

# ESSENTIAL, NOT EXPENDABLE: PROTECTING THE ECONOMIC CITIZENSHIP OF AGRICULTURAL WORKERS

HUNTER KNAPP\*

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## INTRODUCTION

When the COVID-19 pandemic reached the United States in early 2020, the importance of agricultural workers became undeniable. Fear of food shortages seized the nation, and many people saw the shelves of grocery stores empty for the first time. On March 19, 2020, the Cybersecurity and Infrastructure Security Agency identified workers in the food and agriculture sectors as “essential critical infrastructure workers.”<sup>1</sup> This designation allowed agricultural workers to continue earning desperately needed wages, but these workers did so without

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1. Memorandum from Christopher Krebs, Dir., Cybersecurity & Infrastructure Sec. Agency on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 19, 2020), <https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf> [<https://perma.cc/XB2M-8LJS>].

adequate protection from COVID-19. Also lacking protected collective-bargaining rights and representatives, individual agricultural workers did not have the power to successfully advocate for safer practices or accommodations to work schedules. Along with many classes of healthcare and transportation workers, the Centers for Disease Control and Prevention (CDC) continues to identify agricultural workers as “essential to maintain critical infrastructure and continue critical services and functions” during the COVID-19 pandemic.<sup>2</sup> This capricious treatment of agricultural workers during the COVID-19 crisis—one moment acknowledging their essential role, the next denying them rights—highlights the need to protect their full economic citizenship.

In *Pursuing Citizenship in the Enforcement Era*, Professor Ming H. Chen argues for a holistic conception of citizenship that includes both formal and substantive dimensions. A person secures economic citizenship—one of the substantive dimensions—when they have the right to seek employment, income, education, and welfare benefits.<sup>3</sup> Although other substantive rights of citizenship, such as the right to vote, are intimately tied to formal citizenship, economic citizenship rights are parceled out to different demographic groups to produce an array of semi-citizen statuses.<sup>4</sup> For example, children born in the United States benefit from formal birthright citizenship but face limitations on their right to work and earn an income.<sup>5</sup> The right to earn and enjoy economic citizenship became a fundamental part of the American identity, developed between fear of the debasement of slavery and contempt for the idleness of aristocracy.<sup>6</sup> The modern agricultural worker—one of these semi-citizen

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2. *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CDC (Mar. 29, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html> [<https://perma.cc/E7P9-SXY7>] (identifying all Food and Agriculture industries under NAICS code 11xxxx as essential).

3. MING HSU CHEN, *PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA* 25 (2020).

4. See ELIZABETH F. COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 7–8 (2009) (describing semi-citizen groups as “structural political classes whose sources and traits cannot be attributed solely to ascriptive bias, economic class conflict, or failings on the part of the individuals who hold them” but are an inevitable result of doctrinal conflict in liberal democracies).

5. These protections were implemented following the child labor abuses during the early 20th century. However, agricultural workers are exceptional in this area as well. See 29 U.S.C. § 213(c)(1) (exempting agricultural employees from the provisions of 29 U.S.C. § 212 relating to oppressive child labor).

6. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 1 (1991).

statuses—can be traced back to the institution of slavery and the failure to maintain equality before the law following abolition. Protecting the economic citizenship rights of agricultural workers can help rectify centuries of injustice while attracting labor to the United States to meet the demands of a growing economy. Agricultural workers will not achieve full economic citizenship until they can be safe from unfair labor practices, receive fair wages, remain healthy, and pursue an education.

Economic citizenship for agricultural workers can and should be protected independently of the pathways to formal citizenship already being debated by Congress.<sup>7</sup> The seasonality of employment, migration patterns of workers, criminal history prohibitions, long waiting periods, and high fees could prevent formal citizenship programs from reaching all agricultural workers. The Economic Research Service within the U.S. Department of Agriculture (USDA) estimated that, in 2006, “an average of 1.01 million hired farmworkers made up a third of the estimated three million people employed in agriculture.”<sup>8</sup> Employment in agriculture rose to 1.07 million in 2010 and 1.16 million in 2020.<sup>9</sup> Due to employment turnover, “an estimated 2.0 to 2.5 unique workers fill each farmworker job slot over the course of a year.”<sup>10</sup> This dynamic contributes to the Legal Services Corporation’s 2016 estimate that the number of agricultural workers in the United States was 2,785,784.<sup>11</sup> Of these

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7. See Farm Workforce Modernization Act of 2021, H.R. 1603, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1603> [<https://perma.cc/M6KN-JFYQ>] (creating a pathway to citizenship premised on seven to ten years of agricultural work without providing workers other substantive protections); see also U.S. Citizenship Act of 2021, H.R. 1177, 117th Cong. § 1105 (2021), <https://www.congress.gov/bill/117th-congress/house-bill/1177/text> [<https://perma.cc/GYP9-ZRML>] (allowing agricultural workers to receive lawful permanent resident status and a pathway to citizenship if they performed agricultural labor or services for at least 2,300 hours or 400 workdays during the preceding five-year period). These proposals represent two options for pathways to formal citizenship for the majority of agricultural workers who hold temporary H-2A visas or completely lack work authorization. Econ. Rsch. Serv., *Farm Labor*, USDA (Aug. 18, 2021), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#h2a> [<https://perma.cc/WC8F-Y7W6>].

8. WILLIAM KANDEL, ECON. RSCH. SERV., USDA, PROFILE OF HIRED FARMWORKERS: A 2008 UPDATE 2 (2008).

9. *Farm Labor*, ECON. RSCH. SERV., USDA, <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#laborcostshare> [<https://perma.cc/Q526-49LD>].

10. KANDEL, *supra* note 8, at 2.

11. *Final Ag Worker Estimates—Tables I-VI (Aug. 2016)*, LEGAL SERVS. CORP., at tbl.1, <https://lsc-live.app.box.com/s/dfs78qhagsk12oxi6fr79pd5eq0geqp> [<https://perma.cc/R8UY-A97E>].

workers, approximately 94,222 were active participants in the H-2A or H-2B forestry programs.<sup>12</sup> Even accurately surveying the agricultural worker population can be difficult because many seasonal migrant farm workers are not accurately recorded, and the roughly 50 percent of the workforce that lacks documented status is reticent to provide personal information to government officials.<sup>13</sup> The data surrounding the work-authorization and citizenship status of agricultural workers should also be looked at skeptically based on the loaded nature of those questions in an era of harsh immigration enforcement.

Creating a pathway to formal citizenship is not sufficient to incorporate these essential workers as *economic* citizens of the United States. Even if agricultural workers secure formal citizenship, they will still be confined to semi-citizen status due to exclusions from fundamental economic rights and protections related to wages and collective bargaining.<sup>14</sup> The denial of these rights makes agricultural work less desirable for U.S. citizens, who are prioritized for employment in other sectors under labor certification laws,<sup>15</sup> leading to the widespread employment of foreign workers in the agricultural industry. The related practice of unauthorized employment in the agriculture industry was addressed in 1986 with the Immigration Reform and Control Act (IRCA) and the creation of Special Agricultural Workers status.<sup>16</sup> This legislation allowed more than one million agricultural workers to apply for lawful temporary status that included work authorization as a pathway to citizenship.<sup>17</sup> Although

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12. *Id.*

13. KANDEL, *supra* note 8, at 12.

14. Section 3(f) of the Fair Labor Standards Act (FLSA) and the associated appropriations rider for the National Labor Relations Board (NLRB) excludes workers engaged in “agriculture” from collective-bargaining and wage protections. 29 U.S.C. § 203(f); Further Consolidated Appropriations Act of 2020, Pub. L. No. 116–94, 133 Stat. 2533, 2601–02; Kirsten Zerger, *The NLRA Agricultural Exemption—A Functional or Mechanical Approach?*, 2 INDUS. REL. L.J. 131, 137–38 (1977).

15. An immigrant seeking permanent labor certification for U.S. employment may not be admitted unless the Department of Labor certifies that “(i) [t]here are not sufficient United States workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor; and (ii) [t]he employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.” 20 C.F.R. § 656.2(c)(1) (2021).

16. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359, 3417–34; 8 U.S.C. § 1160.

17. Hiroshi Motomura, *What Is “Comprehensive Immigration Reform”?* *Taking the Long View*, 63 ARK. L. REV. 225, 226 (2010); DONALD M. KERWIN, *MIGRATION &*

unauthorized employment in agriculture decreased substantially following the legislation, by 2000, more than 50 percent of agricultural workers lacked employment authorization.<sup>18</sup> This dynamic reveals the movement of agricultural workers who attain lawful status or citizenship to different professions with more secure economic citizenship rights.

