

Cornell University Law School

## Scholarship@Cornell Law: A Digital Repository

---

Cornell Law Faculty Publications

Faculty Scholarship

---

2021

### Scorched Border Litigation

Briana Beltran

Beth Lyon

Nan Schivone

Follow this and additional works at: <https://scholarship.law.cornell.edu/facpub>



Part of the [Human Rights Law Commons](#), [Labor and Employment Law Commons](#), and the [Litigation Commons](#)

---

# SCORCHED BORDER LITIGATION

Briana Beltran, Beth Lyon, and Nan Schivone\*

## ABSTRACT

Each year, employers bring hundreds of thousands of temporary foreign workers into the United States only to return them to their communities of origin when their visas end. During their short months working in the United States—whether in agricultural fields, hotels, traveling carnivals, or private homes—many of these workers experience violations of their rights: wages are stolen, injuries are ignored, and those who complain are punished on the spot or sent home.

Temporary foreign workers who choose to file a lawsuit to vindicate their rights typically do so once they are no longer in the United States, often litigating from rural communities in other countries. During litigation, the employers and the employers' lawyers regularly use the fact that the workers are no longer present in the United States to gain a procedural or substantive advantage in litigation. This strategy, which we call "scorched border" tactics, is a standard litigation practice and is enabled by the very design of temporary foreign work programs, themselves rooted in the United States' long history of low-wage foreign labor exploitation. Scorched border litigation drives up costs for a deeply under-resourced public interest bar and can chill lawyers' case selection, shutting down access to justice for some of the most vulnerable of the working poor. However, to date, there exists no study documenting or analyzing this undeniable phenomenon.

---

\* Lecturer, Farmworker Legal Assistance Clinic, Cornell Law School; Clinical Professor of Law, Cornell Law School; and Legal Director, Justice in Motion. Thank you very much to Cathleen Caron, Maggie Gardner, Jaclyn Kelley-Widmer, and Annie Smith for their thoughtful and helpful comments on this Article. In addition, we are grateful to the many litigators who consulted with us on this project, responded to our survey, or otherwise provided their own detailed perspective, information, and case experiences as we drafted this Article. Thank you very much to Anza Abbas, Ayumi Berstein, Alexandra Eguiluz, Samuel Gamer, Joey Gates, Jonas Lee, Gabriela Lopez, Jordan Lu, Christie Park, Abigail Ramos, and McKenzie Szarmach for their research and administrative support during the years of work on this project. Finally, though any errors are our own, thank you very much to the editors of the *Columbia Human Rights Law Review* for their feedback and support during the editing process.

This Article documents and critiques scorched border litigation tactics, drawing on a broad range of sources including a survey of practitioners who represent temporary foreign worker (“TFW”) plaintiffs, a collection of case histories, and a review of court rulings. We find that federal court litigation has already adapted to handle the complexities presented by these TFW cases, such as modifying the manner and location of a TFW plaintiff’s deposition. These types of adaptations are not new to experienced lawyers representing TFW plaintiffs and are regularly permitted by courts. However, these adaptations are often so far out of the litigation norm that defense lawyers seek to gain an advantage by creating costly and unnecessary disputes in a case.

The forced adaptation of the civil justice system to the COVID-19 pandemic, however, may open new opportunities for countering scorched border tactics. With courts now experienced in remote proceedings, what was the subject of ridicule or pushback by defense lawyers in TFW cases is suddenly the norm. A review of new pandemic-era federal court rules offers concrete prescriptions for federal district courts on how to proceed when an individual litigant does not reside in the United States. In so doing, we aim to ensure that the return of TFW plaintiffs to their communities of origin after their employment in the United States is over—as is required by the very programs that allow them to work here—can no longer be used by employers to block their access to justice.

