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NOTES

THE IMPACT OF PROHIBITING LEGAL SERVICE CORPORATION OFFICES FROM REPRESENTING UNDOCUMENTED IMMIGRANTS ON MIGRANT FARMWORKER LITIGATION

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INTRODUCTION

In July 2010, a federal court enjoined Arizona's controversial law that requires officers, "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States . . . to determine the immigration status of that person."¹ As a result, the place of immigrants in American society—especially those who are undocumented or do agricultural work—is again prominent in the national discourse.² The federal government has also been re-evaluating the role of the Legal Services Corporation (LSC) in the U.S. civil litigation regime, increasing its funding to approximately \$420 million.³ It also allowed LSC offices to take attorney fee-generating cases under certain circumstances in 2009.⁴ In 2010, Congress proposed allowing LSC offices to

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1. Support Our Law Enforcement and Safe Neighborhoods Act, ARIZ. REV. STAT. § 11-1051 (2010), *invalidated in part by* United States v. Arizona, 703 F. Supp. 2d 980, 1008 (D. Ariz. 2010), *aff'd*, 641 F.3d 339 (9th Cir. 2011).

2. *See, e.g.*, Chris Collins, *Whose Jobs Are Done by Illegal Immigrants?*, FRESNOBEE, Nov. 18, 2010, <http://www.fresnobee.com/2010/11/18/2163652/whose-jobs-are-done-by-illegal.html#storylink=mirelated>.

3. Linda E. Perle, *Congress Increases LSC Funds and Eliminates Attorneys' Fees Restriction*, CENTER L. & SOC. POL'Y (Dec. 10, 2009), http://www.clasp.org/issues/in_focus?type=civil_legal_assistance&id=0002.

4. Fee-Generating Cases, 45 C.F.R. § 1609.3 (2010).

undertake class action lawsuits.⁵ In light of these events, it is important to examine LSC's history with migrant and seasonal farmworkers,⁶ how that relationship has changed, and what effects those changes have had.

Each year hundreds of thousands of migrant and seasonal agricultural workers travel to Midwestern states to perform a wide variety of agricultural tasks. The number of migrants (workers and their families) varies widely by state, from approximately 10,000 in Iowa to more than 160,000 in Michigan in 1993.⁷ According to the U.S. Department of Labor, 53% of those workers are undocumented immigrants.⁸ In many cases, these workers experience very poor working and living conditions. Regarding working conditions, this has meant underpayment, undisclosed or unauthorized deductions, manipulation of wage rates by their supervisors, and a lack of job security.⁹ Regarding living

5. Hans A. Von Spakovsky, *In the Omnibus Bill, a Treat for the Litigation Industry*, NAT'L REV. ONLINE (Dec. 16, 2010), <http://www.nationalreview.com/corner/255500/omnibus-bill-treat-litigation-industry-hans-von-spakovsky>. This prohibition on class action lawsuits does not apply to collective action suits under the Fair Labor Standards Act (29 U.S.C. § 216(b) (2006)), since those are not governed by Federal Rule of Civil Procedure 23 (45 C.F.R. § 1617.2(a) (2010)). Voicemail from Lisa Krisher, Attorney, Ga. Legal Servs., to author (Mar. 7, 2011, 2:00 PM) [hereinafter Krisher]; see also, Brian Herrington, *Fair Labor Standards Collective Action vs. Rule 23 Class Action*, BARRETT LAW GROUP, P.A. (Jan. 15, 2010), <http://www.bherringtonlaw.com/2010/01/fair-labor-standards-act-collective-action-vs-rule-23-class-action/>.

6. The law only differentiates between migrant and seasonal farmworkers by definition, not the protections offered. Pursuant to 29 U.S.C. § 1802(8)(A), "the term 'migrant agricultural worker' means an individual who . . . is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A). A seasonal farmworker is defined as "an individual who . . . is not required to be absent overnight from his permanent place of residence." *Id.* § 1802(10)(A). Since both groups are protected almost identically under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA) and Fair Labor Standards Act (FLSA), the term "migrant farmworkers" in the body of this Note encompasses both groups.

7. NAT'L CTR. FOR FARMWORKER HEALTH, INC., MIGRANT AND SEASONAL FARMWORKER DEMOGRAPHICS 3 (2009) (citing ALICE LARSON & LUIS PLASCENCIA, OFFICE OF MINORITY HEALTH, MIGRANT ENUMERATION STUDY (1993)), available at <http://www.ncfh.org/docs/fs-Migrant%20Demographics.pdf>. 1993 was the most recent year for which I could find data on all fifty states. Indiana had approximately 30,000 migrant and seasonal farmworkers that year. *Id.*

8. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002, at ix (2005), available at http://www.doleta.gov/agworker/report9/naws_rpt9.pdf; see also Mark Heller, Managing Attorney, Advocates for Basic Legal Equal., Inc. (ABLE), History and Demographics of Migrant Farmworkers in the United States at the 2010 Committee on Regional Training (CORT), Midwest Farmworker and Immigrant Worker Law Training (June 2, 2010) [hereinafter CORT Training]. The CORT Training was held June 2-4, 2010 to train legal outreach workers on how to engage, advise, and perform intake with migrant and seasonal farmworkers.

9. See MICH. CIVIL RIGHTS COMM'N, A REPORT ON THE CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS IN MICHIGAN 34-35 (2010) (internal citations omitted), available at http://www.michigan.gov/documents/mdcr/MSFW-Conditions2010_318275_7.pdf.

conditions, “[m]igrant farmworkers and their families are often forced to endure substandard housing conditions including structural defects, overcrowding, close proximity to pesticides and poor sanitation.”¹⁰

To combat these conditions, two federal laws provide a private right of action for farmworkers and their families: the Migrant and Seasonal Agricultural Workers Protection Act (AWPA)¹¹ and the Fair Labor Standards Act (FLSA).¹² The AWPA generally requires that workers receive prompt, full payment and safe, healthy housing.¹³ The FLSA affords workers liquidated damages of up to 100% of their delinquent pay and provides for attorney fees.¹⁴ Each summer, farmworkers are informed of their rights under these laws by attorneys and interns from migrant farmworker legal programs traveling to the camps and hotels where workers stay.¹⁵ Many such programs are operated by Legal Services Corporation (LSC) offices, independent state legal aid offices that receive federal funding to provide legal representation for indigent community members.¹⁶ However, due to changes in funding in 1996, LSC offices are almost completely prohibited from representing undocumented workers outside of initial intake services.¹⁷ In many states there are no other legal aid organizations besides these offices for low-income individuals or families with dedicated programs to help migrant farmworkers.¹⁸ Therefore, many undocumented farmworkers lack the resources to bring their claims at all.¹⁹

Part I of this Note presents a historical overview of the relationship between LSC and migrant farmworkers and the laws protecting workers. Part II discusses how LSC critics influenced the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (OCRAA) and how the restrictions impacted LSC

10. *Id.* at 10 (citing William Kandel, U.S. Dep’t of Agric., Profile of Hired Farmworkers, A 2008 Update 28 (2008)).

11. 29 U.S.C. §§ 1801-72 (sometimes abbreviated MSAWPA, MSWPA, or MSPA).

12. *Id.* §§ 201-19 (2006 & Supp. 2010).

13. *Id.* §§ 1822-23 (2006).

14. *See id.* § 219(b); *Leach v. Johnston*, 812 F. Supp. 1198, 1214 (M.D. Fla. 1992), *disapproved of by* *Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994).

15. The CORT Training annually brings together outreach workers from six Midwestern states for training on legal aspects and outreach. After the training, the outreach workers travel to workers at their residences to inform them of their legal rights and begin the representation process if there are violations of applicable federal or state law and the workers wish to be represented against their bosses.

16. BRENNAN CTR. FOR JUSTICE, HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS? 2 (2001) [hereinafter BRENNAN CTR.].

17. Restrictions on Legal Assistance to Aliens-Prohibition, 45 C.F.R. § 1626.3 (2010).

18. At the 2010 CORT Training, there were no non-LSC outreach workers from Indiana, Wisconsin, or Iowa.

19. *See* David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 577-78 (1995) (discussing how, if a legal services attorney cannot take a claim because of conflict of interest, the practical effect is a bar to representation for an indigent client altogether).

representation of migrant workers. Part III is an analysis of the Note's two hypotheses: (1) the prohibition on LSC offices representing undocumented immigrants has correlated with a sharp drop in migrant farmworker litigation; and (2) the litigation rates in states that do not have non-LSC offices handling migrant farmworker litigation are lower than those that do. Part IV offers specific recommendations on how to ensure the legal needs of all migrant farmworkers are adequately met.

I. OVERVIEW AND BACKGROUND

A. LSC

The history of LSC and its offices' interaction with migrant farmworkers began in 1964 with the creation of the Office for Economic Opportunity (OEO), established by the Economic Opportunity Act of 1964.²⁰ OEO provided federal funding for quasi-independent legal aid organizations across the country to provide legal access to indigent clients.²¹ Recognizing even then the difficult working and living conditions that migrant farmworkers faced, "[t]he only specific national earmarking of funds was for services to Native Americans and migrant farmworkers."²² However, OEO legal aid quickly fell out of favor with many, as lawyers in OEO offices "lustily sued local authorities across the [United States] on behalf of poor clients."²³ As a result, the Richard Nixon Administration, under the auspices of OEO director (and staunch legal aid opponent) Howard Phillips,²⁴ "began dismantling the OEO during the early [19]70s."²⁵ Congress transferred the responsibility for indigent legal aid to the newly-formed LSC.²⁶ LSC is subject to increased oversight by Congress and the President, "funded by Congress but run independently, by eleven board members named by the President and confirmed by the Senate."²⁷ LSC oversees hundreds of legal aid offices across the United States.²⁸ These offices are prohibited or

20. Economic Opportunity Act of 1964 (EOA), Pub. L. No. 88-452, 78 Stat. 508 (repealed 1981).

21. Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 36 (2007).

22. ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POL'Y, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 9 (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf>.

23. *The Law: Corporation for the Poor*, TIME, July 1975, at 64 [hereinafter *The Law*], available at <http://www.time.com/time/magazine/article/0,9171,913362,00.html>.

24. See BRENNAN CTR., *supra* note 16, at 3 ("Phillips nearly succeeded in entirely eliminating federal funding for legal aid.").

25. *The Law*, *supra* note 23, at 64.

26. See *History of Civil Legal Aid*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/About/About_HistoryCivil (last visited Jan. 22, 2012).

27. *The Law*, *supra* note 23, at 64.

28. There are LSC offices in all fifty states, the District of Columbia, and four U.S. territories

severely restricted from undertaking impact litigation (such as criminal or selective services cases) or prohibited political activities,²⁹ and are supposed to focus on helping individual indigent clients.³⁰ The earmark allocated to assisting migrant farmworkers remained.³¹ This money is primarily spent in outreach by staff attorneys and legal interns visiting farmworkers at their residences to educate them on legal protections and to ascertain if the workers are experiencing any problems.³²

Even with this narrowed and less-controversial focus, LSC continued to be criticized by groups and prominent individuals concerned that LSC was “a haven for ideologically-driven lawyers who use public funding to further their own aims, rather than to help low-income people.”³³ Harry Bell, board member of the American Farm Bureau Federation (“Farm Bureau”), has been a vocal critic.³⁴ Farm Bureau has maintained that legal outreach workers were “soliciting business and stirring up controversy particularly among migrant and seasonal farmworkers.”³⁵ Farm Bureau advocated abolishing LSC during Ronald Reagan’s Administration.³⁶ While the Reagan Administration was unsuccessful in eliminating the program entirely,³⁷ LSC’s funding was substantially reduced in inflation-adjusted dollars.³⁸ However, this did not quiet critics of LSC. As its

or commonwealths. *LSC Programs*, LEGAL SERVICES CORP., <http://www.lsc.gov/find-legal-aid> (last visited Jan. 22, 2012).

29. See Alan W. Houseman & Linda E. Perle, *What You May and May Not Do Under the Legal Services Corporation Restrictions*, in *POVERTY LAW MANUAL FOR THE NEW LAWYER* 242, 242 (Ilze Sprudz Hirsh ed., 2002).

30. Henry Rose, *Class Actions and the Poor*, 6 *PIERCE L. REV.* 55, 62 (2007). “I want everyone to know the reason for the prohibitions is because legal services . . . [was intended] to represent individual poor people in individual cases, not to represent a class of poor people suing a welfare agency or suing a legislature or suing the farmers as a class.” *Id.* at 61 n.50 (statement of Sen. Pete Domenici).

