default/files/Polaris_National_Hotline_2018_Statistics_Fact_Sheet.pdf) (last visited Feb. 24, 2021).

<sup>55</sup> Polaris Project, *North Carolina Spotlight 2018 Statistics from the National Human Trafficking Hotline*, <https://humantraffickinghotline.org/sites/default/files/NC-2018-State-Report.pdf> (last visited Feb. 24, 2021).

<sup>56</sup> *See Hidden Slaves*, *supra* note 7, at 1.

#### **D. Risk of Wage Theft**

The Ag-Gag law also makes it easier for employers to engage in wage theft, by curtailing First Amendment rights associated with its investigation. Even though FLSA<sup>57</sup> and AWPA<sup>58</sup> require employers to pay agricultural workers a minimum wage, wage theft is rampant. For example, a 2012 survey of New Mexico dairy and field workers found that over sixty-seven percent experienced wage theft, forty-three percent never received minimum wage, and ninety-five percent experienced nonpayment of any wages for time spent waiting each day in the field to begin working.<sup>59</sup> One of the most widespread practices is paying farmworkers “piece-rate[s],” which means that the farmworker is paid a set amount for each piece of product harvested.<sup>60</sup> Piece-rates often fail to pay farmworkers the minimum wage; although the law requires employers to make up the difference, many do not. For example, a 2009 study found that Oregon farmworkers paid on “piece-rate” basis

---

<sup>57</sup> 29 U.S.C. § 206.

<sup>58</sup> 29 U.S.C. § 1822.

<sup>59</sup> *U.S. Department of Labor Enforcement in Agriculture: More Must Be Done to Protect Farmworkers Despite Recent Improvements*, Farmworker Justice at 6 <http://www.farmworkerjustice.org/wp-content/uploads/2012/05/FarmworkerJusticeDOLenforcementReport2015-1.pdf> (last visited Feb. 24, 2021).

<sup>60</sup> *Id.*

earned less than the minimum wage 90 percent of the time and on average received 37 percent less than the minimum wage.<sup>61</sup>

The lax regulation of the agricultural industry encourages wage theft and leaves workers to enforce their right to lawful pay on their own. The agricultural industry is exempt from many worker regulations, including many FLSA protections.<sup>62</sup> Moreover, there is little government enforcement of existing protections, and the penalties for violations are low. In 2008, fewer than 1 percent of the investigations conducted by the Department of Labor involved alleged wage theft under the AWP, and the average penalty was a paltry \$342.<sup>63</sup> The lack of enforcement is also a result of the inadequate amount of investigators in the Department of Labor, as there are only 894 investigators to investigate all labor violations in the entire country.<sup>64</sup> The Ag-Gag law worsens this problem too by ensuring that UFW and its farmworkers cannot supplement these investigations with their own evidence gathering.

---

<sup>61</sup> *Id.*

<sup>62</sup> 29 U.S.C. § 207.

<sup>63</sup> *Weeding Out Abuses*, Farmworker Justice and Oxfam America (2010), at 5, <http://www.oxfamamerica.org/static/media/files/weeding-out-abuses.pdf>.

<sup>64</sup> Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, (Feb. 18, 2018) <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.



Absent effective government enforcement, farmworkers must rely on civil litigation in order to receive their agreed-upon wages for all hours worked. These cases often rely on pay and time records that are often withheld from farmworkers. UFW assists many farmworkers each year in investigating wage theft complaints before formal litigation. A number of these have resulted in major class action wage and hour litigation brought on behalf of tens of thousands of farmworkers, including suits against major fruit growers in California, such as Delano Farms, Gerawan Farming, Giumarra Vineyards, and Sunview Vineyards.

Obtaining records and contemporaneous video recordings of actual workplace conditions can be crucial to proving a wage theft claim. For example, in *Chavez v. IBP, Inc.*, No. 01- cv-5093, 2005 WL 6304840 (E.D. Wash. May 16, 2005), meat processing employees relied on videotapes to prove their claims. Specifically, the employees' video recordings proved that employees removed their equipment before entering the cafeteria for lunch, which entitled them to back pay for the time it took to remove the equipment. *See also, Whole Foods Market, Inc.*, 363 NLRB No. 87 (Dec. 24, 2015) (listing dozens of cases).

The class action against Delano Farms is particularly instructive. As a result of UFW's pre-suit investigation (again, including activities the Ag-Gag law proscribes), the complaint included detailed factual allegations regarding the myriad ways in which the defendants engaged in wage theft, including: (a) forcing

farmworkers to work “off-the-clock” by organizing tables, wheelbarrows, trays, packing material, bags, boxes, and other materials and equipment essential for the harvest; (b) forcing farmworkers to work “off-the-clock” by attending training before the official, recorded start of the work day; (c) forcing farmworkers to work “off-the-clock” by cleaning up or finishing packing boxes after the official, recorded end of the work day; (d) forcing farmworkers to work “off-the-clock” by requiring them to arrive before the start of the work day and wait for their designated foremen to arrive; (e) forcing farmworkers work “off-the-clock” by carrying out certain tasks at home without compensation; (f) forcing farmworkers to purchase and/or maintain tools and equipment at their own cost; (g) failing to provide farmworkers with accurate itemized wage statements; and (h) failing to maintain accurate time-keeping records.<sup>65</sup>

In sum, undercover collection of evidence is essential to proving many wage theft claims. Yet under North Carolina’s Ag-Gag Law, UFW representatives and farmworkers would face harsh civil penalties for these acts.

## CONCLUSION

For the reasons set forth above, and the reasons Plaintiffs-Appellees and fellow *amici* state, this Court should affirm the District Court’s ruling that §§ 99A-

---

<sup>65</sup> Class Action Complaint, *Arredondo, et al. v. Delano Farms Co.*, No. 1:09-cv-01247 (E.D. Cal. July 17, 2009), ECF No. 2.

2(b)(1)-(3) and (5) of North Carolina's Ag-Gag Law are unconstitutional. It should also conclude that all of the challenged provisions are facially invalid because they fail scrutiny and are overbroad.

Respectfully submitted,

Dated: March 1, 2021

MARTÍNEZ AGUILASOCHO &  
LYNCH, APLC

By: /s/ Mario Martinez

MARIO MARTINEZ  
MARTÍNEZ AGUILASOCHO &  
LYNCH, APLC  
P.O. Box 1998  
Bakersfield, CA 93303  
(661) 859-1174  
[mmartinez@farmworkerlaw.com](mailto:mmartinez@farmworkerlaw.com)

By: /s/ Chris Lim

CHRIS LIM  
LAW OFFICE OF R. CHRIS LIM  
2046 Hillhurst Avenue, # 13  
Los Angeles, CA 90027-2719  
[chris.lim@loshelzlaw.com](mailto:chris.lim@loshelzlaw.com)

*Counsel for Amicus Curiae*

### CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Federal Rule of Appellate Procedure 32(a)(7). This brief contains 6,384 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedures Rule 32(b).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Civil Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in a 14-point Times New Roman.

Dated: March 1, 2021

By: /s/ Mario Martinez

MARIO MARTINEZ

By: /s/ Chris Lim

CHRIS LIM

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of **BRIEF OF *AMICUS CURIAE* UNITED FARM WORKERS OF AMERICA IN SUPPORT OF PLAINTIFFS - APPELLEES** was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit and served on all counsel of record via electronic mail or CM/ECF delivery on March 1, 2021.

By: /s/ Mario Martinez  
MARIO MARTINEZ

By: /s/ Chris Lim  
CHRIS LIM