## TABLE OF CONTENTS

Introduction.....	4
I. Temporary Foreign Workers in Context .....	6
A. A History of Precarity .....	8
B. Ripe for Exploitation.....	15
C. The Need for Litigation.....	21
D. The Rise of Niche Practitioners.....	24
II. Scorched Border Litigation.....	29
A. Examples of Scorched Border Litigation .....	29
B. Research Methodology .....	35
1. Temporary Foreign Worker Federal Litigation Dataset .....	35
2. Survey of Plaintiffs' Lawyers .....	35
C. Survey Results.....	36
1. Respondents to Our Survey: Plaintiffs' Lawyers .....	36
2. Tactics Reported: Defense Lawyers .....	38
D. Collateral Damage .....	41
III. Putting Temporary Foreign Workers on a More Equal Footing .....	43
A. Jurisprudence on Scorched Border Tactics.....	44
1. Deposition Testimony .....	45
2. Trial Testimony.....	48
B. Reshaping Court Rules to Protect TFW Plaintiffs .....	50
1. Deposition Testimony .....	52
2. Trial Testimony.....	54
3. Post-Pandemic Prospects for Change .....	56
Conclusion .....	57

## INTRODUCTION

In 2010, a Tennessee vegetable farm sought permission from the U.S. government to bring in workers from Mexico, claiming there were not enough U.S. workers to fill its labor needs for the season.<sup>1</sup> More than a dozen workers thus entered the United States on H-2A temporary agricultural work visas that year and headed to Tennessee to work at Fish Farms.<sup>2</sup>

The workers began the season at the tomato farm, but soon encountered a “series of abuses,” including pesticide exposure while in the fields and in their trailers, housing infested with insects, and a lack of clean and accessible water, forcing the workers to wash their clothes in a river.<sup>3</sup> The workers subsequently complained about these conditions to federal and state officials, only to then face a series of increasing retaliatory actions by Fish Farms supervisors.<sup>4</sup>

When U.S. Department of Labor (“DOL”) officials arrived at the farm to investigate the complaints, one of the workers came outside to see what was happening, still holding the knife he had been using to make a sandwich; the “employers [then] had him arrested for aggravated assault” and “surrounded the [workers’] trailers, brandishing firearms.”<sup>5</sup> Soon thereafter, some of the workers attempted to take photos with their cell phones of pesticides being sprayed.<sup>6</sup> Fish Farms promptly fired all of the workers and put them on a bus headed to a nearby city, where they would be transferred to commercial transportation back to Mexico.<sup>7</sup>

The following year, fifteen of the workers filed a lawsuit in federal court based on this unlawful treatment.<sup>8</sup> Fish Farms immediately sought to dismiss the lawsuit, making the extraordinary argument that foreign workers in the United States on H-2A visas essentially have no employment rights at all and that such workers are legally prohibited from directly pursuing any remedies for their mistreatment by filing a civil lawsuit.<sup>9</sup>

---

1. Lopez v. Fish, No. 2:11-CV-113, 2012 WL 2126856, at \*1 (E.D. Tenn. May 21, 2012).

2. *Id.*; see also 8 U.S.C. § 1101(A)(15)(H)(ii)(a) (providing the statutory basis for granting H-2A visas).

3. Ed Marcum, *Mexican Workers Sue Newport Farm*, KNOXVILLE NEWS SENTINEL (Apr. 13, 2011), <https://archive.knoxnews.com/business/mexican-workers-sue-newport-farm-ep-405064138-357926921.html/> [https://perma.cc/ASJ6-XA8K].

4. *Id.*

5. *Id.* (alteration in original).

6. *Id.*

7. *Id.*

8. *Id.*

9. See *infra* notes 118–25 and accompanying text.

Sadly, such a story—in any of its aspects—is not unique, nor is it surprising given the sordid history of labor exploitation in the United States. Employers bring temporary foreign workers to this country by the hundreds of thousands each year, knowing that they can extract the workers’ labor to their hearts’ content before the workers return to their communities of origin once the employment term, and thus the validity of their visa, ends.<sup>10</sup> During the course of such employment—whether in agricultural fields, hotels, traveling carnivals, or private homes—many of these workers experience violations of their rights: wages are stolen, injuries are ignored, and those who complain might be swiftly punished, including being sent home, as was the case with the Fish Farms workers.<sup>11</sup> In the event that workers later file civil lawsuits against their former employers to address such legal violations, the employers regularly try to have it both ways, attempting to use the fact that the workers are no longer present in the United States to gain a procedural or substantive advantage in litigation.