31. See Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 *HOFSTRA LAB. & EMP. L.J.* 575, 613 (2001).

32. For example, LSCs are budgeted only ten dollars per potential client and spend an average of only \$150 on an actual client. *Id.* Indiana Legal Services, on the other hand, spent approximately \$2000 per week on salaries and expenses for migrant farmworker outreach in summer 2010. E-mail from Melody Goldberg, Dir., Migrant Farmworker Law Ctr. at Indiana Legal Services (Jan. 6, 2011, 11:24 AM EST) (on file with author).

33. BRENNAN CTR., *supra* note 16, at 2.

34. *Id.*

35. *Id.* at 5-6.

36. *Id.* Farm Bureau partnered in this effort with the Conservative Caucus and Moral Majority. *Id.* at 5

37. Memorandum from David Hoppe of Government Relations, *Without Reforms, the Legal Services Corporation Bill Deserves a Veto* (Sept. 23, 1988) [hereinafter Hoppe], available at <http://www.policyarchive.org/handle/10207/bitstreams/12418.pdf>. The first seven budgets submitted by the Reagan Administration sought to abolish LSC completely. *Id.*

38. See *id.* (“The Administration proposes to fund LSC at \$250 million, down \$45 million

budget began to rise during the last two years of George H.W. Bush's presidency³⁹ and the first two years of the Bill Clinton Administration,⁴⁰ critics renewed their calls for LSC's reduction or transformation.⁴¹ As is discussed later in this Note, they were successful starting in 1995.⁴²

B. Migrant Farmworkers

For decades, migrant and seasonal farmworkers have played an integral role in the U.S. agricultural economy.⁴³ As of 1993—the last year data was available for all fifty states—there were more than three million migrant and seasonal workers in the United States.⁴⁴ Over 1.3 million were working in Texas, California, or Florida.⁴⁵ While 75% of the workers were initially born in Mexico, workers tend to be full-time U.S. residents; almost twice as many have lived in the United States for at least fourteen years as have entered within the past twelve months.⁴⁶ Despite the low pay and seasonal nature of the work, for many farmworkers it is the only income they earn during the course of the year.⁴⁷ These workers often lack skills, education, and English proficiency that would enable them to find non-agricultural work.⁴⁸ Thus, they provide a willing workforce, despite in many cases traveling over 1,000 miles⁴⁹ and working

from fiscal 1988.”); *see also* BRENNAN CTR., *supra* note 16, at 2 (noting in 1981 the budget was approximately \$300 million).

39. HOUSEMAN & PERLE, *supra* note 22, at 34.

40. *Id.* at v. For Fiscal Years 1994 and 1995, Congress appropriated approximately \$400 million per year. *Id.*

41. *See* Mauricio Vivero, *From “Renegade” Agency to Institution of Justice: The Transformation of Legal Services Corporation*, 29 *FORDHAM URB. L.J.* 1323, 1327-28 (2002).

42. *Infra* notes 147-70 and accompanying text.

43. Holley, *supra* note 31, at 583-85 (emphasizing that the abuses workers suffered in the 1940s and 1950s under the bracero program (workers from Mexico) and the original H-2 guest worker program gave rise to the Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983), the forerunner to the AWPA).

44. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 4.

45. *Id.* at 3-4.

46. *Id.* at 1.

47. *See id.* at 3 (indicating that only ten percent of the aggregate man-days of migrant farmworkers were spent doing non-farm work, compared to twenty-three percent of man-days spent not working).

48. *Id.* at 2 (noting a slight plurality of respondents (forty-two percent) believed that they did not possess the requisite skills to find other employment, whereas thirty-seven percent believed they did).

49. *See* Vivian D. Roeder & Ann V. Millard, *Gender and Employment Among Latino Migrant Farmworkers in Michigan* 7 (Julian Samora Research Institute, Working Paper No. 52, 2000), available at <http://web.jsri.msu.edu/pdfs/wp/wp52.pdf> (finding that sixty percent of migrant Latino farmworkers in Michigan come from Florida or Texas).

conditions hazardous to both their short-term and long-term health.⁵⁰ Conversely, most medium and large-scale farmers are dependent upon migrant workers as reliable low-wage labor because much of fruit and vegetable harvesting must be done by hand.⁵¹ Indeed, farmers would not be able to maintain their profit margins without laborers willing to work long hours at minimum wage.⁵² Farmers have a financial incentive to find workers who will stay for the entire growing season and are willing to stay in cheap, substandard housing.⁵³ A 1997 Virginia Tech study showed that almost half the migrant worker housing had communal bathrooms,⁵⁴ and almost half the respondents reported structural problems such as leaks in roofs, vermin, and lead paint.⁵⁵

Given these circumstances, one might expect the farmers to ensure that workers are treated well to increase productivity and reduce turnover. Unfortunately, migrant farmworkers face many difficulties, especially with regards to their health and compensation.⁵⁶ “Migrant laborers generally have no employment security, no benefits, poor living conditions, poor pay, requirements to travel and work long hours, and are frequently exposed to agricultural chemicals.”⁵⁷ Many workers start when they are very young.⁵⁸ They can work

50. See Stephanie Little et al., *Farmworker Legal Servs., Health and Safety: Labor Camp Standards, Field Sanitation, and Pesticides at the CORT Migrant Farmworker Outreach Training* (June 3, 2010) (on file with author). In 1998-1999 there were 1156 cases of pesticide-related illnesses reported in California alone. Rupali Das et al., *Pesticide-Related Illness Among Migrant Farm Workers in the United States*, 7 INT’L J. OCCUPATIONAL & ENVTL. HEALTH 303, 306 (2001).

51. See Yoav Sarig et al., *Alternatives to Immigrant Labor? The Status of Fruit and Vegetable Harvest Mechanization in the United States*, CENTER IMMIGR. STUD. (Dec. 2000), <http://www.cis.org/FarmMechanization-ImmigrationAlternative> (noting that “at least 20 to 25 percent of the U.S. vegetable acreage and 40 to 45 percent of the U.S. fruit acreage is totally dependent on hand harvesting” and “[t]he high costs of producing food in the United States, compared to the costs in less developed countries that can sell in the U.S. markets, are pushing American growers out of business”).

52. See Collins, *supra* note 2 (“Because illegal immigrants will work for almost any wage, employers have little reason to pay other workers more.”).

53. See *Howard v. Malcolm*, 658 F. Supp. 423, 427 (E.D. N.C. 1987), *infra* note 111 and accompanying text, for a description of egregious, but not unique, housing conditions facing migrant farmworkers.

54. C. THEODORE KOEBEL & MICHAEL P. DANIELS, CTR. FOR HOUS. RESEARCH, HOUSING CONDITIONS OF MIGRANT AND SEASONAL FARMWORKERS 4 (1997), available at http://www.vchr.vt.edu/pdfreports/mfw_final.doc.pdf.

55. *Id.* at 8.

56. See, e.g., *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1256-57 (N.D. Okla. 2006); *Astorga v. Connleaf, Inc.*, 962 F. Supp. 93, 94-95 (W.D. Tex. 1996); *Leach v. Johnston*, 812 F. Supp. 1198, 1214 (M.D. Fla. 1992).

57. Roeder & Millard, *supra* note 49, at 1.

58. 29 U.S.C. § 213(c)(4)(A) (2006) (permitting workers to begin hand harvesting crops when they are as young as ten years old if the corporation has obtained a waiver from the Department of Labor).

in any capacity upon turning sixteen,⁵⁹ including in “occupation[s] that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen.”⁶⁰ Most workers (approximately 79%) are paid hourly with minimum wage as the average wage, while approximately 16% were paid on a piece-rate basis (i.e., workers are paid “X” cents per unit of crop),⁶¹ which makes determining whether workers have been underpaid incredibly difficult. Additionally, a provision of the FLSA exempts farmers from having to pay overtime.⁶² Thus, despite half of workers working more than forty hours per week,⁶³ they may earn only their regular pay (almost always the minimum wage)⁶⁴ for the additional hours worked.

In addition to the low pay, agricultural work is “one of the most dangerous occupations in the country.”⁶⁵ Workers, including minors, are regularly put in danger by “toxic pesticides, heavy machinery, and other hazards.”⁶⁶ Federal regulations require employers to provide employees with protective equipment if they enter a field after spraying⁶⁷ and prohibit spraying within a certain number of hours of workers having to perform general work in the fields.⁶⁸ Still, workers frequently exhibit signs of pesticide poisoning when visited by medical workers.⁶⁹ Workers in some states face additional risk because agricultural employers are not required to carry worker’s compensation insurance.⁷⁰ Employers know they are unlikely to be sanctioned for failing to compensate workers for lost time or provide transportation for workers so they can seek medical treatment.⁷¹

59. *Id.* § 213(c)(1-2) (offering protections for workers ages fifteen and younger).

60. *Id.* § 213(c)(2).

61. NAT’L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 2; *see also* MICH. CIVIL RIGHTS COMM’N, *supra* note 9, at 3 (“Other testimony . . . established that the accepted industry practice of growers paying piece rates to workers often results in workers being paid less than the required minimum hourly wage.”).

62. 29 U.S.C. § 213(b)(12).

63. *See* NAT’L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 2 (noting that twenty-five percent of all workers average more than fifty hours per week).

64. *Id.*

65. FARMWORKER JUSTICE & OXFAM AM., WEEDING OUT ABUSES: RECOMMENDATIONS FOR A LAW-ABIDING FARM LABOR SYSTEM 1 (2010), *available at* <http://www.fwjustice.org/files/immigration-labor/weeding-out-abuses.pdf>.

66. OXFAM AM., LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 40 (2004), *available at* <http://www.oxfamamerica.org/files/like-machines-in-the-fields.pdf>.

67. Entry Restrictions, 40 C.F.R. § 170.112(c)(4) (2011).

68. *Id.* § 170.112(c)(3); *see also* Stephanie Little et al., *supra* note 50.

69. Das et al., *supra* note 50, at 306-07.

70. *See, e.g.*, IND. CODE § 22-3-2-9(a)(2) (2011) (Under the heading of “exempt employees,” Indiana law states that “IC 22-3-2 through IC 22-3-6 shall not apply to . . . (2) farm or agricultural employees”). This near-blanket exemption is the exception among Midwestern states. *See* 820 ILL. COMP. STAT. ANN. 305/3-19 (West 2012); MICH. COMP. LAWS ANN. § 418.115 (West 2012).

71. *See, e.g.*, FARMWORKER JUSTICE & OXFAM AM., *supra* note 65, at 4-5.

Therefore, the employers thus have little incentive to do so.⁷²

Housing conditions are also problematic, and there are almost as many non-workers living in migrant camps as there are workers living there.⁷³ A 2001 Housing Assistance Counsel survey “found that 61% of migrant farmworker housing surveyed in Michigan was overcrowded.”⁷⁴ Forty-five percent of the housing was at least “moderately substandard,”⁷⁵ of those units, more than one-quarter of houses “lacked at least one working appliance,”⁷⁶ while “over 50% of the units surveyed were adjacent to pesticide-treated fields.”⁷⁷ Despite these issues, farmworkers and their families too often do not know of available remedies.⁷⁸

*C. Legal Protection: From the Farm Labor Contractor Registration Act
to the Migrant and Seasonal Agricultural Workers Protection Act
and Fair Labor Standards Act*

Recognizing these difficulties—and the inadequacy of common law remedies—Congress passed the Farm Labor Contractor Registration Act of 1963 (FLCRA) in 1964.⁷⁹ The FLCRA created new protections for migrant workers:

- (1) requiring farm labor contractors (FLCs) to register with the U.S. Department of Labor prior to engaging in contracting;⁸⁰
- (2) stripping FLCs of their licenses if they provided false or misleading information to workers concerning terms of employment⁸¹ or “fail[ing] . . . to comply with the terms of any working arrangements he has made with migrant workers”;⁸²

72. At one Indiana farm, an H-2(A) visa holder was told that he would have to pay for medical care for his work-related injury, despite the farmer being required to carry workers compensation insurance. See 8 U.S.C. § 1188(b)(3) (2006) (describing the requirements for an employer to get a labor certification to hire H-2(A) workers).