Providing a path out of insecure immigration status for many agricultural workers already living in the United States is not enough. The food system should not depend on the oppression of workers through systemic denials of economic rights or the fear of deportation. Professor Shklar argues, “It is in the marketplace, in production and commerce, in the world of work in all its forms, and in voluntary associations that the American citizens find their social place, their standing, the approbation of fellows, and possibly some of their self-respect.”<sup>19</sup> For too long, agricultural workers have been denied a secure and prosperous place in American life based on exclusions rooted in the legacy of slavery. It is time to protect the economic citizenship of agricultural workers by guaranteeing their rights to collectively bargain and earn fair wages while also addressing the disparities in treatment related to immigration status affecting their health and education.

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POLY INST., MORE THAN IRCA: US LEGALIZATION PROGRAMS AND THE CURRENT POLICY DEBATE 2 tbl.1 (2010).

18. Based on data collected from 1989 to 1991, 29 percent of farmworkers interviewed had work authorization by virtue of this program or the temporary resident status of the main naturalization program of the IRCA, and only 14 percent of the agricultural worker population lacked work authorization. *Data Tables: Demographic and Employment Characteristics*, U.S. DEPT OF LAB., EMP. & TRAINING ADMIN., <https://www.dol.gov/agencies/eta/national-agricultural-workers-survey/research/data-tables> [<https://perma.cc/BRV5-NBQM>] (follow the “Table 1” hyperlink in the “U.S.” column of the “Demographic” row). A notable decrease to 36 percent of unauthorized employment in 2017 to 2018 likely reflects citizenship insecurity and fear of government officials during the Trump presidency, which discouraged unauthorized agricultural workers from participating in the National Agricultural Workers Survey (NAWS) process.

19. Judith Shklar, *American Citizenship: The Quest for Inclusion*, Tanner Lectures on Human Values 387, 413 (May 1–2, 1989), [https://tannerlectures.utah.edu/\\_resources/documents/a-to-z/s/shklar90.pdf](https://tannerlectures.utah.edu/_resources/documents/a-to-z/s/shklar90.pdf) [<https://perma.cc/7FLD-HBS9>].

## I. THE EXCLUSION OF AGRICULTURAL WORKERS FROM ECONOMIC CITIZENSHIP

The promise of emancipation remains partially unfulfilled for agricultural workers due to the impact of institutional racism on U.S. labor law. When roughly four million previously enslaved people gained formal citizenship rights with the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments, Southern Democrats pursued an aggressive strategy to ensure that economic rights would not be given to those working in agriculture.<sup>20</sup> Before the war, the unpaid labor of those former slaves accounted for roughly 25 percent of the per capita earnings of all White Southerners.<sup>21</sup> Thus, recreating the low labor costs that made Southern agriculture competitive in the global economy became the central project of Southern lawmakers after the Civil War. Following the end of Reconstruction, Southern Democrats pursued a complex strategy to restore the racial hierarchy of the South, thereby protecting the plantation economy on which their most powerful constituents depended. Denying agricultural workers foundational labor rights established in the National Labor Relations Act (NLRA)<sup>22</sup> and the Fair Labor Standards Act (FLSA)<sup>23</sup> institutionalized the Southern Democrats' goal for a permanently oppressed class of people to exploit for their labor.

Fortunately, ending the agricultural exceptionalism embedded in federal and state labor law requires nothing more than legislation. For example, Cesar Chavez, Dolores Huerta, and the United Farm Workers began the movement that eventually led to the passage of the Agricultural Labor Relations Act of 1975, which provides California agricultural workers with collective-bargaining protections and protection from unfair labor

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20. See *Slavery, United States*, LIBR. CONG., [https://www.loc.gov/rr/geog-map/placesinhistory/archive/2011/20110318\\_slavery.html](https://www.loc.gov/rr/geog-map/placesinhistory/archive/2011/20110318_slavery.html) [<https://perma.cc/3ZGH-C4NL>]; DAVID A. BATEMAN ET AL., *SOUTHERN NATION: CONGRESS AND WHITE SUPREMACY AFTER RECONSTRUCTION* 5 (2018).

21. Roger L. Ransom, *The Economics of the Civil War*, UNIV. CAL. RIVERSIDE, at tbl.1 (2021), <http://web.mnstate.edu/stutes/Econ411/Readings/civil.htm> [<https://perma.cc/UU9Z-NPRN>].

22. The NLRA established the NLRB, protected the rights of employees to organize and collectively bargain, and took steps to prevent unfair labor practices. 29 U.S.C. §§ 153–63.

23. The FLSA established the national minimum wage and overtime pay for time worked in excess of forty hours in a workweek. 29 U.S.C. §§ 206–07.

practices guaranteed by the Agricultural Labor Relations Board.<sup>24</sup> More recently, Washington passed a bill guaranteeing overtime pay for more than one-hundred-thousand agricultural workers in the state.<sup>25</sup> On June 25, 2021, Colorado joined this group of progressive states when Governor Polis signed S.B. 21-087, an Act Concerning Agricultural Workers' Rights.<sup>26</sup> The Colorado legislation guarantees collective-bargaining rights, minimum-wage and overtime protections, and a suite of other rights needed by agricultural workers.<sup>27</sup> As more states implement these protections, collective-bargaining efforts will become more effective, and industry arguments about competitive disadvantage due to labor costs will become more hollow. While efforts by states are important, only the elimination of federal exclusions under the NLRA and FLSA can fully protect foreign and migratory agricultural workers. Recognizing and protecting the rights to collectively bargain and receive fair pay is essential to incorporating agricultural workers as economic citizens.

First, this Part will argue that the exclusion of agricultural workers from the NLRA was intended to maintain racial hierarchy rather than protect small family farms. Next, this Part will assess how agricultural exceptionalism was expanded with the FLSA. Again, the historical evidence points to a race-based rationale for the exclusion of agricultural workers from critical wage legislation, while small farmers were used as the political scapegoat. Throughout this Part, the success of states in eliminating agricultural exceptionalism is chronicled to demonstrate the feasibility of protecting the economic citizenship of agricultural workers.

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24. Michael H. LeRoy & Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 530–33 (1999).

25. *Agricultural Overtime*, WA. ST. DEPT OF LAB. & INDUS., <https://lni.wa.gov/workers-rights/wages/overtime/> [https://perma.cc/4ZJ5-C9Q4]; *Statement by President Joseph R. Biden, Jr. in Support of Washington State's Overtime Bill for Farm Workers*, WHITE HOUSE (May 11, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/11/statement-by-president-joseph-r-biden-jr-in-support-of-washington-states-overtime-bill-for-farm-workers/> [https://perma.cc/SHT7-5PN6].

26. *Agricultural Workers' Rights*, S.B. 21–087, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021) (signed into law on June 6, 2021).

27. *Id.* Statutory protections extend to extreme heat and the musculoskeletal damage caused by using a short-handled hoe.

### A. *Collective-Bargaining Rights*

Congress should amend the NLRA to eliminate the exclusion of agricultural workers from the definition of “employee.”<sup>28</sup> The NLRA protects “the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.”<sup>29</sup> According to the Supreme Court, “That is a fundamental right.”<sup>30</sup> Nevertheless, in 1935, the bloc of Southern Democrats proved powerful enough to exclude agricultural workers from this landmark legislation.<sup>31</sup> Moreover, employers remain free to commit “unfair labor practices” against agricultural workers without fear of intervention by the National Labor Relations Board (NLRB).<sup>32</sup> Codifying agricultural worker exceptionalism in the NLRA left an entire class of workers vulnerable to exploitation by an industry with a long history of abusive practices.

Incorporating agricultural workers as “employees” under the NLRA would address almost a century of racist discrimination and begin the process of protecting these workers’ economic citizenship. Due to the racialization of agricultural work in the United States—first with slavery, then with the widespread employment of foreign nationals on a temporary basis—agricultural worker exceptionalism has disproportionately impacted People of Color. Based on the legislative history, the exclusion of agricultural workers from NLRA protections was traditionally attributed to concerns about Congressional overreach or the negative impact on small farmers.<sup>33</sup> However, racist Southern

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28. 29 U.S.C. § 152(3).

29. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937); 29 U.S.C. §§ 157–59 (2018).

30. *Jones*, 301 U.S. at 33.

31. 29 U.S.C. § 152(3). See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 27 OHIO ST. L.J. 95 (2011) (discussing the period of Congressional power for racist Southern Democrats that produced agricultural exceptionalism).

32. *Jurisdictional Standards*, NLRB: ABOUT NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> [<https://perma.cc/HSD3-TLX7>].