This type of litigation strategy—which we term “scorched border” litigation—not only represents an effort to impede temporary foreign workers’ access to justice, but also serves as a resource drain and distraction from the substantive issues in a case. It has nevertheless become a common trope in these cases and is expected among the network of lawyers who represent temporary foreign workers. To date, however, there exists no study or public-facing documentation of this undeniable phenomenon. For that reason, this Article examines the way that these litigation disputes often unfold.

To begin our research, we developed a comprehensive dataset of federal court cases filed on behalf of temporary foreign worker (“TFW”) plaintiffs.<sup>12</sup> We then used this dataset for two purposes. First, we conducted a survey of the lawyers who were counsel of record regarding their experiences litigating these cases. Second, we examined specific cases from the dataset to learn more about defendants’ litigation tactics.

---

10. See *infra* Part I(B) (describing the types of exploitation faced by temporary foreign workers).

11. See *infra* Part I(B); see also *infra* note 112 and accompanying text.

12. Throughout this Article, we use the term “temporary foreign workers” to refer to individuals present in the United States on temporary nonimmigrant work visas. See *infra* notes 55–62 and accompanying text. Such individuals have often been—and still continue to be—referred to as “guestworkers,” including in the titles of numerous sources cited in this Article. Some advocates avoid the term “guestworkers” because of the positive connotations it carries with the inclusion of the word “guest,” which largely fails to align with the daily reality faced by such workers. For this reason, we have deliberately chosen to use the term “temporary foreign workers” instead, and to abbreviate it as “TFW” when using it as a modifier.

The information we gathered from this initial survey distribution and case review illustrated that federal court litigation has already adapted to handle the complexities presented by these TFW cases. One such adaptation, for example, is the frequency with which courts allow parties to modify the manner and location of a TFW plaintiff's deposition.<sup>13</sup> These types of adaptations are not new to experienced lawyers representing TFW plaintiffs, but, because they may be out of the litigation norm, they provide great potential for defense lawyers to create and prolong disputes during a case, wasting precious time and resources.

Subsequent to the initial distribution<sup>14</sup> of our survey, however, all litigators were forced to adapt in response to COVID-19. Courts began to allow more remote proceedings and, indeed, have even held civil trials entirely by Zoom.<sup>15</sup> What was once the subject of ridicule or pushback by defense lawyers in TFW cases was suddenly commonplace. We thus added an additional component to our project and conducted a review of court practices and procedures during the COVID-19 pandemic, seeking to learn what potential these changes might hold for TFW cases in the long-term.

This Article proceeds as follows. Part I provides an overview of TFW programs, detailing the history of these programs in the United States, before turning to the present-day landscape, including a discussion of the exploitation faced by such workers, the need to turn to private litigation because of a lack of government-enforced remedies, and the history and skills of the lawyers who represent workers throughout that litigation. Part II provides a detailed look at scorched border litigation, first by discussing two case examples that illustrate such tactics, then by turning to our practitioner survey regarding defense lawyers' tactics, and finally by elaborating on the costs of these tactics on access to justice for temporary foreign workers. In Part III, we first summarize the current state of the law as applied to scorched border litigation disputes before offering suggestions for enhancing temporary foreign workers' access to justice in light of COVID-19 era federal court rules. We then conclude.

## I. Temporary Foreign Workers in Context

Temporary foreign workers who are in the United States pursuant to nonimmigrant visa programs often endure serious labor exploitation. The potential for exploitation emerges from the features of these nonimmigrant

---

13. See *infra* Part III(A)(1).

14. As explained more fully below, we distributed a short version of the survey to TFW lawyers in the late spring of 2020. See *infra* Part II(B)(2).

15. See *infra* notes 203–08 and accompanying text.

visa programs themselves: workers generally come to the United States from impoverished communities in non-English-speaking countries for placement in temporary jobs in isolated settings, often via an unaccountable cadre of recruiters. The risks to workers are magnified because employers create and control their lawful immigration status in the United States.