73. ALICE C. LARSON, STATE OF MICH. INTERAGENCY MIGRANT SERVS. COMM., MIGRANT AND SEASONAL FARMWORKER ENUMERATION PROFILES STUDY 21 (2006), available at http://www.michigan.gov/documents/dhs/DHS-MSFW-Study-2006_179382_7.pdf (indicating a 2004-2006 study estimated 45,800 migrant farmworkers in Michigan and 44,916 non-workers who were living in camps).

74. MICH. CIVIL RIGHTS COMM’N, *supra* note 9, at 10.

75. *Id.* at 10-11.

76. *Id.* at 11.

77. *Id.*

78. See Richard S. Fischer, *A Defense of the Farm Labor Contractor Registration Act*, 59 TEX. L. REV. 531, 535 (1981) (“Employers and their own crewleaders often take advantage of them but beyond bitterness they know of no recourse.” (citations omitted)).

79. Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-582, 78 Stat. 920 (1964) (repealed 1983).

80. *Id.* § 4(a).

81. *Id.* § 5(b)(2).

82. *Id.* § 5(b)(4).

- (3) requiring numerous disclosures to workers before starting work concerning the nature of their employment,⁸³ and
- (4) requiring the FLCs to pay workers promptly and provide them with appropriate documentation showing the total hours worked and the applicable tax withholding.⁸⁴

These provisions afforded many new protections to workers and were maintained as the foundation for worker protections when the AWP⁸⁵ was passed to replace the FLCRA.

However, the shortcomings of the FLCRA soon became apparent. First, as farms grew in size and complexity in the years following the passage of the FLCRA, farmers were more likely to contract the labor directly or use a personnel manager rather than an FLC.⁸⁶ However, the FLCRA only subjected FLCs to the law and defined them as “any person, who, for a fee, either for himself or on behalf of another person, recruits, solicits, hires, furnishes, or transports ten or more migrant workers (excluding members of his immediate family) at any one time in any calendar year for interstate agricultural employment.”⁸⁷ This definition excluded producers and farmers who directly hire workers,⁸⁸ even though they subject their workers to the same abuses that FLCs do.⁸⁹ Thus, the law could not ensure proper treatment for workers in all employment situations.

More problematically, farmworkers had no private right of action under the FLCRA.⁹⁰ The only means of FLCRA enforcement was for federal or state department of labor (DOL) officers to inspect the migrants’ working conditions or FLC’s payroll records and issue fines if the officers observed violations.⁹¹ Unfortunately, this punishment was almost non-existent: A fine was levied only once during the first ten years the FLCRA was in effect.⁹²

While there were some in Congress who sought to further reduce the scope of those subject to the FLCRA,⁹³ the majority of lawmakers understood the

83. *Id.* § 6(b).

84. *Id.* § 6(e).

85. 29 U.S.C. §§ 1821-1823 (2006).

86. *See* Fischer, *supra* note 78, at 541-42. Even in the mid-2000s, as FLCs have become more prevalent than in years past, almost eighty percent of those responsible for migrant farmworker working conditions would have been able to escape legal repercussions. *See* NAT’L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 2 (reporting that growing and packing firms hired 79% of workers, while only 21% of workers were hired by FLCs, but emphasizing that this 21% was an increase of 14% in 1993-94).

87. § 3(b), 78 Stat. at 920.

88. “Such term shall not include . . . any farmer . . . who engages in any such activity for the purpose of supplying migrant workers solely for his own operation. . . .” *Id.* § 3(b)(2).

89. Fischer, *supra* note 78, at 541.

90. *Id.* at 535.

91. §§ 7-9, 78 Stat. at 923-24.

92. Fischer, *supra* note 78, at 535.

93. “[A]mending the section defining ‘farm labor contractor’ to exempt from coverage corporations that hire farmworkers for their own operations, all the permanent and temporary

inadequacies of the law and sought to correct them by replacing the FLCRA with the AWPA.⁹⁴

The AWPA included several new important protections for migrant workers that were not in the FLCRA. The first major change was to subject almost every employer to the worker protection requirements, whether they used an FLC or directly hired workers themselves.⁹⁵ The AWPA also lowered an important administrative and judicial barrier to litigation by clearing up “a great deal of confusion among agricultural employers and courts as to whether an employer was subject to the provisions of the FLCRA.”⁹⁶ This makes it much more difficult for farmers to escape liability by either hiring workers directly or claiming they are powerless over the acts of their contractors, since they could be held jointly and severally liable for damages with FLCs.⁹⁷

Second, the AWPA gives workers a private right of action against their employers without having to first exhaust any administrative remedies: “[a]ny person aggrieved by a violation of this chapter or any regulation under this chapter . . . may file suit in any district court of the United States . . . without regard to exhaustion of any alternative administrative remedies provided herein.”⁹⁸ This right of action is available to both documented and undocumented workers⁹⁹ and decreases the costs of obtaining relief; farmworkers can proceed

employees of such corporations, and all agricultural cooperatives.” *Id.* at 539-40 (quoting the Farm Labor Contractor Registration Act Amendments of 1980, 126 CONG. REC. S9791-92 (daily ed. July 24, 1980)).

94. 29 U.S.C. §§ 1801-1872 (2006).

95. 29 U.S.C. § 1803(a) lists the limited circumstances under which an agricultural employer can be fully exempt from the AWPA.

96. Daniel B. Conklin, Note, *Assuring Farmworkers Receive Their Promised Protections: Examining the Scope of AWPA’s “Working Arrangement,”* 19 KAN. J.L. & PUB. POL’Y 528, 535 (2010). There is a narrow exception for family farms that employ non-family members for less than 500 man-days. 29 U.S.C. § 1803(a)(2).

97. *See Antenor v. D & S Farms*, 88 F.3d 925, 929-30 (11th Cir. 1996) (citing the AWPA definition of joint employment [29 C.F.R. § 500.20 (2011)] as “a condition in which a single individual stands in the relation of an employee to two or more persons at the same time. A determination of whether the employment is to be considered joint employment depends upon all the facts in the particular case. If the facts establish that two or more persons are completely disassociated with respect to the employment of a particular employee, a *joint employment* situation does not exist.”). Establishing privity between the farmer and FLC, however, remains a challenge in holding farmers directly responsible. *See generally Aimable v. Long & Scott Farms*, 20 F.3d 434 (11th Cir. 1994) (holding that the farmer was not responsible for workers’ AWPA damages because the farmer was not a “joint employer” with the FLC).

98. 29 U.S.C. § 1854(a).

99. *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987). In issuing the writ of mandamus, the court also held that litigants’ immigration status was not discoverable, even for determining legitimacy of representation. *Id.* (“There is no authority, therefore, to inquire into the documentation of aliens to determine whether the Texas Rural Legal Aid, Inc. [an LSC office], Farm Worker Division, has authority to represent the petitioners in this case.”).

directly to litigation without having to go through administrative procedures that the federal or a state department of labor was required to undertake before fining FLCs.¹⁰⁰

Moreover, the fairly expansive personal jurisdiction for farmers and FLCs¹⁰¹ means farmworkers have increased access to the federal court system, since in most cases they can sue in either their home state or the state in which they worked.¹⁰² LSC offices are particularly helpful in litigation, since attorneys from the states where workers work during the growing season can coordinate with attorneys in LSC offices in states where the migrant workers live during the non-growing season. For instance, in *Castorena v. Mendoza*,¹⁰³ a case involving workers who migrated from the Rio Grande Valley area of Texas to Indiana and Illinois for work, Indiana Legal Services (ILS) worked closely with an attorney in Illinois and with Texas Rio Grande Legal Aid, an LSC office near the workers' homes, filing the lawsuit in Texas.¹⁰⁴

Third, the AWPAs not only provides for restitution to farmworkers for overdue and incomplete pay, it provides statutory damages of \$500 per worker per violation by the farmer or FLC;¹⁰⁵ fines assessed under the FLCRA for similar violations did not get paid out to farmworkers.¹⁰⁶

Finally, the statute provides a remedy for those people living in migrant housing but not working, usually family members of workers. If the employer has not provided safe and adequate housing,¹⁰⁷ anyone residing in that housing

100. See Conklin, *supra* note 96 at 537.

101. See, e.g., *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1193 (9th Cir. 2001) (going to Arizona and recruiting workers to work in another state, "it is reasonable for the [Arizona] district court to exercise jurisdiction over Martin Farms").

102. See Holley, *supra* note 31, at 586.

103. Plaintiff's Original Complaint, *Castorena v. Mendoza*, 1:08-cv-374 (S.D. Tex 2008).

104. E-mail from Melody Goldberg, Dir., Migrant Farmworker Law Ctr. at Indiana Legal Services (Nov. 18, 2010, 4:46 PM EST) (on file with author).

105. 29 U.S.C. § 1854(c)(1). Specifically this section states:

If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to \$500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to \$500 per plaintiff per violation, or up to \$500,000 or other equitable relief.

Id.

106. Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-528, § 9, 78 Stat. 920, 924 (repealed 1983).

107. See 29 U.S.C. § 1823; Applicable Federal Standards: ETA and OSHA housing standards, 29 C.F.R. § 500.132(a) (2011). The section states:

(1) A person who owns or controls a facility or real property to be used for housing

gains a private right of action regardless of whether he or she is employed by the farmer or FLC.¹⁰⁸ In 2006, the State of Michigan Interagency Migrant Services Committee estimated that while there were approximately 45,554 migrant and seasonal farmworkers in the state,¹⁰⁹ there were almost 45,000 non-workers living in migrant housing.¹¹⁰ This AWP provision offers workers and their families protection in an area where particularly horrifying abuses are suffered. The court in *Howard v. Malcolm* described an egregious set of violations at a camp in which:

1. Mice and vermin were “all around” the camp; 2. Food storage and preparation areas were dirty and unsanitary; 3. There was no hot water in the bathrooms and showers; 4. Toilet paper was rarely available; 5. In Building # 1, some of the screens were torn off the building and there were holes in the floor and walls; 6. In Building # 3, rooms leaked, there was water damage to and rot within the walls, and screens were torn. . . .¹¹¹

Because a farm labor camp operator was ultimately found liable, rather than an FLC,¹¹² he would have escaped liability under the FLCRA, but was liable under the AWP.¹¹³

The FLSA is also a meaningful complement to the AWP’s protections of workers. The FLSA sets the minimum wage that each worker must be paid in

any migrant agricultural worker, the construction of which was begun on or after April 3, 1980, and which was not under a contract for construction as of March 4, 1980, shall comply with the substantive Federal safety and health standards promulgated by OSHA at 29 CFR [§] 1910.142. These OSHA standards are enforceable under MSPA, irrespective of whether housing is, at any particular point in time, subject to inspection under the Occupational Health and Safety Act.

- (2) A person who owns or controls a facility or real property to be used for housing any migrant agricultural worker which was completed or under construction prior to April 3, 1980, or which was under a contract for construction prior to March 4, 1980, may elect to comply with either the substantive Federal safety and health standards promulgated by OSHA [on Temporary Labor Camps] at 29 CFR [§] 1910.142 or the standards promulgated by ETA [on a Housing Site] at 20 CFR [§] 654.404 *et seq.*

Id.

108. 29 U.S.C. § 1854(a) (providing a private right of action to “[a]ny person aggrieved”).

109. LARSON, *supra* note 73, at 21.

110. *Id.* at 1 (stating that “[t]he total of all ‘MSFW Farmworkers and Non-Farmworkers’ in Michigan is 90,716,” while “the estimated total of all MSFWs in Michigan is 45,800”).

111. *Howard v. Malcolm*, 658 F. Supp. 423, 427 (E.D. N.C. 1987) (footnotes omitted).

112. *Id.* at 426.

113. *Id.* at 437-38.

any state¹¹⁴ and provides for attorney fees in the event of a successful claim,¹¹⁵ whereas the AWP does not.¹¹⁶ When AWP and FLSA claims are part of the same lawsuit, attorney fees can be recovered for time spent on both claims.¹¹⁷ Because of this provision, many migrant worker lawsuits contain both claims.¹¹⁸ While the AWP offered many improvements for farmworkers over the FLCRA, serious shortcomings remain. Most workers, if terminated in retaliation for reporting these violations or trying to get the farmer or FLC to fix his practices, lack the financial means to forego wages in exchange for the prospect of receiving backpay and additional damages from litigation.¹¹⁹ More basically, too many workers never know about protections offered to them. A recent survey of Latino Workers by the Southern Poverty Law Center found that approximately 80% “had no idea how to contact government enforcement such as the Department of Labor. Many respondents did not know such agencies even exist.”¹²⁰ Therefore, it is very difficult for workers to exercise their rights of action under the AWP and FLSA.