33. LeRoy & Hendricks, *supra* note 24, at 505; see also Perea, *supra* note 3131, at 119 (citing a Washington Representative of the National Grange arguing that “[i]f farm labor is poorly paid in the United States today, then it can be said with emphasis that the farmer and his family are still more poorly paid”). However, in 1935, when the agricultural worker exception first entered U.S. labor law, “only one

Democrats controlled key positions in Congress such that progress on labor rights could only occur “so long as the New Deal did not disturb southern agricultural, industrial, or racial patterns.”<sup>34</sup> The disenfranchisement of Black people during the Jim Crow era entrenched the dominance of Southern Democrats such that the bloc effectively “possessed a structural veto over all New Deal and Fair Deal legislation.”<sup>35</sup> In the House, Representative Marcantonio of New York argued against the exclusion partially because it would facilitate the expansion of the “plantation system” in places like Arkansas, which amounted to a “continuance of virtual slavery.”<sup>36</sup>

The segregation of the rights of manufacturing workers from agricultural and domestic workers in the NLRA functionally maintained racial and economic hierarchy in the South.<sup>37</sup> While manufacturing workers gained collective-bargaining rights and the protections of the NLRB in 1935, agricultural

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in seven farms employed any hired labor; fewer than one percent employed four or more workers; and less than one-quarter of one percent employed eight or more workers.” Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1375 (June 1987). Even if that explanation was originally considered valid grounds for exclusion, the rationale is questionable today. Modern jurisdictional standards affecting retail businesses would exempt most small farms with a gross annual volume of business of less than \$500,000 and non-retailers with indirect annual interstate commerce under \$50,000. See *Jurisdictional Standards*, *supra* note 32.

34. Linder, *supra* note 33 at 1351–52 (quoting JAMES PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 132 (1967)). During the New Deal period, the Senate Agriculture Committee was chaired by “Cotton” Ed Smith of South Carolina, the House Agriculture Committee by Marvin Jones of Texas, the Senate Appropriations Committee by Carter Glass of Virginia, the House Ways and Means Committee by Robert Doughton of North Carolina, and the Senate Finance Committee by Pat Harrison of Mississippi. Southern Democrats also controlled the powerful House Rules Committee and the House Speaker position.

35. Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 STUD. AM. POL. DEV. 1, 1 (2005).

36. Perea, *supra* note 3, at 121.

37. When challenging an agricultural worker exemption in the Social Security Act of 1935, the NAACP noted that excluding agricultural and domestic workers from labor protections would impact approximately 60 percent of all Black workers—3.5 million people—most of whom lived in the South. See *Economic Security Act: Hearing on S. 1130 Before the S. Comm. on Fin.*, 74th Cong. 644 (1935) [hereinafter *Social Security Hearings*] (reproducing the statement of Charles Houston); Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 410(a)(1)–(2) (1982)). In 1925, prior to the NLRA and FLSA, agricultural earnings were 67 percent of manufacturing earnings in the South Atlantic region and 76 percent of manufacturing earnings in the East South-Central region. By 1941, these ratios decreased to 39 percent and 35 percent, respectively. Lee J. Alston & T.J. Hatton, *The Earnings Gap Between Agricultural and Manufacturing Laborers, 1925–1941*, 51 J. ECON. HIST. 83, 93 tbl. 3 (1991).

workers can still be fired without recourse for simple acts like discussing their wages.<sup>38</sup> Agricultural exceptionalism allowed plantation owners to continue exercising absolute control over workers by firing and replacing any employees who sought a pay increase, discussed work-related safety concerns with each other, or spoke on behalf of coworkers about improving workplace conditions.<sup>39</sup>

Congress should end the statutory exclusion of agricultural workers from the NLRA as a first step in rectifying the oppressive practices that continue in the agricultural industry today. Although the NLRA does not preclude state legislation, the current patchwork of state-based solutions remains ineffective. For example, California provides agricultural workers with collective-bargaining protections and protection from unfair labor practices guaranteed by the Agricultural Labor Relations Board.<sup>40</sup> Other states including Arizona, Kansas, Louisiana, New York, Nebraska, New Jersey, Oregon, Washington, and Wisconsin provide some form of collective-bargaining protections for agricultural workers.<sup>41</sup> Despite these state-based solutions, less than 2 percent of full-time agricultural workers are represented by a union, compared to more than 7 percent in non-agricultural private industries and more than 38 percent of public sector employees.<sup>42</sup> The seasonal and migratory nature of agricultural labor, insecurity related to immigration status, and low wages contribute to this minimal rate of unionization. However, these labor market characteristics also highlight the benefits that a nationwide union for agricultural workers could

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38. *Employee Rights*, NLRB, <https://www.nlrb.gov/about-nlrb/rights-we-protect/your-rights/employee-rights> [<https://perma.cc/6HLW-TSU9>].

39. *Id.*

40. LeRoy & Hendricks, *supra* note 24, at 531–33.

41. ARIZ. REV. STAT. ANN. §§ 3-3101–3125 (1994); KAN. STAT. ANN. §§ 44-820–830 (2005); LA. STAT. ANN. § 23:888 (1956); N.Y. LAB. LAW § 701 (2020); N.Y. LAB. LAW § 701(2)(b) (2021); NEB. REV. STAT. ANN. § 48-901 (1959); N.J. CONST., art. I, ¶ 19; *see* *Comite Organizador de Trabajadores Agricolas v. Molinelli*, 552 A.2d 1003 (N.J. 1989); *Bravo v. Dolsen*, 888 P.2d 147 (Wash. 1995) (interpreting the provision); *see also* *I.B.T., Local No. 863 v. Seaboard Farms*, 519 A.2d 920 (N.J. Super. Ct. App. Div. 1986); OR. REV. STAT. ANN. § 662.810 (1963); WASH. REV. CODE ANN. § 49.32.020 (2010); WIS. STAT. ANN. §§ 111.02, .04 (2015). Colorado recently passed a bill that will include agricultural workers in collective-bargaining protections and provide them numerous other economic and health-related protections. *See* *Agricultural Workers' Rights*, S.B. 21-087, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021) (signed into law on June 6, 2021).

42. *Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/union2.t03.htm> [<https://perma.cc/HHX4-ZHFD>].

provide.<sup>43</sup> Ending the federal exclusion would also bring the full strength of the NLRB into investigation and enforcement rather than leaving those roles to less consistent state governments.

Eliminating the federal exclusion can help workers overcome the challenges impeding a national agricultural labor movement. Federal protections are better than state-by-state solutions because the migratory nature of agricultural labor can span multiple states, meaning an individual may go from having robust protections to having none at different points in the year. Undocumented workers already have judicially recognized rights to collective bargaining as statutory employees so long as they are not excluded from protections based on profession.<sup>44</sup> During the 2020 campaign and his first one-hundred days in office, President Joe Biden signaled his support for federal collective-bargaining protections for agricultural workers.<sup>45</sup> Now is the time for Congress to take action. The exclusion from organizing and collective-bargaining protections forms a critical part of the relegation to semi-citizen status imposed on agricultural workers—one rooted in racism and the legacy of slavery. Eliminating the agricultural worker exception in the NLRA would be a major step toward incorporating agricultural workers as economic citizens of the United States.

### *B. Wage Protections*

Congress should end the statutory exclusion of agricultural workers from the protections of the FLSA to further protect their economic citizenship. Despite recent increases in agricultural worker wages, they still linger close to or at the state minimum

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43. Gosia Wozniacka, *Less than 1 Percent of US Farmworkers Belong to a Union. Here's Why.*, CIV. EATS (May 7, 2019), <https://civileats.com/2019/05/07/less-than-1-percent-of-us-farmworkers-belong-to-a-union-heres-why/> [<https://perma.cc/H9UM-W93U>].

44. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (“Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of employee.”); *see also* *NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir. 1999) (holding that the NLRA continues to recognize undocumented workers as employees after IRCA); *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992); *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008); *NLRB v. Concrete Form Walls, Inc.*, 225 Fed. App’x 837 (11th Cir. 2007).

45. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, JOEBIDEN.COM, <https://joebiden.com/empowerworkers/> [<https://perma.cc/8DD2-QQWB>]; Exec. Order No. 14,025, 86 Fed. Reg. 22,829 (Apr. 26, 2021).

wage in many places because of longstanding disparities between agriculture and other industries.<sup>46</sup> Low wages persist in the agricultural industry despite labor shortages because the FLSA excludes many agricultural workers from minimum-wage, maximum-hour, and child-labor protections.<sup>47</sup> Although the FLSA was intended to support the most vulnerable members of society during the Great Depression,<sup>48</sup> an agricultural exception was necessary to obtain the votes of Southern Democrats desperate to preserve the racial hierarchy of the Jim Crow South.<sup>49</sup> Small family farms that did not hire outside labor would have been exempted from FLSA coverage regardless, so the real beneficiaries of the agricultural-worker exclusions were the larger farms of the South and Southwest seeking to replicate plantation agriculture.<sup>50</sup> Numerous changes have been made to the FLSA since 1938,<sup>51</sup> but agricultural workers on large farms are “still the only numerically significant group of adult minimum-wage workers wholly excluded from the maximum hours and overtime protection of the [FLSA]” for a reason other than the size of the employer.<sup>52</sup>

Rather than attempting to support the economic citizenship of the people at the bottom of the economic ladder in the South who were already excluded from collective-bargaining

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46. STEVEN ZAHNISER ET AL., ECON. RSCH. SERV., USDA, EIB-201, FARM LABOR MARKETS IN THE UNITED STATES AND MEXICO POSE CHALLENGES FOR U.S. AGRICULTURE (2018); Alston & Hatton, *supra* note 37; *Figure 2. Agriculture: Occupational Employment and Wages*, U.S. BUREAU OF LAB. STAT. (July 2014), <https://www.bls.gov/opub/mlr/2014/article/agriculture-occupational-employment-and-wages.htm> [<https://perma.cc/6CYV-3PFZ>].

47. Fair Labor Standards Act, 29 U.S.C. § 213(a)(6), (b)(12)–(13), (c)(1)–(4).

48. President Roosevelt unequivocally called for the inclusion of farmworkers in the wage legislation in his presidential message accompanying the original bill. Farhang & Katznelson, *supra* note 3535, at 13.

49. *See generally* Linder, *supra* note 33, at 1336 (providing appendices detailing the systemic exclusion of farmworkers under the bill). Representative James Mark Wilcox of Florida explained that “the problem of our Negro labor” was of great importance to the South, and that “[t]here has always been a difference in the wage scale of [W]hite and colored labor,” and he warned the federal government “cannot put the Negro and the [W]hite man on the same basis and get away with it.” Farhang & Katznelson, *supra* note 35, at 14 (quoting 82 CONG. REC. 1,404 (1937)). Representative Edward Cox of Georgia bemoaned the support for the FLSA generated by Black political organizations “because it will . . . render easier the elimination and disappearance of racial and social distinctions.” *Id.* (quoting 82 CONG. REC. 442 (1937)).

50. Linder, *supra* note 33, at 1376.

51. Fair Labor Standards Amendments of 1966, Pub. L. No. 89–601, § 203(a), 80 Stat. 833, 833–34 (1966).

52. Linder, *supra* note 33, at 1335.

protections, a coalition of Southern and farm-state legislators “aggressively expanded the scope of the agricultural exemption and elaborated its reach in detail.”<sup>53</sup> The FLSA defines “agriculture” to include:

farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.<sup>54</sup>

The wholesale exclusion of agricultural workers from the basic wage protections of the FLSA puts these essential workers at a perpetual disadvantage when seeking better pay. Although in 1977 Congress eliminated the minimum-wage exception for large agricultural employers, the FLSA still contains the overtime exemption.<sup>55</sup> It is time for Congress to take the next step in supporting the economic citizenship of agricultural workers by fully eliminating the agricultural exemption in the FLSA. The current patchwork of state minimum-wage and overtime

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53. Farhang & Katznelson, *supra* note 35, at 13. In 1946, Congress began using the annual Appropriations Act for the NLRB to instruct the adjudicative body to rely on the definition of agriculture found in the FLSA. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 397 (1996); JACLYN REILLY, *AGRICULTURAL LABORERS: THEIR INABILITY TO UNIONIZE UNDER THE NATIONAL LABOR RELATIONS ACT*, PENN. ST. L., [https://pennstatelaw.psu.edu/\\_file/aglaw/Publications\\_Library/Agricultural\\_Laborers.pdf](https://pennstatelaw.psu.edu/_file/aglaw/Publications_Library/Agricultural_Laborers.pdf) [<https://perma.cc/GMM5-EM8H>]; *see also* NAT'L LAB. RELS. BD., *JUSTIFICATION OF PERFORMANCE BUDGET FOR COMMITTEE ON APPROPRIATIONS 5* (2019), <https://www.nlr.gov/sites/default/files/attachments/pages/node-155/nlr-by-2019-cbj-2-12-18.pdf> [<https://perma.cc/V4EF-Q37R>] (quoting the requirement “that no part of this appropriation shall be . . . used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the [NLRA] of July 5, 1935, and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3(I) of the [FLSA] of June 25, 1938 . . .”).

54. 29 U.S.C. § 203(f).

55. *History of Changes to the Minimum Wage Law*, U.S. DEP'T OF LAB.: WAGE & HOUR DIV., <https://www.dol.gov/agencies/whd/minimum-wage/history> [<https://perma.cc/SH8P-5L4B>].

protections established by states like California,<sup>56</sup> Hawaii,<sup>57</sup> Maryland,<sup>58</sup> and New York<sup>59</sup> do not adequately protect workers. In fact, the state laws continue to distinguish agricultural workers from most other professions by setting the weekly overtime threshold at sixty hours or allowing exceptions for special industries.<sup>60</sup> Employers argue that special accommodations are necessary because they cannot absorb large increases in cost; however, agricultural labor composes a small fraction of the price consumers pay for produce.<sup>61</sup> If states pass legislation or use administrative rulemaking to create overtime protections, they should treat agricultural workers as full economic citizens by setting the threshold for overtime pay at forty hours per week. Creating a tier of less protective overtime-pay standards for agricultural workers perpetuates the discrimination against the People of Color who work in the industry.

Together, the exclusions of agricultural workers from vital protections of the FLSA and the NLRA stand as twin pillars of institutional racism from a bygone era. Congress should pass legislation to eliminate these oppressive exclusions as soon as possible.

## II. DISAGGREGATING FORMAL CITIZENSHIP AND ECONOMIC CITIZENSHIP FOR AGRICULTURAL WORKERS

Although the modern agricultural worker usually lacks formal U.S. citizenship, their essential role in the economy should be rewarded with economic citizenship. As noted by Professor Ming H. Chen, in addition to wage and labor-organization protections, economic citizenship includes the right to receive

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56. Ind. Welfare Comm'n, Cal. Dep't of Ind. Rel., Notice on Regulating Wages, Hours, and Working Conditions in the Agricultural Occupations, at 4, <https://www.dir.ca.gov/IWC/IWCArticle14.pdf> [<https://perma.cc/66FL-2UTR>].

57. HAW. REV. STAT. § 387-3 (2021).

58. MD. CODE ANN., LAB. & EMPL. § 3-420.

59. N.Y. LAB. LAW § 163-a (McKinney 2020).

60. *See, e.g.*, N.Y. LAB. LAW § 163-a (McKinney 2020) (establishing a sixty-hour weekly threshold); MD. CODE ANN., LAB. & EMPL. § 3-420 (2018) (establishing a sixty-hour weekly threshold); HAW. REV. STAT. ANN. § 387-1 (2021) (exempting coffee-producing employers).

61. *See* Daniel Costa & Philip Martin, *How Much Would It Cost Consumers to Give Farmworkers a Significant Raise?*, ECON. POL'Y INST. (Oct. 15, 2020, 12:30 PM), <https://www.epi.org/blog/how-much-would-it-cost-consumers-to-give-farmworkers-a-significant-raise-a-40-increase-in-pay-would-cost-just-25-per-household/> [<https://perma.cc/YF5V-JF8C>].

equitable healthcare and pursue an education.<sup>62</sup> Because most agricultural workers are noncitizens who often migrate around the country, they do not have access to the same healthcare and education resources available to other people in the United States. As one of the leading economies in the world, the United States should take affirmative steps to support the health of agricultural workers and ensure they and their children have the opportunity to grow through education.

The agricultural industry shifted to employing primarily foreign workers during the twentieth century to maintain control of the labor force at a time when Black people were able to realize formal and economic citizenship more fully. In response to labor shortages that emerged during World War II, agricultural-business interests successfully lobbied for the creation and modification of the Bracero Program to regularize the flow of Mexican migrant agricultural workers.<sup>63</sup> This new, predominantly Spanish-speaking, Mexican workforce lacked the substantive social, legal, and political dimensions of citizenship, and Braceros' temporary formal citizenship status was tied to their employer.<sup>64</sup> Reports by journalists and nonprofit organizations chronicled the abuses of the Bracero Program, while government officials noted the similarities to the conditions of slavery in the plantation economy.<sup>65</sup> In the twenty-two years before the Bracero Program was terminated in 1964, nearly five-million workers—93 percent of whom were Mexican—were contracted to work on agricultural operations in the United States.<sup>66</sup> During this period, the agricultural industry became dependent on the flow of foreign workers with limited economic and civil rights.