While stories of abuse in these TFW programs have increasingly drawn the attention of the media and public, especially during the COVID-19 pandemic, this phenomenon is not new.<sup>16</sup> On the contrary, since the colonial era, numerous U.S. industries have relied on an easily exploitable labor

---

16. See, e.g., Zack Kopplin, *They Think We Are Slaves: An Investigation into America's Au Pair Program*, POLITICO (Mar. 27, 2017), <https://www.politico.com/magazine/story/2017/03/au-pair-program-abuse-state-department-214956> [<https://perma.cc/SL24-DE8F>] (describing J-1 workers in au pair program); Jessica Garrison et al., *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED NEWS (July 24, 2015), <https://www.buzzfeed.com/jessicagarrison/the-new-americanslavery-invited-to-the-us-foreign-workers> [<https://perma.cc/C4DL-KZMN>] (discussing H-2A and H-2B programs); *Risky Rides: Carnival Workers' Grueling Hours May Threaten Safety*, NBC NEWS (Aug. 24, 2014), <https://www.nbcnews.com/news/latino/risky-rides-carnival-workers-grueling-hours-may-threaten-safety-n186966> [<https://perma.cc/EMF4-PYYJ>] (discussing H-2B workers in the carnival industry). There has also been press coverage of the way that H-2A workers have been particularly affected by the COVID-19 pandemic. See, e.g., Miriam Jordan, *Migrant Workers Restricted to Farms Under One Grower's Virus Lockdown*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/us/coronavirus-tomato-migrant-farm-workers.html> (on file with the *Columbia Human Rights Law Review*) (recounting lockdowns imposed by a Virginia tomato grower on H-2A workers in an attempt to reduce the spread of COVID-19, which one worker summarized as follows: “[i]n years past, when we didn’t work, we were free to go to the beach, visit friends . . . Now, they don’t let us go anywhere.”); Jackie Botts & Kate Cimini, *Investigation: COVID Rips Through Motel Rooms of Guest Workers Who Pick Nation's Produce*, CAL MATTERS (Sept. 4, 2020), <https://calmatters.org/california-divide/2020/08/guest-worker-covid-outbreak-california/> [<https://perma.cc/U22D-P9E9>] (summarizing COVID-19 outbreaks among H-2A workers in California); Brooke Jarvis, *The Scramble to Pluck 24 Billion Cherries in Eight Weeks*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/12/magazine/cherry-harvest-workers.html> (on file with the *Columbia Human Rights Law Review*) (summarizing general critiques of H-2A agricultural program as “a modern system of indentured servitude” and describing a COVID-19 outbreak among H-2A workers at an orchard in Washington State, leading to two worker deaths by August 2020); Ismael García-Colón, *The COVID-19 Spring & the Expendability of Guestworkers*, DIALECTICAL ANTHROPOLOGY (July 29, 2020), at 1–8 (discussing the effect of COVID-19 on the agricultural industry and TFW programs in the United States and worldwide); Dulce Torres Guzman, *East Tennessee Migrant Workers at Mercy of Employers*, TENN. LOOKOUT (June 4, 2020), <https://tennesseelookout.com/2020/06/04/east-tennessee-migrant-workers-at-mercy-of-employers> [<https://perma.cc/6WCX-6RBN>] (describing an outbreak of COVID-19 at a Rhea County, Tennessee tomato farm, which sickened all two hundred H-2A workers and caused them to “vanish[]” from public view).

force,<sup>17</sup> and the current programs have historical antecedents going back decades, if not longer. Below, we provide a brief historical overview of TFW programs, including the particular history of workers who come to the United States under the H-2 visa classification. This history demonstrates that worker precarity is embedded in the very fabric of this country, in most industries. We then transition back to the present day, focusing on common patterns of abuse in these programs, and the limited—and challenging—remedies available to such workers. In short, temporary foreign workers' excluded status resurfaces when they attempt to seek relief for legal violations: they are often left to fend for themselves, necessitating a turn to civil litigation as the only possible remedy for harm.

### A. A History of Precarity

The majority of today's nonimmigrant visas—which allow employers to hire temporary foreign workers without significant accountability for harms suffered on the job—have their origins in earlier programs within the agricultural industry.<sup>18</sup> This history makes plain that worker exploitation was always understood to be part of the programs. As professor Cindy Hahamovitch notes:

Since the Second World War, whenever concern about the number of [unauthorized immigrants] . . . in the United States reached a fever pitch, guestworkers gained legitimacy. In fact, within a few years of the wars' end, the [Immigration and Naturalization Service] began dealing with the unauthorized Mexican immigrants it apprehended