II. REACTIONS AND CHANGES TO LSC-MIGRANT WORKER RELATIONS

A. Overview of Interaction and Pre-1997 LSC Involvement

While the AWP and FLSA provide many rights to farmworkers, challenges remain to farmworkers actually exercising those rights. The remote location of many farms where migrants work and live¹²¹ makes it difficult for members of the

114. 29 U.S.C. § 206 (2006 & Supp. 2010). However, the law exempts agricultural employers from having to provide extra pay for overtime. *Id.* § 213(b)(12).

115. *Id.* § 216(b).

116. *See, e.g., Gooden v. Blanding*, 686 F. Supp. 896, 897 (S.D. Fla. 1988) (stating, “[t]he Plaintiffs recovered on claims brought under the Fair Labor Standards Act (FLSA), and the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), . . . [while] only the FLSA provides for attorneys fees.” (internal citations omitted)).

117. *Id.* (holding that “both of these actions arise out of the same core facts. Accordingly, this Court deems it appropriate that attorneys fees should include all hours reasonably spent on the litigation as a whole.” (citing *Certilus v. Peeples*, No. 81-46-Civ-OC-12, slip op. (M.D. Fla. Dec. 5, 1984))).

118. *See, e.g., Salinas v. Rodriguez*, 978 F.2d 187 (5th Cir. 1992); *Antenor v. D & S Farms*, 39 F. Supp. 2d 1372 (S.D. Fla. 1999); *Gooden*, 686 F. Supp. 896.

119. U.S. DEP’T OF LABOR, *supra* note 8, at 47 (noting that the average household income range for a migrant farmworker family is \$15,000-\$17,499). In *Martinez v. Mendoza*, for example, the defendants committed AWP violations in the summer of 2006, but the plaintiffs were not granted damages until February 2009. *Martinez v. Mendoza*, 595 F. Supp. 2d 923, 924-25, 928 (N.D. Ind. 2009).

120. S. POVERTY LAW CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 6 (2009), available at <http://www.splcenter.org/sites/default/files/downloads/UnderSiege.pdf>.

121. *See* LEGAL SERVS. CORP., A REPORT ON RURAL ISSUES AND DELIVERY AND THE LSC-SPONSORED SYMPOSIUM 15 (2003).

legal community to reach the workers.¹²² Moreover, workers are “scared of being deported, know little about the American legal system, and could not, in any event, hire a lawyer.”¹²³ As stated previously, Congress realized this problem early on, and thus had dedicated earmarks for legal aid offices under the OEO and LSC to service migrant farmworkers.¹²⁴

Each summer, LSC offices employ interns to meet with workers face-to-face at their camps or at their residences.¹²⁵ These interns learn about the conditions facing workers, educate the workers on their protections under applicable laws, letting them know whether their rights under the laws have been violated.¹²⁶ This education is vital to ameliorating the barriers that indigent and immigrant workers face in accessing the legal system.¹²⁷ If the workers meet the LSC eligibility requirements, mainly for income¹²⁸ and nature of complaint,¹²⁹ the LSC office could represent the workers in initiating demand letters and in litigation,¹³⁰ including class actions.¹³¹ While LSC offices were prohibited from using federal funds to represent undocumented immigrants, before 1996 they were allowed to

122. *Id.* at 10-11. Geography and low population density means services are less prevalent and more expensive since there are far fewer private attorneys in rural areas and there do not exist the economies of scale that legal aid offices can provide in metropolitan areas. *Id.* at 17.

123. Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491, 493 (2003). This stands in sharp contrast to a citizen or lawful permanent resident (LPR): “[T]hanks to AWPA, if a grower wrongfully terminates a domestic worker, that worker just might go home, find a Legal Services lawyer, and file suit in federal court hundreds or thousands of miles away.” Holley, *supra* note 31, at 618.

124. *See* HOUSEMAN & PERLE, *supra* note 22, at 9.

125. For example, at the CORT Migrant Farmworker Training 2010, all seven states (Indiana, Illinois, Iowa, Michigan, Nebraska, Ohio, and Wisconsin) were represented by their respective LSC offices. *See* 2010 CORT Midwest Farmworker and Immigrant Worker Law Training Attendees (June 2, 2010) (on file with author).

126. *See, e.g.*, Arturo Ortiz, Senior Paralegal, ABLE & Miguel Keberlein, Supervisory Attorney, Ill. Migrant Legal Assistance Project, Migrant Outreach at the 2011 CORT Training (June 2, 2011).

127. *See* Sudha Shetty, Note, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees?*, 2 SEATTLE J. SOC. JUST. 565, 565-66 (2004).

128. A client’s household’s income may not exceed 125% of the federal poverty guidelines. Financial Eligibility Policies, 45 C.F.R. § 1611.3(c)(1) (2010).

129. *See* 42 U.S.C. § 2996f(b) (2006) (prohibiting LSC offices from taking criminal cases or cases dealing with abortion, among other restrictions.).

130. *See, e.g.*, *In re Reyes*, 814 F.2d 168 (5th Cir. 1987); *Eliserio v. Floydada Hous. Auth.*, 455 F. Supp. 2d 648 (S.D. Tex. 2006); *Paz v. Bonita Tomato Growers, Inc.*, 920 F. Supp. 174 (M.D. Fla. 1996); *Alfred v. Okeelanta Corp.*, No. 89-8250-CIV-RYSKAMP, 1990 U.S. Dist. LEXIS 21021, at *1 (S.D. Fla. 1990), *class certification granted*, No. 89-8285-CIV-RYSKAMP, 1991 U.S. Dist. LEXIS 21865 (S.D. Fla. 1991).

131. *See, e.g.*, *Murillo v. Texas A & M Univ. Sys.*, 921 F. Supp. 443 (S.D. Tex. 1996); *Alfred*, 1990 U.S. Dist. LEXIS 21021 at *47 (S.D. Fla. 1990).

use non-congressional funds to represent such workers.¹³²

This government funded interaction, and in some cases representation, drew sharp criticism from prominent groups.¹³³ The most vocal critic in this area was the Farm Bureau, which expressed concern that “legal aid lawyers educate farm employees about their rights and help them take group action to enforce those rights.”¹³⁴ These criticisms—and their proposed solutions, which included increased administrative barriers to legal aid attorneys representing farmworkers and not allowing LSC employees to make unsolicited visits to camps¹³⁵—had been made for years, as they and other organizations attempted to undermine LSC as a whole.¹³⁶ For the most part, these efforts failed to gain sufficient support in Congress.¹³⁷

In the early 1990s Senator Phil Gramm (Republican-Texas) proposed reducing LSC funding by almost \$50 million,¹³⁸ while Representatives Charlie Stenholm (Democrat-Texas) and Bill McCollum (Republican-Florida) “introduced a series of seven amendments that constituted the most sweeping contemplated congressional [sic] overhaul of LSC to date.”¹³⁹ They proposed sweeping new restrictions on the cases and activities LSC offices would be able to undertake, such as prohibiting them from class actions and fee-generating cases.¹⁴⁰ The goal was to combat what Representative McCollum termed the “extensive abuses within [LSC] by lawyers with their own political agendas actively recruiting clients, creating claims, and advancing their own social causes.”¹⁴¹ Senator Gramm’s proposal was tabled in committee thanks in large part to the influence of “longtime legal services supporter Senator Warren Rudman” (Republican-New Hampshire),¹⁴² while the Stenholm-McCollum proposal could not pass a full House vote.¹⁴³ As a result, only two minor restrictions were passed: “the ban on political redistricting cases and some restrictions on LSC-funded lobbying and rule-making.”¹⁴⁴ However, the exceptional circumstances in the mid-1990s produced a different outcome.

132. See Robert R. Kuehn, *Undermining Justice: The Legal Profession’s Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1044; see also Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19,409 (April 21, 1997) (to be codified 45 C.F.R. pt. 1626).

133. See BRENNAN CTR., *supra* note 16, at 2.

134. *Id.* at 5.

135. *Id.* at 6.

136. See generally *id.* at 2 (describing attacks by the Conservative Caucus, National Law and Policy Center, and others against LSC as advancing their own agenda, and succeeding in reducing its budget to \$278 million in 1995).

137. See, e.g., BRENNAN CTR., *supra* note 16, at 5; Hoppe, *supra* note 37.

138. Vivero, *supra* note 41, at 1326-27.

139. *Id.* at 1326.

140. *Id.*

141. 141 CONG. REC. E1220 (daily ed., June 9, 1995).

142. Vivero, *supra* note 41, at 1327.

143. *Id.* at 1326-27.

144. *Id.* at 1327.

B. 1994-97: The Perfect Storm

In 1994, there was widespread concern over illegal immigration.¹⁴⁵ Specifically, there was concern that undocumented immigrants were taking jobs while their children were becoming public charges¹⁴⁶ at a time when state budgets could not handle the additional expense.¹⁴⁷ This led voters in California, the state with the most migrant workers,¹⁴⁸ to pass Proposition 187 in November of 1994.¹⁴⁹ This ballot initiative—popularly known as Save Our State (SOS)—excluded “illegal immigrants from public social services, non emergency health care and public education.”¹⁵⁰ Proposition 187 also required “[v]arious state and local agencies . . . to report anyone suspected of being an illegal immigrant to the state attorney general and U.S. Immigration and Naturalization Service (INS).”¹⁵¹ While some parts were deemed unconstitutional in 1997,¹⁵²

145. The following passages demonstrate the heightened urgency that the issue had taken on in the fall of 1994:

California Governor Pete Wilson declared an “immigration emergency” on September 21 and argued in a third lawsuit against the federal government that the “foreign invasion” of California requires federal reimbursement for educating, incarcerating, and providing emergency health care to undocumented immigrants who arrived since 1986.

. . .

Democratic gubernatorial candidate Kathleen Brown on September 13 called for a doubling of the number of Border Patrol agents along the US-Mexican border. . . .

Immigration and the California Election, MIGRATION NEWS, Oct. 1994, available at http://migration.ucdavis.edu/mn/more.php?id=435_0_2_0.

146. *Illegal Immigration: Numbers, Benefits, and Costs in California*, MIGRATION NEWS, May 1994, available at http://migration.ucdavis.edu/mn/more.php?id=298_0_2_0 (“The massive fraud in this program--perhaps two of three persons [of the 1.1 million seasonal agricultural workers] approved did not satisfy the [Reagan amnesty] program's requirements--encouraged new streams of aliens to head north, and the growth of the false documents industry and labor contracting has enabled illegal aliens to continue to find US jobs.”). “In January 1994, Governor [Pete] Wilson estimated that the state incurred \$2.3 billion in unreimbursed costs to provide federally-mandated services to unauthorized immigrants.” *Id.*

147. See, e.g., LEGISLATIVE ANALYST’S OFFICE, FOCUS BUDGET 1994: HIGHLIGHTING MAJOR FEATURES OF THE 1994 CALIFORNIA BUDGET (1994), available at <http://www.lao.ca.gov/1994/94budget.html> (“[California] faced a 1994-[19]95 budget gap of \$4.6 billion. This gap consisted of a \$2.2 billion carryover deficit from 1993-[19]94 and a \$2.4 billion operating shortfall in 1994-[19]95 between baseline spending and projected revenues.”).

148. See NAT’L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 3.

149. *Prop. 187 Approved in California*, Migration News, Dec. 1994, http://migration.ucdavis.edu/mn/more.php?id=492_0_2_0.

150. Nancy H. Martis, #187 *Illegal Aliens. Ineligibility for Public Services. Verification and Reporting*, CAL. J. (1994), available at <http://www.calvoter.org/archive/94general/props/187.html>.

151. *Id.* The referendum was invalidated in large part in 1997 when a California district court held that it was an unconstitutional attempt to regulate immigration on a state level. *California:*

SOS's passage was indicative of the public sentiment toward undocumented immigrants in the mid-1990s.¹⁵³

Meanwhile, the Republican Party won a landslide victory in the 1994 mid-term elections, taking control of both houses of Congress.¹⁵⁴ Many Republicans were elected in part because of a commitment to reducing the size and concentration of power in the federal government, as a balanced budget amendment was a cornerstone of the Contract with America.¹⁵⁵ A component of this was either defunding social welfare programs or turning over control to states through block grants.¹⁵⁶ This attitude in Congress gave LSC critics unprecedented influence over changes to be made to LSC.¹⁵⁷ In 1995, "the House Budget Committee, chaired by John Kasich [Republican] of Ohio, passed a resolution recommending the phase-out of all LSC funding."¹⁵⁸ Also, the Legal Aid Act of 1995 was introduced, which would have devolved legal aid to state agencies, essentially eliminating LSC as a government entity.¹⁵⁹ While neither proposal passed, LSC funding and the scope of its offices' operations underwent significant changes.