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62. CHEN, *supra* note 3, at 25.

63. See Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 BERKELEY LA RAZA L.J. 125, 127–33 (2004).

64. *Id.*

65. Elizabeth Blair, *In Confronting Poverty, 'Harvest of Shame' Reaped Praise and Criticism*, NPR (May 31, 2014, 5:22 AM), <https://www.npr.org/2014/05/31/317364146/in-confronting-poverty-harvest-of-shame-reaped-praise-and-criticism> [https://perma.cc/R298-NBZ3]. See MARY BAUER & MEREDITH STEWART, *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES*, S. POVERTY L. CTR. 1, 4 (2013 ed.) [hereinafter *CLOSE TO SLAVERY*], [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) [https://perma.cc/3T5N-XP8C] (citing the U.S. Department of Labor officer in charge of the Bracero Program who described the program as a system of “legalized slavery”).

66. Howard R. Rosenberg, *IRCA and Agricultural Workers: They May Have Strong Arms but Do They Have to Be Braceros?*, 10 DEF. ALIEN 78, 85–86 (1987).

Despite the termination of the Bracero Program, the U.S. agricultural industry still depends on a robust flow of migrant workers from the Southern border that became partially formalized with the establishment of the H-2A Program, structuring most authorized employment of foreign agricultural workers today.<sup>67</sup> Based on the most recent National Agricultural Workers Survey (NAWS), 69 percent of hired farmworkers are born in Mexico, and 72 percent of workers are noncitizens.<sup>68</sup> Approximately 51 percent of those interviewed had work authorization by virtue of U.S. citizenship, Lawful Permanent Resident (LPR) status, or some other visa program, meaning roughly 49 percent were undocumented.<sup>69</sup> It is probable that the proportion of the farmworker population that is working without authorization is even higher than reported by NAWS because of the employer-focused approach of the NAWS data collection. The threat of immigration enforcement and the denial of voting rights to the foreign-worker population reproduce some of the conditions of the plantation economy to ensure employer dominance in rural areas.<sup>70</sup> Even though these workers lack formal citizenship rights, their essential role in the nation gives them a claim to economic citizenship.

In order to remain competitive in the global labor market, the United States needs to incorporate agricultural workers as economic citizens by supporting their rights to healthcare and education.<sup>71</sup> Despite historical migration flows, improving economic conditions in Mexico are contributing to a decline in unauthorized immigration and rising labor shortages for

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67. CLOSE TO SLAVERY, *supra* note 65, at 6–7; *see also* 8 U.S.C. § 1188 (detailing the conditions for the admission of temporary H-2A workers); Temporary Employment of Foreign Workers in the United States, 20 C.F.R. § 655 (2021); Enforcement of Contractual Obligations for Temporary Alien Agricultural Workers Admitted Under Section 218 of the Immigration and Nationality Act, 29 C.F.R. § 501 (2021).

68. TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015–2016, at 2 fig. 1.1 (2018), [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) [<https://perma.cc/9GUT-SK4Q>].

69. *Id.* at 4–5.

70. *See* Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 505–06 (1998) (discussing the slavery-type conditions and the use of immigration officials to control workers).

71. For example, the United States signed but never ratified the International Covenant on Economic, Social and Cultural Rights, arts. 7, 13, Oct. 5, 1977, 993 U.N.T.S. 3 (recognizing the right of all people to safe and healthy working conditions and education, respectively).

producers.<sup>72</sup> Thoroughly chronicled abuse by employers rooted in the tenuous immigration status of most farmworkers also continues to make working in the U.S. agriculture industry dangerous and dehumanizing.<sup>73</sup> Similar to the racism that produced agricultural exceptionalism during the New Deal era, the xenophobic and “America First” mentality of late twentieth and early twenty-first century U.S. politics perpetuated the systematic denial of equitable healthcare and education to agricultural workers and their families. To incorporate agricultural workers as economic citizens, Congress should (1) allow “essential workers” to receive federal public benefits like Medicaid, regardless of immigration status; and (2) improve education outcomes for agricultural-worker communities by providing substantial infusions of funding to existing programs run by state and local governments. These simple steps would further promote the economic citizenship of agricultural workers, regardless of their formal citizenship status.

### *A. Healthcare*

Excluding these vital members of society from economic citizenship—which includes affordable healthcare coverage—produces negative health outcomes for agricultural workers and their communities. In 2019, workers in the agriculture, forestry, and fishing industry suffered a rate of injury and illness impacting their ability to work double that of the general population.<sup>74</sup> For example, exposure to pesticides, respiratory irritants, hazardous machinery, repetitive musculoskeletal stress, inadequate sanitary and housing facilities, and extreme heat all contribute to the disparate negative health outcomes.<sup>75</sup> Despite the

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72. ZAHNISER ET AL., *supra* note 46, at 3–22.

73. See generally HUM. RTS. WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012), [hrw.org/sites/default/files/reports/us0512ForUpload\\_1.pdf](http://hrw.org/sites/default/files/reports/us0512ForUpload_1.pdf) [<https://perma.cc/B22A-MYSJ>] (describing the unique vulnerabilities of agricultural workers due to a dysfunctional immigration system, inadequate civil law protections for agricultural workers, and failures of institutions).

74. See Injuries, Illnesses, and Fatalities, U.S. BUREAU LAB. STAT. (Nov. 4, 2020), [https://www.bls.gov/iif/oshwc/osh/os/summ1\\_00\\_2019.htm](https://www.bls.gov/iif/oshwc/osh/os/summ1_00_2019.htm) [<https://perma.cc/BE4M-543E>] (showing an incidence rate for “[c]ases with days away from work, job restriction, or transfer” of 1.6 for all industries and a rate of 3.2 for agriculture, forestry, and fishing).

75. NAT’L CTR. FOR FARMWORKER HEALTH, OCCUPATIONAL HEALTH & SAFETY FACTSHEET (2018), [ncfh.org/uploads/3/8/6/8/38685499/fs-occ\\_health\\_2018.pdf](https://ncfh.org/uploads/3/8/6/8/38685499/fs-occ_health_2018.pdf) [<https://perma.cc/V8R2-GLAW>]; Amy K. Liebman & Wilson Augustave,

numerous dangers affecting agricultural workers, the Occupational Safety and Health Administration (OSHA) has issued only a handful of standards affecting the agricultural industry and relies on the Environmental Protection Agency (EPA) with regard to pesticide regulation.<sup>76</sup> The advance of climate change necessitates the implementation of new protections specifically designed to prevent heat stress, especially for the workers most at risk.<sup>77</sup> The increasing heat will also increase the prevalence and intensity of wildfires, which creates additional respiratory health and safety concerns for agricultural workers.<sup>78</sup> Children may legally begin working in agriculture as early as age twelve,<sup>79</sup> so the effects of the many occupational hazards faced by this population are especially damaging.<sup>80</sup> The children of migrant and seasonal agricultural workers also struggle to access nutritious food, resulting in an array of health problems.<sup>81</sup> Providing inclusive health insurance coverage options to agricultural workers and creating targeted programs to improve community health outcomes could help incorporate agricultural workers as economic citizens, regardless of formal immigration status.

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*Agricultural Health and Safety: Incorporating the Worker Perspective*, 15 J. AGROMEDICINE 192, 193 (2010); Marc Schenker, *Exposures and Health Effects from Inorganic Agricultural Dusts*, 104 ENV'T HEALTH PERSP. 661 (2000).

76. U.S. DEPT OF LAB., *Agricultural Operations*, OSHA, <https://www.osha.gov/agricultural-operations> [https://perma.cc/DHQ2-FFXH]; Amy K. Liebman & Wilson Augustave, *supra* note 75.

77. See Richard A. Fenske & Kent E. Pinkerton, *Climate Change and the Amplification of Agricultural Worker Health Risks*, 26 J. AGROMEDICINE 15, 15 (2021) (specifically noting the heightened risk in the Western United States); Diane M. Gubernot et al., *Characterizing Occupational Heat-Related Mortality in the United States, 2000–2010*, 58 AM. J. INDUS. MED. 203, 203 (2015). The agricultural industry experienced the highest rate of heat-related deaths in the United States between 2000 and 2010. June T. Spector et al., *A Case-Crossover Study of Heat Exposure and Injury Risk in Outdoor Agricultural Workers*, PLOS ONE, Oct. 7, 2016, at 2.