With the Omnibus Consolidated Rescissions and Appropriations Act (OCRAA) of 1996, Congress reduced LSC's budget by over 30% to \$278 million.¹⁶⁰ This was LSC's lowest funding amount in nominal dollars in at least fifteen years, and a reduction of almost 50% in real dollars from its 1980 peak.¹⁶¹

Proposition 187 Unconstitutional, MIGRATION NEWS, Dec. 1997, available at http://migration.ucdavis.edu/mn/more.php?id=1391_0_2_0.

152. *California: Proposition 187 Unconstitutional*, *supra* note 151.

153. See Adam Sonfield, *The Impact of Anti-Immigrant Policy on Publicly Subsidized Reproductive Health Care*, 10 GUTTMACHER POL'Y REV. 7 (2007) ("Throughout its history, the United States has gone through cycles of anti-immigrant fervor. Such times are marked by claims that immigrants—because of excessive numbers, lack of skills and resources, or cultural isolation and differences—are a danger to the country and a drain on its resources. . . . The mid-1990s was a crest of one such cycle.").

154. R.W. Apple Jr., *The 1994 Elections: Congress - - News Analysis How Lasting a Majority?; Despite Sweeping Gains for Republicans, History Suggests the Power Is Temporary*, N.Y. TIMES, Nov. 10, 1994, <http://www.nytimes.com/1994/11/10/us/1994-elections-congress-analysis-lasting-majority-despite-sweeping-gains-for.html>.

155. See *The Fiscal Responsibility Act*, HOUSE.GOV, <http://www.house.gov/house/Contract/fiscrespd.txt> (last visited Jan. 31, 2012) (calling for a balanced budget amendment and a permanent line-item veto to reduce spending as part of the Contract with America).

156. See, e.g., *Personal Responsibility Act*, HOUSE.GOV, <http://www.house.gov/house/Contract/persrespb.txt> (last visited Jan. 31, 2012) (focusing on capping aggregate welfare spending and empowering states to take over welfare programs).

157. See Rose, *supra* note 30, at 62.

158. Vivero, *supra* note 41, at 1328.

159. Legal Aid Act of 1995, H.R. 2277, 104th Cong. § 3 (1995).

160. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50 (1996).

161. See BRENNAN CTR., *supra* note 16, at 2 ("Today, LSC struggles with an appropriation

These reductions forced LSC to close 300 field offices, and 900 attorneys were terminated.¹⁶² OCRAA also included many new restrictions in the services the remaining offices could provide.¹⁶³ While the “legislative history of the prohibition [on LSC offices undertaking class actions] is scant . . . what exists indicates that there were two primary policy reasons for the prohibition. . . .”¹⁶⁴ First, proponents of the restrictions, which by 1995 included longtime LSC supporter Senator Pete Domenici (Republican-New Mexico),¹⁶⁵ wanted LSC offices to “represent individuals only and should not seek to pursue the interests of the poor as a group.”¹⁶⁶ Opponents were concerned that, as Senator James Inhofe (Republican-Oklahoma) stated, “over a period of years [LSC] has turned into an agency that is trying to reshape the political and social fabric of America.”¹⁶⁷

Second, these opponents believed that “[a]dvocacy for political and social change for the poor is not an appropriate use of federal funds.”¹⁶⁸ Opponents claimed, in the words of Senate Majority Leader Robert Dole (Republican-Kansas), that LSC had “become . . . the instrument for bullying ordinary Americans to satisfy a liberal agenda that has been repeatedly rejected by the voters.”¹⁶⁹ Because the fee-generating provisions of the FLSA and the potentially lucrative statutory penalties under the AWPAA should convince private attorneys to take on undocumented workers’ meritorious cases, proponents reasoned, there

of just over \$300 million. Even without adjusting for inflation, that is less than the program had at its disposal in 1981. When the figure is adjusted for inflation, it is less than half of the 1981 allocation.” (emphasis omitted)).

162. Alan W. Houseman, *Legal Aid History*, in *POVERTY LAW MANUAL FOR THE NEW LAWYER* 18, 22-23 (2002).

163. *See generally*, §§ 501-15, 110 Stat. at 1321-50 to -55.

164. Rose, *supra* note 30, at 61.

165. *See* Alexander D. Forger, *Address: The Future of the Legal Services*, 25 *FORDHAM URB. L.J.* 333, 335 (1998) (referring to “our great staunch friend, Senator Domenici”).

166. Rose, *supra* note 30, at 61 (citing 141 *CONG. REC.* S14608 (daily ed. Sept. 29, 1995) (statement of Sen. Domenici)). Specifically, Senator Pete V. Domenici commented:

I want everyone to know the reason for the prohibitions is because legal services, when it was founded by Richard Nixon in association with the American Bar, intended this to represent individual poor people in individual cases, not to represent a class of poor people suing a welfare agency or suing a legislature or suing the farmers as a class.

141 *CONG. REC.* S14608.

167. 141 *CONG. REC.* S14524 (daily ed. Sept. 28, 1995) (statement of Sen. Inhofe).

168. Rose, *supra* note 30, at 61 (citation omitted). The author examined *Velazquez v. Legal Servs. Corp.* when he stated that “in discussing class actions and other restrictions, the [appropriations] committee ‘understood that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society[.]’ but did ‘not believe that such advocacy is an appropriate use of federal funds.’” *Id.* at 61 n.51 (quoting *Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 595-96 (E.D.N.Y. 2004), *aff’d in part, vacated in part sub nom.* *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006)).

169. 141 *CONG. REC.* S14605 (daily ed. Sept. 29, 1995) (statement of Sen. Dole).

was no reason for LSC offices to continue to do so.¹⁷⁰

Opponents of these reforms argued that LSC offices and their workers, in many places, were the only legal offices for the disadvantaged with legitimate causes of action to turn.¹⁷¹ The restrictions would make farmers and FLCs more likely to hire undocumented workers, since these workers do not have no-cost access to the legal system, and thus exacerbate illegal immigration.¹⁷² There were several reasons why those opposed to the restrictions believed such restrictions would lead to this outcome. First, in many areas there are no private attorneys who speak Spanish or Creole¹⁷³ and are properly trained to undertake farmworker cases.¹⁷⁴ Second, the availability of lawyers for people poor enough to qualify for LSC assistance belies the premise that private attorneys can adequately replace the representation gaps left by the restrictions¹⁷⁵ since “[t]here is about one lawyer for every 240 non-poor Americans, but only one lawyer for every 9,000 Americans whose low income would qualify for civil legal aid.”¹⁷⁶ Migrant farmworker families are much more likely to fall into the latter category than the general population, with an average household income in the range of \$15,000-17,499 and nearly one in three families living below the poverty line.¹⁷⁷ Not only

170. See H.R. REP. NO. 104-196, at 120 (1995) (“The [Appropriations] Committee believes that Federally-funded legal aid programs should serve as a catalyst, not a replacement, for private bar activity. The Committee believes that cases which provide an opportunity for the collection of attorneys fees can be serviced by the private bar.”).

171. See Taylor, *supra* note 19, at 577-78.

172. Kuehn, *supra* note 132, at 1045.

173. See, e.g., LINDA BASCH ET AL., NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION-STATES 150 (1994) (“Haitians have also become part of the migrant stream of farm workers in the eastern United States.”) (citation omitted); KATHY CARMODY & ASSOCS., THE QUEST FOR THE BEST: ATTORNEY RECRUITMENT AND RETENTION CHALLENGES IN FLORIDA CIVIL LEGAL AID 5, 13-14 (2007), available at <http://www.flabarfindn.org/downloads/pdf/recruitment.pdf> (surveying over 300 legal aid attorneys in Florida, and finding less than 30% reported speaking Spanish, and less than 2% reported speaking Creole).

174. See generally Marshall J. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. REV. 1115, 1123 (1982) (“Conflicted legal aid clients, however, are likely to go without legal assistance if a legal aid office cannot represent them, as significant alternatives to legal aid and supplemental modes of legal representation for indigents exist in only a few areas of the country.”).

175. See Rose, *supra* note 30, at 64 (“The reality is that private attorneys will not be willing to pursue all worthy class actions on behalf of low-income clients.”).

176. Kuehn, *supra* note 132, at 1041 (quoting David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209, 211 (2003)); see also Delayed Update of the HHS Poverty Guidelines for the Remainder of 2010, 75 Fed. Reg. 45628-02 (Aug. 3, 2010) [hereinafter Delayed Update] (setting the threshold for civil legal aid in the contiguous forty-eight states and District of Columbia at \$18,310 for a family of three and \$22,050 for a family of four).

177. U.S. DEP’T OF LABOR, *supra* note 8, at 47. Moreover, the much higher fertility rates for

does this income level make them eligible for civil legal aid, it makes hiring a private attorney cost-prohibitive for most migrant families.¹⁷⁸ Moreover, attorneys who are willing and able to serve indigent clients are not evenly distributed but are instead mostly concentrated in larger urban areas;¹⁷⁹ this is especially true for non-LSC legal aid organizations.¹⁸⁰ As a result, “[a]lthough one in seven Americans lives in poverty, only one percent of attorneys are dedicated to serving the legal needs of the poor.”¹⁸¹ In many states, this only leaves “poor persons to appear in court proceedings pro se,”¹⁸² which many will never do.¹⁸³ Thus, opponents argued, farmers and FLCs are likely to subject the undocumented workers to worse working conditions than they would for citizens or documented immigrants, since the former group would likely not have access to low or no-cost legal aid.¹⁸⁴

However, OCRAA passed largely along partisan lines¹⁸⁵ and contained massive restrictions for LSC offices generally and specifically in respect to immigrants. First, section 504(a)(7) stated, “[n]one of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a ‘recipient’) . . . that initiates or participates in a class action suit.”¹⁸⁶ This restriction on class actions based on Federal Rule of Civil Procedure 23¹⁸⁷ took

Hispanic women—101.5 live births per 1,000 women aged 15 to 44 in 2006, compared to 59.5 for non-Hispanic white and 70.6 for non-Hispanic black women—means more people may have to survive on that income. Joyce A. Martin et al., *Births: Final Data for 2006*, NAT’L VITAL STAT. REP., Jan. 7, 2009 at 52, available at http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_07.pdf.

178. See Delayed Update, *supra* note 176 (stating that the median income range for migrant farmworker families falls below the income threshold for civil legal aid).

179. See LEGAL SERVS. CORP., *supra* note 121, at 17-18.

180. In Indiana, non-LSC legal aid offices are located in only the two largest cities, Indianapolis and Fort Wayne. See *ILAS Basics*, INDIANAPOLIS LEGAL AID SOC’Y, <http://www.indylas.org/> (last visited Jan. 26, 2012); NEIGHBORHOOD CHRISTIAN LEGAL CLINIC-INDIANAPOLIS, <http://www.nlegalclinic.org/ContactUs.aspx> (last visited Feb. 8, 2012); NEIGHBORHOOD CHRISTIAN LEGAL CLINIC-FORT WAYNE, <http://www.nlegalclinic.org/ftwayne> (last visited Feb. 8, 2012). However, LSC-funded Indiana Legal Services operates in ten cities. See *About Us*, IND. LEGAL SERVICES, <http://www.indianajustice.org/Home/PublicWeb/About/Offices> (last visited Jan. 26, 2012).

181. Kuehn, *supra* note 132, at 1041.

182. *Id.* at 1046.

183. In the six states examined in Part II of the statistical analysis, there were no pro se AWPA actions filed in the 2005-2009 period. See *infra* notes 201-40 and accompanying text.

184. See Kuehn, *supra* note 132, at 1045.

185. Two hundred and seven Republicans and 2 Democrats voted in favor and 21 Republicans, 184 Democrats, and 1 Independent voted against. *Final Vote Results for Roll Call 55*, OFF. CLERK (Mar. 7, 1996), <http://clerk.house.gov/evs/1996/roll055.xml>.

186. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 (1996).

187. Definitions, 45 C.F.R. § 1617.2(a) (2011) (“Class action means a lawsuit filed as, or

away one of the most useful litigation tools for both migrant workers and LSC offices. Migrant workers, with their large numbers and common issues, sometimes met the requirements for class certification.¹⁸⁸ For LSC offices—almost all of which operate on tight budgets¹⁸⁹—class action suits afforded these offices the chance to pursue claims for many workers in an economically efficient manner.¹⁹⁰

Class actions were also attractive to LSC offices for migrant farmworker litigation because they could obtain attorney fees if the suit was successful.¹⁹¹ This enabled LSCs to take cases centered on AWPAs claims, which do not otherwise generate attorney fees,¹⁹² in addition to FLSA, which provides for them.¹⁹³ However, section 504(a)(13) of OCRAA prohibited LSC offices not only from taking attorney fees, but also from taking cases that could generate those fees (i.e., they could not simply take the case and refuse to collect fees).¹⁹⁴ This restriction meant that LSC offices could not join FLSA and AWPAs claims for qualified clients.¹⁹⁵

Third, and most importantly for this Note, section 504(a)(11) established an absolute bar to undocumented immigrants being represented by LSC offices.¹⁹⁶ The section stated that:

(a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity

otherwise declared by the court having jurisdiction over the case to be, a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. . . .”). As noted above, this restriction does not apply to non-Rule 23 class actions, such as “a collective action claim under the Fair Labor Standards Act [29 U.S.C. §§ 201-19 (2006 & Supp. 2010)].” Krisher, *supra* note 5.

188. See *supra* note 131 and accompanying text.

189. Federal funding accounts for only approximately \$10.00 per potential client per year, and LSC offices generally spend approximately \$150 per actual client. Holley, *supra* note 31, at 613.

190. See generally, *In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993) (holding that “[i]n the instant case, society’s interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights”).

191. FED. R. CIV. P. 23(h).

192. See, e.g., *Gooden v. Blanding*, 686 F. Supp. 896, 897 (S.D. Fla. 1988).

193. 29 U.S.C. § 216(b) (2006).

194. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. Law No. 104-134, § 504(a)(13), 110 Stat. 1321, 1321-55 (1996) (“None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a ‘recipient’) . . . that claims (or whose employee claims), or collects and retains, attorneys’ fees pursuant to any Federal or State law permitting or requiring the awarding of such fees.”); see also General Requirements, 45 C.F.R. § 1609.3 (2010) (repealing the restriction in 2010, but determining that LSC offices may only take on these cases when a non-LSC attorney is unable to).

195. See *supra* text accompanying notes 191-94.

196. § 504(a)(11), 110 Stat. at 1321-54 to -55.

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is—

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).¹⁹⁷

Despite the statutory language referring only to the LSC-appropriated funds,¹⁹⁸ OCRAA barred offices from using *non*-congressional funds (e.g. private donors, bar associations, interest on lawyers' trust accounts (IOLTAs), etc.) to represent undocumented immigrants.¹⁹⁹ Therefore, to be represented by an LSC attorney, an otherwise-qualified potential client must either prove her status as a legal immigrant²⁰⁰ or sign an attestation form affirming that she is a U.S. citizen.²⁰¹

The additional restrictions have undoubtedly raised procedural hurdles to migrant farmworkers achieving access to the legal system.²⁰² However, the

197. *Id.* Subsections (B)-(F) list additional, minor exceptions. *Id.* § 504. An important additional exception, popularly known as the Kennedy Amendment, was passed later in 1996 to allow LSC offices to represent undocumented immigrants and their children who “ha[ve] been battered or subjected to extreme cruelty in the United States.” Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a)(2)(C), 110 Stat. 3009, 3009-60 (1996), *amended by* Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 104, 119 Stat. 2960, 2978-79 (2006); *see also* Applicability [on Restrictions on Legal Assistance to Aliens], 45 C.F.R. § 1626.4(a) (2010). The Victims of Trafficking and Violence Protection Act of 2000 was passed in 2000 and amended in 2005 to expand coverage to immigrants who were victims of severe trafficking. 22 U.S.C. § 7105(b)(1)(B) (2006).

198. § 504(a), 110 Stat. at 1321-53 (“None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity.”).

199. Definitions [Regarding Use of Non-LSC Funds, Transfer of LSC Funds, Program Integrity], 45 C.F.R. § 1610.2 (2010); Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. 19,409 (April 21, 1997) (to be codified at 45 C.F.R. pt. 1626). LSC offices were allowed to represent undocumented immigrants when operating under the 1983 Amendment to the Legal Services Corporation Act, which had only prohibited Congressional funds from being used. Restrictions on Legal Assistance to Aliens, 62 Fed. Reg. at 19,409.

200. Verification of Eligible Alien Status, 45 C.F.R. § 1626.7 (2010). The latter provision is rarely used, because although H-2(A) temporary agricultural workers may be represented by LSC attorneys, they are not protected under the AWP. 29 U.S.C. § 1802(8)(B)(ii) (2006) (“The term ‘migrant agricultural worker’ does not include . . . (ii) any temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under [29 U.S.C. §§] 1101(a)(15)(H)(ii)(A) and 1184(c). . . .”); *Id.* § 1802 (10)(B)(iii) (excluding H-2(A) workers from the term “seasonal agricultural worker”).

201. Verification of Citizenship, 45 C.F.R. § 1626.6 (2010).

202. *See, e.g.*, BRENNAN CTR. FOR JUSTICE, LEFT OUT IN THE COLD: HOW CLIENTS ARE AFFECTED BY RESTRICTIONS ON THEIR LEGAL SERVICES LAWYERS 6 (2000) (recounting the story of a woman whose class-action suit against Butte County, California was delayed because LSC attorneys had to withdraw).

question of whether this has caused an actual drop in migrant farmworker litigation has not been subject to empirical test, which this Note now does.

III. IMPACT OF LSC RESTRICTIONS ON LITIGATION RATES

A. *Explanation of Methodology*

This section seeks to test two main hypotheses. The first is that overall litigation on behalf of migrant farmworkers has declined since the passage of the 1996 restrictions, and therefore that private or non-LSC attorneys have not assumed the cases that LSC attorneys were prohibited from taking. The second is that there is a difference in litigation rates between states that have non-LSC legal aid organizations that reach out to and represent migrant farmworkers and those that do not. In other words, when there is not a migrant focused non-LSC organization, undocumented migrant workers have no practical legal recourse.²⁰³ These are two related but distinct concepts that require separate measurements.

For the first hypothesis, I examine the rates of published and unpublished cases filed in the ten years before the restrictions took effect (1987-1996) and the first full ten years after (1997-2006).²⁰⁴ While this data does not provide complete information on litigation, it is a reasonable metric that covers a time period sufficient to measure the true impact of the restrictions. Moreover, the scope of publications available on electronic databases (on either Public Access to Court Electronic Records (PACER) or private databases such as LexisNexis or Westlaw) for much of this time period does not extend beyond the published and unpublished decisions in many cases.²⁰⁵ The broad time frame was necessary to ensure there were enough cases from which to draw meaningful conclusions; despite the private right of action afforded to documented and undocumented workers under AWPAs and FLSA, neither statute is heavily litigated, as the results show.²⁰⁶

203. See, e.g., Taylor, *supra* note 19, at 577-78.

204. The search was conducted by conducting searches on Westlaw or WestlawNext and LexisNexis for both periods. LEXIS NEXIS, <http://lexisnexis.com/lawschool> (searching: "Agricultural Workers Protection Act" OR "29 USC 1801" and date (geq (01/01/1987) and leq (12/31/1996)), and date (geq (01/01/1997) and leq (12/31/2006)); "Fair Labor Standards Act" AND migrant w/15 farm! AND NOT "Agricultural Workers Protection Act" and date (geq (01/01/1987) and leq (12/31/1996), and date (geq (01/01/1997) and leq (12/31/2006)). WESTLAWNEXT, <http://next.westlaw.com> (searching: "Agricult! Work! Protect! Act" between 01/01/1987 and 12/31/1996, and 01/01/1997 and 12/31/2006). WESTLAW, <http://lawschool.westlaw.com> (searching: "Fair Labor Standards Act" AND migrant w/15 farm! AND NOT "Agricultural Workers Protection Act" and date (geq (01/01/1987) and leq (12/31/1996), and date (geq (01/01/1997) and leq (12/31/2006)).

205. For instance, on WestlawNext, there were 986 documents listed under Pleadings and Motions in civil cases pertaining to the AWPAs. None of these documents predates 1995, and only seven predate 2000 (search results on file with author).

206. The low rates of litigation are even more troubling considering that migrant farmworker

I conducted searches on Westlaw and LexisNexis for both periods.²⁰⁷ After compiling the list of cases, I eliminated the appellate opinions in those cases for which the trial court's opinion was already available or appeals by a farmer or FLC from an adverse administrative decision. This narrowed the list of cases to only farmworker-actuated complaints.

For the second hypothesis, the total filings from the more recent period of 2005-2009 were examined. This was chosen for two reasons. First, electronic copies of court documents had become widely available by this time.²⁰⁸ Examining case filings allows for more meaningful state-by-state comparisons since it presents a more complete picture of filed litigation than reported and unreported decisions. Second, the filing records indicate whether an LSC office, non-LSC office, or private attorney filed each case. The state-by-state analysis centered on Midwestern states in an attempt to reduce any geographically-derived differences. I examined three states—Indiana, Iowa, and Wisconsin—in which an LSC office was the only state legal aid dedicated to assisting migrant workers, and three states—Illinois, Michigan, and Ohio—where there is a non-LSC indigent legal aid organization with a migrant farmworker outreach program.²⁰⁹ Each of these states has an LSC-funded migrant outreach program as well.²¹⁰ For this section, I conducted a WestlawNext search for AWPA filings from January 1, 2005 through December 31, 2009.²¹¹

B. Results and Discussion

1. *Decided Case Rates.*—The results from each test confirmed the hypotheses. In examining the decided case rates, the number of published and unpublished decisions declined by 30% over the decade, from 116 in 1987-1996 to only 81 in 1997-2006. The drop outside the big three migrant states of Florida, Texas, and California (and the Eleventh, Fifth, and Ninth Circuits, respectively) was slightly more pronounced, declining from sixty-five to forty-one cases. The most common states in which suits were filed outside of those three were Michigan and New York (eleven of the forty-one non-Florida, Texas, or

camp are still seriously lacking in oversight by U.S. and state department of labor inspectors. See Marsha Chien, *When Two Laws Are Better Than One: Protecting the Rights of Migrant Workers*, 28 BERKELEY J. INT'L L. 15, 24 (2010) (“In 2001, the U.S. Department of Labor (DOL) employed just 23 to 24 full-time officials to conduct over 2,000 AWPA investigations. . . . [and] nearly half of those investigations yielded findings of AWPA violations.”).

207. See *supra* note 204 and accompanying text.

208. See *supra* note 204 and accompanying text.

209. *LSC Programs*, LEGAL SERVICES CORP., <http://www.lsc.gov/find-legal-aid> (last visited Jan. 27, 2012).

210. *Id.*

211. The cases listed are those where I found at least one document related to an AWPA filing. I cite to the original complaint where available. I traced the PACER records from one district and obtained filing records from the court clerks in three district courts. In all four instances the records were less complete than what I found on WestlawNext.

California cases). Both states have well-established non-LSC migrant farmworker legal aid programs,²¹² and seven of the eleven cases were filed by those agencies.²¹³ This decline underscores the void that the LSC representation restrictions have created in states where an LSC office is the only indigent legal aid service for migrant workers. It also demonstrates that non-LSC offices and private attorneys are not filling the void created by the drop in LSC litigation. However, an examination of class actions yields an important exception to this finding.

Table 1: Differences in Adjudication Rates Before and After LSC Restrictions

	1987-1996	1997-2006
Total Cases	115	81
Cases Excluding TX, FL, CA	65	41
Total Class Actions	14	16
Class Actions Litigated by LSC Offices	8	0 ²¹⁴
Class Actions Litigated by Non-LSC Offices	5	8
Class Actions Litigated by Private Attorneys	1 ²¹⁵	7

Class action suits actually increased slightly in the 1997-2006 period, both in the number of suits filed and as a proportion of all suits filed. Whereas just fourteen suits filed in 1987-1996 were class actions, approximately 12% of the total lawsuits; fifteen were filed in the next ten years, approximately 18%. Moreover, non-LSC and private attorneys helped to almost completely fill the

212. FARMWORKER LEGAL SERVICES N.Y., <http://wp.flsny.org> (last visited Jan. 27, 2012) (providing services in New York); MIGRANT LEGAL AID, <http://migrantlegalaid.com> (last visited Jan. 27, 2012) (providing services in Michigan).