78. Heather E. Riden et al., *Wildfire Smoke Exposure: Awareness and Safety Responses in the Agricultural Workplace*, 25 J. AGROMEDICINE 330, 334 (2020).

79. See WAGE & HOUR DIV., U.S. DEPT OF LAB., WH1295, CHILD LABOR BULLETIN 102: CHILD LABOR REQUIREMENTS IN AGRICULTURAL OCCUPATIONS UNDER THE FAIR LABOR STANDARDS ACT 3 (2016), [dol.gov/sites/dolgov/files/WHD/legacy/files/childlabor102.pdf](https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/childlabor102.pdf) [https://perma.cc/PDC2-V5A3].

80. NAT'L CTR. FOR FARMWORKER HEALTH, *supra* note 75.

81. M. Margaret Weigel et al., *The Household Food Insecurity and Health Outcomes of U.S.-Mexico Border Migrant and Seasonal Farmworkers*, 9 J. IMMIGRANT MINORITY HEALTH 157 (2007); Jill F. Kilanowski, *Patterns and Correlates of Nutrition Among Migrant Farm-Worker Children*, 34 W. J. NURSING RSCH. 396 (2012); Thomas A. Arcury & Sara A. Quandt, *Delivery of Health Services to Migrant and Seasonal Farmworkers*, 28 ANN. REV. PUB. HEALTH 345, 349 (2007).

Addressing the disparities in health outcomes should begin with improving access to affordable healthcare for agricultural workers and their families. Lack of health insurance; lack of transportation; high costs; language barriers; and fear of the medical system, employer retaliation, or immigration officials result in agricultural workers utilizing fewer health services than U.S. Hispanic people and non-Hispanic White people.<sup>82</sup> Migrant and seasonal agricultural workers experience the most extreme challenges and “would benefit from tailored outreach and services.”<sup>83</sup> Unlike almost all affluent countries, many people in the United States rely on their employers for health insurance.<sup>84</sup> However, due to immigration-status restrictions affecting employment authorization and benefit eligibility, most agricultural workers do not have access to affordable private or public health insurance. In 2019, before the onset of the COVID-19 crisis, approximately 42.8 percent of the U.S. population had government-provided health insurance and only 9.2 percent were completely uninsured.<sup>85</sup> In contrast, according to the most recent National Agricultural Workers Survey, less than 50 percent of all farmworkers have health insurance and that number is below 25 percent for undocumented agricultural workers.<sup>86</sup> Despite this lack of insurance, 63 percent of respondents in a survey of agricultural workers reported using a healthcare provider in the previous two years and 26 percent of respondents reported

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82. Katherine D. Hoerster et al., *Impact of Individual-, Environmental-, and Policy-Level Factors on Health Care Utilization Among US Farmworkers*, 101 AM. J. PUB. HEALTH 685 (2011).

83. *Id.* at 689; see also Bethany Boggess & Hilda Ochoa Bogue, *The Health of U.S. Agricultural Worker Families: A Descriptive Study of over 790,000 Migratory and Seasonal Agricultural Workers and Dependents*, 27 J. HEALTH CARE FOR POOR & UNDERSERVED 778, 778 (2016) (finding approximately 80 percent of surveyed migrant and seasonal agricultural workers earned family incomes below the federal poverty level and that 71 percent of adults were uninsured).

84. Ben Zipperer & Josh Bivens, *16.2 Million Workers Have Likely Lost Employer-Provided Health Insurance Since the Coronavirus Shock Began*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 14, 2020, 11:29 AM), <https://www.epi.org/blog/16-2-million-workers-have-likely-lost-employer-provided-health-insurance-since-the-coronavirus-shock-began/> [https://perma.cc/Q3BB-B7D4].

85. RYAN J. ROSSO, CONG. RSCH. SERV., IF 10830, U.S. HEALTH CARE COVERAGE AND SPENDING, at tbl.1 (2021), <https://fas.org/sgp/crs/misc/IF10830.pdf> [https://perma.cc/2C7W-QV56].

86. HERNANDEZ & GABBARD, *supra* note 68, at 43 fig. 9.1. This survey does not include H-2A workers who are eligible to purchase private insurance but are not provided it through the program.

paying the entire cost themselves.<sup>87</sup> Unfortunately, the community health centers and migrant health clinics that play a vital role in providing affordable healthcare services for uninsured agricultural workers often suffer from underfunding.<sup>88</sup> The disparity in healthcare coverage between the essential agricultural workers of the United States and the rest of the population is a product of their continued exclusion from economic citizenship.

Congress can act to reduce this health inequity, but the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)<sup>89</sup> is a major hurdle to the incorporation of foreign agricultural workers as economic citizens. During the Clinton Administration, Congress reached bipartisan consensus that the “incentive for illegal immigration provided by the availability of public benefits” (including healthcare) needed to be removed.<sup>90</sup> Under the PRWORA, with few exceptions, noncitizens are ineligible for federal public benefits.<sup>91</sup> Immigrants can be considered “qualified” to receive “federal public benefits” after the five-year residency period if they are LPRs; refugees or asylees; people paroled by DHS for at least one year; Cuban and Haitian entrants; certain abused immigrants, their children, and/or their parents; and certain survivors of trafficking and their derivative beneficiaries.<sup>92</sup> The Department of Health and Human Services (HHS) has interpreted the term “federal public benefit” to include thirty-one HHS programs, including Medicare, Medicaid, the Child Care Development Fund, Children’s Health Insurance Program, and Temporary Assistance for

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87. *Id.* at 40.

88. *Id.* at 43; see also Francis J. Stilp, *The Migrant Health Program in the United States: A Personal View from the Front Line*, MIGRATION WORLD MAG. (Oct. 1994), <https://go.gale.com/ps/i.do?id=GALE%7CA16871715&sid=google Scholar&v=2.1&it=r&linkaccess=abs&issn=10585095&p=AONE&sw=w&userGroupName=coloboulder> [<https://perma.cc/U6XR-MH9W>] (describing the financing of the Migrant Health Care Program that amounts to \$118 per year per client, compared to an average per capita healthcare bill in the U.S. of \$2,800 per year).

89. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

90. 8 U.S.C. § 1601.

91. Federal public benefits include “any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and any retirement welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided . . .” 8 U.S.C. § 1611(c).

92. Broder et al., *Overview of Immigrant Eligibility for Federal Programs*, NAT’L IMMIGR. L. CTR., at 2 (July 2021), <https://www.nilc.org/issues/economic-support/overview-immeligfedprograms/> [<https://perma.cc/923T-73RS>].

Needy Families.<sup>93</sup> The PRWORA also allows states to continue denying certain public benefits to qualified noncitizens even after five years of residence.<sup>94</sup> Congress should start reducing the barriers to treating agricultural workers as economic citizens by creating an exception in the PRWORA to allow “essential workers” to receive federal public benefits.

The exclusion of noncitizens from public healthcare coverage fosters distrust in government, which further damages community health. Thankfully, exceptions exist for benefits including short-term, non-cash, in-kind emergency disaster relief; child nutrition assistance; testing and treatments for symptoms of communicable diseases; and public health assistance for immunizations.<sup>95</sup> These exceptions were vital to combatting the spread of COVID-19 in noncitizen communities. However, the longstanding fear of government fostered by past discrimination against People of Color dissuaded many agricultural workers from proactively seeking testing or treatment for COVID-19. Tragically, this distrust is justified given the dark history of forced sterilizations and other abusive medical procedures inflicted on People of Color.<sup>96</sup> The modern web of federal and state restrictions sprouting from the PRWORA creates an atmosphere of confusion where even eligible immigrants do not participate in benefit programs at high rates.<sup>97</sup> Noncitizens are also more likely to struggle to access medical care because they fear potential conflict with immigration authorities—an impulse that grows stronger during periods of aggressive immigration

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93. Interpretation of Federal Public Benefit, 63 Fed. Reg. 41,658-61 (Aug. 4, 1998).

94. 8 U.S.C. § 1612(b). Relevant benefits include temporary assistance for needy families, Social Services block grants, and Medicaid. See Michael Shapland, *Soskin v. Reinertson: An Analysis of the Tenth Circuit’s Decision to Permit the State of Colorado to Withhold Medicaid Benefits from Aliens Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act*, 2 SETON HALL CIR. REV. 339 (2005) (describing Colorado’s denial of benefits to immigrants beginning in 2003).

95. 8 U.S.C. § 1613(c).

96. See, e.g., Nicole L. Novak et al., *Disproportionate Sterilization of Latinos Under California’s Eugenic Sterilization Program, 1920–1945*, 108 AM. J. PUB. HEALTH 611 (2018).

97. See Edward D. Vargas, *Immigration Enforcement and Mixed-Status Families: The Effects of Risk of Deportation on Medicaid Use*, 57 CHILD YOUTH SERV. REV. 83, 85 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4592159/pdf/nihms-723737.pdf> [<https://perma.cc/M82G-TL9B>] (citing numerous studies on “the disparity between program availability and program take-up”).

enforcement.<sup>98</sup> Moreover, heightened interior enforcement during the Trump Administration caused anxiety and damaged the physical and mental health of Latina women in rural regions of the United States.<sup>99</sup> Harsh immigration enforcement can cause even more damaging effects in the lives of pregnant women and their future U.S. citizen children.<sup>100</sup> Sadly, the population's well-founded distrust of the government contributes to many negative health outcomes for noncitizens and agricultural workers.

The Trump Administration intentionally added to the distrust and uncertainty by tying the receipt of public benefits directly to potential eligibility for naturalization with the "Public Charge Rule."<sup>101</sup> This rule change expanded the public charge determination to bar applicants from naturalization if they previously accessed nonemergency Medicaid or other noncash benefit programs.<sup>102</sup> Even before the rule was implemented, the fear of negative repercussions created a chilling effect. One survey conducted in December 2018 found that more than 20 percent of low-income families did not apply for benefit programs for which they otherwise would have been eligible out of fear of risking a future chance at LPR status.<sup>103</sup> When the COVID-19 pandemic struck, many noncitizens lived in fear of immigration enforcement or lost opportunities for naturalization, which discouraged them from accessing publicly available resources. Although President Biden rescinded the change to the public charge determination and deescalated the climate of harsh immigration

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98. *Id.* at 87–88; Marc L. Berk & Claudia L. Schur, *The Effect of Fear on Access to Care Among Undocumented Latino Immigrants*, 3 J. IMMIGR. HEALTH 151 (2001).

99. See Andrea Gómez Cervantes & Cecilia Menjívar, *Legal Violence, Health, and Access to Care: Latina Immigrants in Rural and Urban Kansas*, 61 J. HEALTH & SOC. BEHAV. 307 (2020).

100. Catalina Amuedo-Dorantes et al., *Immigration Enforcement and Infant Health*, (IZA Inst. Lab. Econ. Discussion Paper, Paper No. 13908, 2020).

101. Public Charge Rule, 22 C.F.R. § 40.41 (2019).

102. Holly Straut-Eppsteiner, *Trump's Public Charge Rule Created Harm Even Before It Was Implemented*, NAT'L IMMIGR. L. CTR. (Mar. 2, 2020), <https://www.nilc.org/2020/03/02/public-charge-rule-created-harm-before-it-was-implemented/> [<https://perma.cc/GN8Q-E33L>].

103. Hamutal Bernstein et al., *With Public Charge Rule Looming, One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URB. INST.: URB. WIRE (May 21, 2019), <https://www.urban.org/urban-wire/public-charge-rule-looming-one-seven-adults-immigrant-families-reported-avoiding-public-benefit-programs-2018> [<https://perma.cc/5SL4-UR4D>].

enforcement,<sup>104</sup> repairing trust between noncitizens and government health infrastructure will take a long time.

In order to protect the health of agricultural workers, Congress should end the exclusion of noncitizens from federal public benefits under the PRWORA or create a specific exemption for “essential workers.” Once the predominantly foreign agricultural work force became eligible for programs like Medicaid, approximately 33 percent of previously ineligible families would qualify immediately because they live below the federal poverty level.<sup>105</sup> More than half of farmworker families with children would be eligible for Medicaid under the Affordable Care Act expansion that increased the qualifying income limit.<sup>106</sup> Indeed, Congress should go one step further and guarantee Medicaid eligibility for all agricultural workers based on their status as “essential to maintain critical infrastructure and continue critical services and functions” in the United States.<sup>107</sup> While the restrictions on access to Medicaid remain in place, additional funding should be allocated to community health centers and migrant health clinics that frequently provide health services to uninsured people. Temporary H-2A workers and migrant agricultural workers experience additional hurdles in accessing healthcare coverage due to movement patterns, so a targeted program should be created that is designed to serve people crossing state lines. Implementing any or all of these changes could help agricultural workers maintain their health, conserve money, and remain active participants in the economy. Many agricultural workers labored during the most uncertain days of the COVID-19 crisis without access to affordable healthcare coverage. Now is the time to end the economic semi-citizen status

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104. Inadmissibility on Public Charge Grounds; Implementation of Vacatur, 86 Fed. Reg. 14,221 (Mar. 15, 2021).

105. HERNANDEZ & GABBARD, *supra* note 689, at 38 fig. 8.2.

106. *Id.* at 36 (54 percent of farmworker families reported annual family income of less than \$30,000); see also *2021 Federal Poverty Levels / Guidelines & How They Determine Medicaid Eligibility*, AMER. COUNCIL ON AGING, <https://www.medicaidplanningassistance.org/federal-poverty-guidelines/> [https://perma.cc/CFW7-JDF3] (Jan. 26, 2021) (stating that the 138 percent poverty threshold used under Medicaid expansion for a family of three is \$30,305).

107. See *Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html#:~:text=This%20interim%20list%20identifies%20%E2%80%9Cessential,the%20United%20States%20> [https://perma.cc/AZD5-GY6T] (identifying all Food and Agriculture industries under NAICS code 11xxxx as essential).

of agricultural workers by guaranteeing them access to affordable healthcare coverage regardless of formal citizenship status.

### *B. Education*

Incorporating agricultural workers as economic citizens of the United States means fully supporting the currently unmet educational needs of their children. A person cannot live as a full economic citizen in the United States if they are denied the ability to grow through public education.<sup>108</sup> Unfortunately, agricultural workers and their families are often prevented from achieving their educational aspirations due to geography, poverty, language barriers, and immigration-status restrictions.<sup>109</sup> Children of migrant and seasonal agricultural workers experience frequent disruptions in their education that can impact them for a lifetime.<sup>110</sup> Latinx children of migrant farm workers are often older than other students in their grade and behind in academic progress.<sup>111</sup> The statistics vary depending on year and data-collection method, but roughly half of Latinx children of migrant farmworkers do not graduate from high school at all.<sup>112</sup> The statistics are even worse for the population as a whole—only 21 percent of all agricultural workers surveyed from 2015 to 2016 completed high school, although this number crept up 3 percent from 2017 to 2018.<sup>113</sup> Nevertheless, many people from migrant-worker families overcome the numerous challenges of early education only to face immigration-status restrictions

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108. See *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.”); see also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“American people have always regarded education and the acquisition of knowledge as matters of supreme importance . . .”).

109. See Gabriela L. Stein et al., *Latinos in Rural, New Immigrant Destinations: A Modification of the Integrative Model of Child Development*, in *RURAL ETHNIC MINORITY YOUTH AND FAMILIES IN THE UNITED STATES*, 37–56 (Lisa J. Crockett & Carlo Gustavo eds., 2016).

110. Paul E. Green, *The Undocumented: Educating the Children of Migrant Workers in America*, 27 *BILINGUAL RSCH. J.* 51 (2003).

111. Zoe E. Taylor & Yumary Ruiz, *Executive Function, Dispositional Resilience, and Cognitive Engagement in Latinx Children of Migrant Farmworkers*, 100 *CHILD. & YOUTH SERVS. REV.* 57, 57 (2019).

112. Zoe E. Taylor et al., *A Mixed-Method Examination of Ego-Resiliency, Adjustment Problems, and Academic Engagement in Children of Latino Migrant Farmworkers*, 28 *SOC. DEV.* 200, 202 (2019).

113. *Data Tables*, *supra* note 18.

when seeking to apply to college.<sup>114</sup> Dismantling the institutional barriers and increasing funding to support programs can facilitate the inclusion of agricultural workers as full economic citizens.

The numerous challenges facing agricultural workers and their families demand robust intervention. The financial difficulties many families face compel children as young as eleven to work “adult hours” in the fields rather than attend school.<sup>115</sup> Acculturation, migratory stress, low levels of English-language proficiency, social isolation, and discrimination all discourage academic engagement and persistence.<sup>116</sup> Poverty, the responsibility to care for younger siblings, and hardships related to immigration status force many children of agricultural workers to carry practical and emotional burdens that negatively impact education.<sup>117</sup> Difficulties are compounded for Latinx children in rural areas who attend schools with fewer financial resources.<sup>118</sup> Migrant youth also report difficulty accessing the school resources that are available.<sup>119</sup> All these challenges escalated with the onset of the COVID-19 pandemic because agricultural workers and their families rarely have computers or internet access.<sup>120</sup> The infusion of more financial resources to support both families and educators can help agricultural workers and their children overcome these challenges.