213. Javier H. v. Garcia-Botello, 239 F.R.D. 342 (W.D.N.Y. 2006); Galaviz-Zamora v. Brady Farms, Inc., 230 F.R.D. 499 (W.D. Mich. 2005); De La Cruz v. Gill Corn Farms, Inc., No. 03-CV-1133, 2005 WL 5419057 (N.D.N.Y. April 13, 2005); Centeno-Bernuy v. Perry, 302 F. Supp. 2d 128 (W.D.N.Y. 2003); Centeno-Bernuy v. Becker Farms, 219 F.R.D. 59 (W.D.N.Y. 2003); Roebuck v. Hudson Valley Farms, Inc., 239 F. Supp. 2d 234 (N.D.N.Y. 2002); Saur v. Snappy Apple Farms, Inc., 203 F.R.D. 281 (W.D. Mich. 2001).

214. Morales-Arcadio v. Shannon Produce Farms, 237 F.R.D. 700, 701 (S.D. Ga. 2006) (noting that an LSC attorney represented some of the plaintiffs in a collective action under FLSA). However, this was not a class action undertaken pursuant to Federal Rule of Civil Procedure 23, which is prohibited under the Omnibus Consolidated Rescissions and Appropriations Act of 1996. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(7), 110 Stat. 1321, 1321-53 (1996).

215. Hardy v. Ross, No. 9-89-2379-3, 1989 WL 161161, *2 (D. S.C. 1989). Robert Willis, the lead attorney in this case, was not listed as being affiliated with an LSC or non-LSC legal aid organization. *Id.*

void left by LSC restrictions, both in class actions and undocumented immigrant representation. As noted above, this restriction prevents LSC offices from representing documented workers in Rule 23 class action suits.²¹⁶ From 1987 to 1996, of the fourteen suits filed, eight were filed by LSC attorneys, five by non-LSC legal aid attorneys, and only one by a private attorney. From 1997 to 2006 the numbers were reversed: nine were filed by non-LSC legal aid attorneys, six by private attorneys, and only one by an LSC attorney. This shows that while private attorneys may not be willing or able to take up regular cases, the more lucrative nature and broader scope of attorney fees from class actions convinces at least some private firms to take on farmworker claims in class actions.²¹⁷ The large number of workers at many farms—especially for jobs such as corn detasseling²¹⁸—and the common circumstances facing those workers make them especially good candidates for class action suits. This is discussed in greater detail in Part IV.

2. *Multi-state Comparisons.*—The comparison of filing rates under the AWPAs from the WestlawNext search between LSC-only and non-LSC-only states clearly demonstrates that the concerns voiced by opponents of LSC restrictions have been borne out. The void left by LSC offices being unable to represent undocumented immigrants has not been filled by private attorneys, and the result is that litigation on behalf of undocumented workers is almost nonexistent in LSC-only states. In Indiana, Iowa, and Wisconsin, the three LSC-only states, there were only four suits filed from January 2005 until the end of 2009, and only one was a class action. Three of these cases were filed in Indiana.²¹⁹ In each of these cases, an LSC attorney represented documented immigrants or citizens. One of these cases reached a verdict, which awarded the

216. “None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to *any* person or entity (which may be referred to in this section as a ‘recipient’) . . . that initiates or participates in a class action suit.” § 504(a)(7), 110 Stat. at 1321-53 (emphasis added); *see also supra* note 187 and accompanying text.

217. As noted above, a class action lawsuit provides for attorney fees for AWPAs claims where a regular suit would not allow for these. *See, e.g.,* Gooden v. Blanding, 686 F. Supp. 896, 897 (S.D. Fla. 1988). Because of the broader scope of people covered under the AWPAs, the number of plaintiffs can be much greater than in a FLSA class action claim. *See supra* notes 107-10 and accompanying text.

218. *See, e.g.,* *LaGrange County Agricultural Labor Camps*, IND. STATE DEP’T OF HEALTH, <http://www.in.gov/isdh/22746.htm> (last visited Jan. 29, 2012) (providing information on the Howe Military School, the largest migrant labor camp in Indiana in 2010, which was licensed to house up to 331 workers who detassel corn).

219. Complaint, *Gallardo-Lopez v. Red Gold, Inc.*, No. 1:09-cv-0038SEB-JMS, 2009 WL 1968371 (S.D. Ind. 2009); Complaint, *Martinez v. Mendoza*, 595 F. Supp. 2d 923 (N.D. Ind. 2009) (No. 4:08-cv-00021); Plaintiffs [sic] Original Complaint, *Arvizu v. JP McClure Enters.*, No. 3:07-cv-0417PC, 2007 WL 4446812 (N.D. Ind. 2007). The fourth suit in LSC-only states was a class action. First Amended Class Action Complaint, *Martinez v. Twin Garden Sales, Inc.*, No. 2:09-cv-00653, 2009 WL 2600733 (E.D. Wis. 2009).

farmworkers almost \$17,000 in damages from their FLCs.²²⁰ The only Wisconsin case was a class action filed by workers represented by a private attorney.²²¹ There were no cases filed in Iowa.

States with non-LSC offices, on the other hand, had much more robust litigation, both in gross litigation rates and the proportion of class action suits, with six class actions and sixteen total lawsuits filed in that time period. In Michigan alone, there were eleven lawsuits filed.²²² In ten of these cases, attorneys from Migrant Legal Aid, a non-LSC legal aid organization in Michigan, represented the plaintiffs.²²³ This included five class actions. In one non-class action case, plaintiffs were represented solely by a private attorney.²²⁴ In Illinois, four lawsuits were filed,²²⁵ one of which was a class action filed by a private attorney.²²⁶ In two of the cases, the Illinois Migrant Legal Assistance Project (ILMAP)—an LSC agency—represented the plaintiff farmworkers,²²⁷ and in two the workers were represented by Farmworker Advocacy Project, a non-LSC program.²²⁸ In Ohio, there were only two suits filed during this time, one of

220. *Martinez*, 595 F. Supp. 2d at 928.

221. First Amended Class Action Complaint, *supra* note 219.

222. *Lopez v. Sutton*, No. 1:08-cv-531, 2009 WL 2777098 (W.D. Mich. 2009); Joint Motion for Dismissal with Prejudice Following Approval of Settlement, *Manzano v. Bartley*, No. 1:08-cv-204, 2009 WL 3813480 (W.D. Mich. 2009); *Jimenez v. Lakeside Pic-n-Pac, L.L.C.*, 13 Wage & Hour Cas. 2d (BNA) 624 (W.D. Mich. 2007); Plaintiff's Original Complaint, *Salinas v. Janssen*, No. 07-10979, 2007 WL 1316685 (E.D. Mich. 2007); Third Amended Complaint and Jury Demand, *Bautista v. Twin Lake Farms, Inc.*, No. 1:04-cv-483, 2007 WL 329162 (W.D. Mich. 2007); Plaintiffs' Original Complaint, *Barcenas v. Stocchiero*, No. 1:07-cv-36, 2007 WL 697632 (W.D. Mich. 2007); Plaintiff's First Amended Complaint & Jury Demand, *Flores v. Carini Farms, Inc.*, No. 1:06-cv-0475, 2006 WL 5171205 (W.D. Mich. 2006); Complaint and Jury Demand, *Cano v. Horkey*, No. 1:06-cv-0621, 2006 WL 2785322 (W.D. Mich. 2006); Plaintiffs' Original Complaint, *Rojas v. Salazar*, No. 4:06-cv-0076, 2006 WL 2320329 (W.D. Mich. 2006); Plaintiff's Original Complaint, *Palomin v. Hagen*, No. 1:05-cv-10171, 2005 WL 2142744 (E.D. Mich. 2005); Class Action Complaint, *Guerrero v. Brickman Grp., LLC*, No. 1:05-cv-0357, 2005 WL 1521281 (W.D. Mich. 2005).

223. See *Salinas*, 2007 WL 1316685, at *1 (noting that LSC office represented plaintiffs jointly with Migrant Legal Aid).

224. *Lopez v. Sutton*, 2009 WL 2752111, at *1 (W.D. Mich. 2009). In *Bautista v. Twin Lake Farms, Inc.*, a private attorney partnered with Migrant Legal Aid to represent plaintiff farmworkers. *Bautista v. Twin Lake Farms, Inc.*, 2006 WL 4036514, at *1 (W.D. Mich. 2006).

225. Complaint, *Rojas v. Mariani Nursery, Inc.*, No. 1:09-cv-05667, 2009 WL 3007833 (N.D. Ill. 2009); Complaint, *Martinez v. Herbal Garden, Inc.*, No. 1:07-cv-4238, 2007 WL 2666465 (N.D. Ill. 2007); Complaint, *Garcia v. Hubner Farms*, No. 2:05-cv-02093, 2005 WL 4114458 (C.D. Ill. 2005); Plaintiffs' Petition for Award of Damages, *Reyes v. Remington Hybrid Seed Co.*, No. 02-2239, 2005 WL 5912152 (C.D. Ill. 2005).

226. *Rojas*, 2009 WL 3007833, at *1 (noting that private attorney represented plaintiffs jointly with the Farmworker Advocacy Program).

227. *Garcia*, 2005 WL 4114458, at *1; *Reyes*, 2005 WL 5912152, at *1.

228. *Rojas*, 2009 WL 3007833, at *1; *Martinez*, 2007 WL 2666465, at *1.

which was filed by Advocates for Basic Legal Equality, Inc. (ABLE), a non-LSC legal aid organization.²²⁹ The other suit was filed pro se.²³⁰

Table 2: Differences in Litigation Rates Between States that Have Non-LSC Legal Aid Offices and Those that Do Not

	LSC-Only States (Indiana, Iowa, and Wisconsin)	Non-LSC-Only States (Illinois, Michigan, and Ohio)
Total Cases Filed	4	16
Cases per Migrant Worker²³¹	1 per 16,000	1 per 16,750
Total Class Actions	1	6
Cases Litigated by LSC Office	3	1
Cases Litigated by Non-LSC Office or Private Attorney Excluding Class Actions	0	8

There are limitations to this data, especially the high settlement and low judgment rates²³² and the inability to determine the immigration status of those workers represented by private attorneys and non-LSC offices.²³³ Also, the act of filing suit does not necessarily equate with the merits of the case.²³⁴ Nonetheless, several conclusions may be reasonably drawn from these findings. First, while the number of cases is higher in states with established non-LSC migrant worker legal aid programs, the rate is still incredibly low given the number of workers and the rate at which violations are reported or found upon inspection. In 2001, for example, there were nearly 1,000 violations found during

229. Complaint, *Villegas v. Wenig Bros. Specialty Crops, Ltd.*, No. 3:07-cv-02188-JZ, 2007 WL 2400318, at *1 (N.D. Ohio 2007).

230. Complaint, *Orozco v. K.W. Zellers & Son, Inc.*, No. 5:09-cv-00216, 2009 WL 3443710, at *1 (N.D. Ohio 2009).

231. Population data derived from NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 3-4.

232. Only *Martinez v. Mendoza* actually had a reported judgment. *Martinez v. Mendoza*, 595 F. Supp. 2d 923, 928 (N.D. Ind. 2009).

233. *See, e.g., In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) ("The district court, therefore, was also in error in concluding that inquiry into the documentation of alien petitioners for purposes of determining coverage under the FLSA and AWPA was warranted.")

234. However, seventeen of the cases were filed by LSC and non-LSC legal aid organizations, which operate on tight budgets and cannot afford to waste resources on baseless or questionable litigation. *See, e.g., Rebecca Berfanger, Cuts Proposed to LSC Budget Would Affect ILS*, IND. LAWYER (Feb. 10, 2011), <http://www.theindianalawyer.com/cuts-proposed-to-lsc-budget-would-affect-ils/PARAMS/article/25741>.

only 2,000 inspections.²³⁵

Second, merely examining the rates of litigation as a proportion of the population is misleading. There was approximately one lawsuit filed for every 16,000 migrant workers in the LSC-only states,²³⁶ while there was approximately one filed for every 16,750 workers in the states with non-LSC organizations.²³⁷ However, this does not mean that the quality of the litigation between the states is equivalent. In only one of the four cases filed in LSC-only states did a non-LSC attorney litigate on behalf of migrant workers.²³⁸ That case was a class action.²³⁹ In the states with non-LSC offices, thirteen of the sixteen cases were litigated solely by non-LSC attorneys, including eight suits that were not class actions.