The difficulty in delivering equitable education to the children of agricultural workers has not escaped the attention of Congress or the nonprofit sector, but underfunding has limited the effectiveness of solutions.<sup>121</sup> The Elementary and Secondary Education Act of 1965 established the Migrant Education

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114. Jessica C. Enyioha, *College Access for Undocumented Students and Law*, 45 EDUC. CONSIDERATIONS 1 (2019).

115. Zama Neff, *Child Farmworkers in the United States: A “Worst Form of Child Labor”*, HUM. RTS. WATCH (Nov. 17, 2011), <https://www.hrw.org/news/2011/11/17/child-farmworkers-united-states-worst-form-child-labor#> [<https://perma.cc/5EUC-K446>].

116. Taylor et al., *supra* note 112.

117. Janese L. Free et al., *Harvesting Hardships: Educators’ Views on the Challenges of Migrant Students and Their Consequences on Education*, 47 CHILD. & YOUTH SERVS. REV. 187 (2014).

118. Stein et al., *supra* note 109, at 49.

119. Margaret A. Gibson, *Bridges to Success in High School for Migrant Youth*, 111 TCHRS. COLL. REC. 683, 702 (2009).

120. Free et al., *supra* note 117, at 194–95.

121. JEFFERY J. KUENZI, CONG. RSCH. SERV., RL31325, THE FEDERAL MIGRANT EDUCATION PROGRAM AS AMENDED BY THE NO CHILD LEFT BEHIND ACT OF 2001, at 7 (2006).

Program to (1) assist states in supporting programs “that address the unique educational needs of migratory children,” (2) ensure that disparities in educational requirements among states do not unduly penalize migratory children, (3) ensure migratory children receive the opportunity to meet academic standards, (4) help children overcome the negative social and economic factors resulting from the migratory lifestyle, and (5) “help migratory children benefit from State and local systemic reforms.”<sup>122</sup> The Department of Education has the duty and power to oversee the allocation of these funds so that educational programs for migratory children can be established or improved by state and local operating agencies.<sup>123</sup> The academic resilience of students can be supported by employing teachers or migrant advocates who grew up as migrants or worked in agriculture themselves.<sup>124</sup> Decreasing the economic stress experienced by children of agricultural workers would also improve academic outcomes.<sup>125</sup> Advisors from the Migrant Education Program have been shown to help facilitate access to resources, but the number of Migrant Education Program-funded teachers has “declined dramatically” since 1985.<sup>126</sup> Without adequate funds, high-quality teachers cannot be recruited and retained, and students cannot access the educational resources they need. Increasing funding for the Migrant Education Program is one small step Congress could take to improve migrant education.

When supported, the children of migrant farmworkers can succeed academically, but they often run into financial challenges when pursuing higher education. The Department of Education also oversees high-school-equivalency and college-assistance-for-migrants programs to support the higher-education goals of migratory students.<sup>127</sup> The College Assistance Migrant Program assists students with application materials; provides tutoring, counseling, and English-language assistance; and helps students navigate the internship and scholarship

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122. 20 U.S.C. § 6391(1)–(5); *see also* *About, MIGRANT EDUC. PROGRAM*, <https://results.ed.gov/about> [<https://perma.cc/738H-4GG3>] (noting the Migrant Education Program is also known as Education of Migratory Children, Title 1, Part C).

123. *See* 20 U.S.C. §§ 6392–98.

124. Free et al., *supra* note 117, at 196.

125. *Id.*

126. Gibson, *supra* note 119, at 705.

127. 20 U.S.C. § 1070d–2(a).

processes.<sup>128</sup> Involvement in these programs can be “a strong social influence that provides students with the academic and financial services needed to overcome academic obstacles.”<sup>129</sup> A study conducted in the California State University system found that migrant students in the College Assistance Migrant Program performed “academically at the same level or higher than Latino and other student groups” and those who received financial assistance through Pell Grants “outperformed all other student groups” in terms of baccalaureate-degree attainment.<sup>130</sup> Participants in the College Assistance Migrant Program who attend universities attribute their success to their academic resilience and self-determination.<sup>131</sup> The parents of participants played a strong role in the students’ decision to pursue higher education, but they would benefit from additional community outreach to provide information about the test requirements and financial aid opportunities.<sup>132</sup> These studies demonstrate the effectiveness of programs designed to support the education of migrant workers and their families, especially when the programs alleviate the financial strain many agricultural workers confront.

The final component of economic citizenship, education, demands interventions across all age levels to ensure that agricultural workers and their families are not confined to semi-citizen status for generations. The Migrant Education Program, which has been languishing due to underfunding, needs to be reinvigorated with an emphasis on promoting English-language skills and multilingualism for both children and parents in agricultural worker families. The College Assistance Migrant Program would also benefit from additional funding to build on its track record of success. Changes to state laws can enable migrant and seasonal agricultural workers and their families to accumulate a residence period over multiple years to qualify for college

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128. Julian J. Mendez & Sheri Bauman, *From Migrant Farmworkers to First Generation Latina/o Students: Factors Predicting College Outcomes for Students Participating in the College Assistance Migrant Program*, 42 REV. HIGHER EDUC. 173, 175 (2018).

129. *Id.* at 198.

130. Adrian D. Ramirez, *The Impact of the College Assistance Migrant Program on Migrant Student Academic Achievement in the California State University System*, 11 J. HISP. HIGHER EDUC. 3, 9–10 (2012).

131. Patricia Alvarez McHatton et al., *Achieving Success: Perceptions of Students from Migrant Farmwork Families*, 34 AM. SECONDARY EDUC. 25, 35 (2006).

132. *Id.* at 36.

admission and in-state tuition.<sup>133</sup> The federal government could further support the higher-education goals of the community by providing career-training opportunities through the Agricultural Extension Service or targeted scholarships at land-grant universities across the country.<sup>134</sup> Empowering agricultural workers and their children to pursue higher education could drive the innovation needed to solve many of the longstanding challenges affecting workers in the industry. All of these solutions demand a substantial investment by Congress, but the reward will be generations of economic citizens ready to contribute more to the country, regardless of formal citizenship status.

### CONCLUSION

The time has come to start protecting the economic citizenship of agricultural workers. To be an economic citizen in the United States means that the individual is safe from unfair labor practices, receives fair wages, remains healthy, and pursues an education. For too long, institutional racism and xenophobia have undergirded the laws affecting agricultural workers. Even if formal citizenship remains elusive, Congress, the executive branch, and state governments can take action to incorporate the essential agricultural workers of the country as economic citizens. Surely, we owe those fundamental human rights to the essential agricultural workers who grow our food and power the economy.

Incorporating agricultural workers as economic citizens, regardless of formal immigration status, would benefit all people of the United States. If farm labor costs increase by 40 percent due to the implementation of collective-bargaining and wage protections, the average consumer would experience less than a 4 percent increase in retail prices.<sup>135</sup> Meanwhile, the average

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133. See, e.g., OHIO REV. CODE ANN. § 3333.31 (1989) (“Rules for determining residence”); OHIO ADMIN. CODE § 3333-1-10 (1994) (“Ohio student residency for state subsidy and tuition surcharge purposes”); see also MICHAEL OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: “PLYLER V. DOE” AND THE EDUCATION OF UNDOCUMENTED CHILDREN (2012) (discussing the implementation of an Ohio law).

134. These institutions have historically discriminated against People of Color, and providing targeted can begin to remedy the past injustice. See Kimberly S. Johnson, *Racial Orders, Congress, and the Agricultural Welfare State, 1865–1940*, 25 *STUD. AM. POL. DEV.* 143, 150–53 (2011).

135. Univ. Cal. Davis, *Food Spending 2017*, RURAL MIGRATION NEWS (Oct. 8, 2018), <https://migration.ucdavis.edu/rmn/more.php?id=2218> [<https://perma.cc/MX3A-KBVZ>].

agricultural worker would experience a new sense of security knowing that they would receive a fair wage for a hard day's work and not be the victim of unfair labor practices by employers. The COVID-19 pandemic revealed the undeniable truth that the health of all Americans is interlinked. If the nation is to continue reckoning with the history of racism and discrimination, the resulting disparities in healthcare and education that persist due to xenophobia need to be confronted. Now that the United States has recognized the critical role agricultural workers play in society, we have a duty to protect their economic citizenship and treat them as essential, not expendable.