These numbers demonstrate that when a suit filed under AWPAA is not a class action—and thus the attorney cannot expect attorney fees from the opposing party—legal aid attorneys are essentially the only ones who will take the cases. In states with non-LSC legal aid options, those agencies have stepped in and filled the gap for migrant workers, many of whom are likely undocumented.²⁴⁰ In states where there is not such an agency, the gap goes unfilled for workers who do not have sufficient numbers or cannot find a private attorney to institute a class action. Thus, the chief fear voiced by opponents of the LSC restrictions that went into effect with OCRAA in 1996—that the restrictions would close off the only avenue for representation undocumented workers have—appears to have been borne out in states that do not have non-LSC legal aid organizations. Fortunately, there are several relatively simple solutions that could improve representation greatly.

D. Proposed Solutions

At a time when state governments are substantially reducing projects and services to attempt to reduce their operating deficits,²⁴¹ and the federal

235. Chien, *supra* note 206, at 24.

236. There were approximately 64,000 workers in 1993 in Iowa, Ohio, and Wisconsin. NAT'L CTR. FOR FARMWORKER HEALTH, INC., *supra* note 7, at 3-4.

237. There were approximately 280,865 workers in 1993 in Illinois, Michigan, and Ohio. *Id.* If Alice Larson's 2006 survey of Michigan farmworkers (90,228) replaced the 1993 number (161,020), the total would drop to 210,073 and the proportion would increase to approximately one for every 13,100. LARSON, *supra* note 73, at 21. For the sake of complete comparison, this Note uses the 1993 numbers.

238. First Amended Class Action Complaint, *supra* note 219.

239. *Id.*

240. It is difficult to ascertain the proportion of undocumented workers who are plaintiffs in litigation. However, as stated above, the U.S. Department of Labor estimated fifty-three percent of workers are undocumented immigrants. U.S. DEP'T OF LABOR, *supra* note 8, at ix.

241. See, e.g., Mary Beth Schneider, *Daniels Gets Pushback on Budget*, INDIANAPOLIS STAR, Jan. 14, 2011, at A1.

government examining ways to do so as well,²⁴² it is probably unrealistic to expect increased funding for the LSC migrant farmworker earmark or for the U.S. or state departments of health or labor to hire more agricultural camp inspectors. Also, the current political discourse makes a full repeal of the ban on representation unlikely. For example, the Obama Administration's fiscal year 2010 and 2011 budgets called for removing the prohibition of LSC offices using non-LSC funds to perform restricted legal activities, restoring the pre-1996 status quo in those areas.²⁴³ However, there is no record of the administration advocating repeal of the outright ban on representing undocumented immigrants.

Therefore, other solutions that have realistic prospects of passing and do not strain budgets must be considered. The easiest—and certainly cheapest—remedy would be to increase the statutory penalties against farmers and FLCs for violations of the AWPAs. The current fine of \$500 per worker per violation²⁴⁴ may not be sufficient to deter farmers who only employ a few workers from committing some of the abuses described above. These smaller farms comprise a large number of the total farms employing migrant workers, as the median number of migrant workers at a migrant labor camp registered with the Indiana State Department of Health (ISDH) is twelve.²⁴⁵ Gradually increasing the fine to \$2,000 per worker per violation (annually or biennially in \$500 increments) may provide sufficient incentive for farmers to treat workers fairly under the law, since they would not want to risk litigation and potential fines four times greater than what they face now. However, this does not seem to be too great an amount to be unduly punitive.

The increased fines may also incentivize private attorneys to take meritorious cases on contingency, since the payoff for the plaintiffs (and, consequently, the attorney) would be larger. Increased fines for repeat offenders may also deter farmers or FLCs from taking the chance that they can abuse their workers and not be sued or investigated again.²⁴⁶ Given the anemic rates of AWPAs inspections

242. See, e.g., Jackie Calmes, *Panel Seeks Social Security Cuts and Higher Taxes*, N.Y. TIMES, Nov. 10, 2010, at A1, available at <http://www.nytimes.com/2010/11/11/us/politics/11fiscal.html>.

243. *National Campaign to Fix the Legal Services Restrictions*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/pages/lsc_national_campaign (last visited Feb. 15, 2012) [hereinafter *National Campaign*]. However, it did not pass in the fiscal year 2010 or 2011 budgets. *FY2011 Appropriations Process for Civil Legal Services*, BRENNAN CTR. FOR JUSTICE, http://www.brennancenter.org/content/resource/FY11_legal_services/ (last visited Jan. 29, 2012).

244. 29 U.S.C. § 1854(c)(1) (2006).

245. A review of the fifty-nine camps registered with the ISDH from 2008 until June 2010 shows that, while the average number of potential workers a camp is registered for is 45.33, this number is skewed by seven camps being registered for more than 100 workers. *Agricultural Labor Camps Roster*, IND. STATE DEP'T HEALTH, <http://www.in.gov/isdh/23455.htm> (last visited Jan. 29, 2012).

246. The Occupational Safety and Health Act allows for a maximum fine to repeat serious offenders of ten times the maximum amount for first-time serious offenders. 29 U.S.C. § 666. While an increase of that magnitude is probably not feasible or even desirable, tripling fines for repeat offenders would still likely have the desired deterrent effect.

and litigation,²⁴⁷ these may be the most effective means of improving conditions.

The more robust rates of non-LSC litigation in states where there are non-LSC migrant legal aid agencies²⁴⁸ demonstrates that the best, and perhaps only, way to effectively advocate for undocumented immigrants is for states to have non-LSC offices that deal with migrant issues. To achieve this end, state legislatures and bar associations should provide funding to non-LSC legal aid offices to hire attorneys who can undertake such cases. Alternatively, the funding could be used to set up a trust to pay attorney fees for private attorneys who agree to take on non-class action AWPAs, since successful AWPAs alone will not generate attorney fees. This funding should also go toward furthering partnerships between LSC offices and those attorneys who would take on the cases for undocumented workers. With LSC outreach workers using their federal funding to make the initial contacts with workers and perform the initial intake, the time and expense for the representing attorney in finding the clients may be reduced. With this close collaboration, undocumented workers would have their most comprehensive access to the legal system since the LSC restrictions took effect.

Finally, as the empirical findings revealed, the rate of class actions have held steady amidst a sharp drop in overall litigation rates, and private attorneys and non-LSC offices have played a major role in making that happen.²⁴⁹ Section 504(a)(7) of OCRAA, the prohibition on LSC offices undertaking Rule 23-based class action suits,²⁵⁰ could be relaxed to allow these offices to represent documented workers in AWPAs class actions.²⁵¹ This would be a sensible compromise between those who advocate a full repeal of the prohibitions on class actions and representing undocumented immigrants²⁵² and those who want to maintain a complete barrier or defund LSC altogether.²⁵³

Implementing a fund to provide fees for private attorneys to take on undocumented worker cases will take time. In the meantime, documented workers—especially in those states where there is not a non-LSC office available to represent them—should not be put at a disadvantage by having the class action option closed off to them. Also, as *Bautista v. Twin Lake Farms, Inc.* demonstrates, LSC and non-LSC offices in the same state have worked together

247. See *supra* notes 220-40 and accompanying text.

248. See *supra* notes 220-40 and accompanying text.

249. See *supra* notes 220-40 and accompanying text.

250. See 45 C.F.R. § 1617.2(a) (2010).

251. See *supra* note 186 and accompanying text.

252. See, e.g., Elizabeth Johnston, Note, *The United States Guestworker Program: The Need for Reform*, 43 VAND. J. TRANSNAT'L L. 1121, 1144-45 (2010) (describing the need for this reform for H-2(A) guestworkers). As stated above, a full repeal of the class action prohibition was proposed as part of the Fiscal Year 2011 (FY11) omnibus spending bill. Von Spakovsky, *supra* note 5. However, this was not included in the FY11 budget. *National Campaign*, *supra* note 243.

253. See, e.g., Peter Flaherty, *New Congress Must Defund Legal Services Corporation, AARP, and Soros*, NAT'L LEGAL & POL'Y CENTER (Nov. 11, 2010), <http://www.nlpc.org/stories/2010/11/11/new-congress-must-defund-legal-services-corporation-aarp-and-soros>.

successfully to represent their respective clients against a common adversary.²⁵⁴ Allowing LSC offices to represent migrant farmworkers in class action suits would achieve two goals. First, it would increase efficiency, since there would not be multiple class actions or one class action and many individual suits against the farmer. Second, it would do so without compromising the effectiveness of representation, since the workers would not have to choose between switching counsel and losing their class membership.

Even without legislative amendment, continued willingness by judges to certify class actions would be a huge assistance in ensuring that migrant workers can obtain relief from unjust practices.²⁵⁵ Continued accommodation by courts in certifying migrant worker classes would not only ensure continued access to the legal system, it would help to fulfill one of the goals advanced by supporters of LSC restrictions: to refocus LSC offices toward helping the individual indigent client.²⁵⁶

CONCLUSION

The lack of access to the legal system for migrant workers has long been recognized as one of the most acute problems facing both workers and the legal system.²⁵⁷ That aid for migrant workers remains a priority within LSC²⁵⁸ is evidence that conditions facing migrant and seasonal workers have not markedly improved, despite the greatly increased legal protections afforded by AWPA over the FLCRA.²⁵⁹ Legal outreach and representation by LSC employees have been essential, given the working conditions and the inadequacy of the regulatory and inspection regimes coordinated by the U.S. and state departments of labor.²⁶⁰ The perceived political activism of LSC offices, the backlash against undocumented workers, and the Republican takeover of Congress led to the marginalization of many LSC allies.²⁶¹ This in turn enabled the prohibition of LSC offices from representing undocumented immigrants.

254. See *Bautista v. Twin Lake Farms, Inc.*, No. 1:04-cv-483, 2007 WL 329162, at *1 (W.D. Mich. 2007).

255. See *supra* Tables 1 and 2.

256. See *Rose*, *supra* note 30, at 61 n.50.

257. Houseman, *supra* note 21, at 36 (noting that migrant farmworker aid was one of only two dedicated earmarks in OEO funding).

258. Each state at the CORT Migrant Farmworker Training has an LSC office and at least one attorney dedicated to migrant farmworker legal assistance.

259. See, e.g., *Velasquez v. Khan*, No. Civ. S01-0246MCEDAD, 2005 WL 1683768, *2 (E.D. Cal. 2005) (describing thousands of dollars of unpaid wages and housing in “grossly substandard condition”).

260. See *Chien*, *supra* note 206, at 24.

261. See *Forger*, *supra* note 165, at 335 (recounting a conversation in which Sen. Domenici (Republican-New Mexico) said, “Although . . . I could live with only a partial restriction on class actions, I think I have to give assurance [to my Senate colleagues] that there are to be no more class actions permitted.”).

This prohibition has correlated with a substantial drop from the already-low rates of litigation under the AWP and FLSA.²⁶² In states that do not have non-LSC legal aid offices dedicated to migrant farmworker legal aid, the door to the justice system has almost completely closed. Nonetheless, a complete repeal of this provision seems unlikely in the current political climate.²⁶³ Judges should continue to be willing to certify class action suits involving migrant farmworkers, and bar associations and private foundations should dedicate funds to ensuring each state has attorneys who can undertake these claims. These small steps would contribute greatly to ensuring migrant workers and their families have true access to the justice system.

262. See *supra* notes 208-40 and accompanying text.

263. See, e.g., *Indiana Lawmakers Pass Immigration Curbs Like Arizona*, REUTERS (Feb. 23, 2011), <http://www.reuters.com/article/2011/02/23/us-immigration-indiana-idUSTRE71M5HN20110223>. Moreover, proponents of immigration reform are not focused on improving conditions for migrant workers. Their focus has been on legitimizing the status of undocumented immigrants or providing a pathway to citizenship for young immigrants. See Comprehensive Immigration Reform ASAP Act of 2009, H.R. 4321, 111th Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4321ih/pdf/BILLS-111hr4321ih.pdf>; *Basic Information about the DREAM Act Legislation*, DREAM ACT PORTAL (Jul. 16, 2010) <http://dreamact.info/students>.