---

17. See, e.g., Richard B. Morris, *Chapter 1: The Emergence of American Labor* in THE U.S. DEPARTMENT OF LABOR BICENTENNIAL HISTORY OF THE AMERICAN WORKER 7–41 (1976), <https://www.dol.gov/general/aboutdol/history/chapter1> [https://perma.cc/5AWA-84EZ] (noting that, due to a limited supply of free labor in the colonial period, “English settlers innovated several forms of bound labor,” such as indentured servitude, which “included all persons bound to labor for periods of years as determined either by a written agreement or by the custom of the respective colony”); see also Ariel Ron & Dael Norwood, *America Cannot Bear to Bring Back Indentured Servitude*, THE ATLANTIC (Mar. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/03/american-immigration-service-slavery/555824/> [https://perma.cc/5DD4-RXBA] (describing the slow transition from indentured servitude to race-based slavery in the American colonies).

18. Much of the historical background on the H-2A program provided in Part I(A) is adapted from Justice in Motion's *Visa Pages*, originally written by one of the authors of this Article. See JUST. IN MOTION, *VISA PAGES: U.S. TEMP. FOREIGN WORK VISAS* (Nov. 2015), [https://683ba61a-c54c-40f0acc5a9f6c778d737.filesusr.com/ugd/d83957\\_4b0b5b7edea14012976f1cf2a73027a7.pdf](https://683ba61a-c54c-40f0acc5a9f6c778d737.filesusr.com/ugd/d83957_4b0b5b7edea14012976f1cf2a73027a7.pdf) [https://perma.cc/RE27-KQ74]; see also *Visa Pages*, JUST. IN MOTION, <https://www.justiceinmotion.org/visa-pages> [https://perma.cc/CY2H-JV58] (describing the application criteria and process as well as the parameters of legal status conferred by H-2A and other temporary work visas).

by transforming them into Braceros, a process that the agency unfortunately called “Drying Out the Wetbacks.” Since the termination of the Bracero Program . . . the [H-2] Program has grown in importance as a purportedly managed alternative to a seemingly unmanageable issue. The same is true today. In recent debates about immigration reform, both parties have considered proposals that would legalize millions of unauthorized immigrants by transforming them into legal but temporary guestworkers . . . . [T]he story of . . . the thousands of other [H-2] workers who exited boats and airplanes to work in American fields and orchards is not a story of carefully managed migration. The history of the [H-2] Program is a tale of exploitation, protest, litigation, and mass deportation.<sup>19</sup>

In this excerpt that remains true today, Hahamovitch reflects on the similarities between our current systems and the mid-twentieth century Bracero and H-2 programs. But the story of temporary foreign workers begins even earlier than that. The U.S. agricultural industry has utilized foreign labor since at least the Civil War, when, simply put, plantation owners needed new people to exploit.<sup>20</sup>

Until the late nineteenth century, hundreds of thousands of Chinese immigrants worked in U.S. agricultural fields “to supplant newly freed” enslaved persons.<sup>21</sup> Chinese migrant workers arrived to the United States either indebted to, or under contract with, employers who paid for their

---

19. CINDY HAHAMOVITCH, *NO MAN’S LAND: JAMAICAN GUESTWORKERS IN AMERICA AND THE GLOBAL HISTORY OF DEPORTABLE LABOR* 6–7 (2011) (footnote omitted).

20. For a discussion of agricultural laborers in California dating back to the 1700s, including indigenous Mexicans, indigenous Californians, Chinese immigrants, and Japanese immigrants, see Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 *UNIV. TOL. L. REV.* 923, 931–37 (2007).

21. Hahamovitch elaborates:

As the slave trade declined in the early nineteenth century, indentured servitude experienced a huge revival around the world . . . particularly in the British Empire, as planters struggled to find cheap, pliable, and ostensibly voluntary alternatives to [enslaved persons]. Similarly, in the United States after the Civil War, American planters in the U.S. South schemed about importing Chinese workers . . . to supplant newly freed [enslaved persons]. Planters abandoned their schemes when they found the Chinese neither cheap nor pliable. Yet U.S. workers and former abolitionists denounced Chinese migrant workers for their apparent willingness to accept substandard wages and conditions.

HAHAMOVITCH, *supra* note 19, at 13.

travel.<sup>22</sup> The program was unpopular. Specifically, the public was not happy about the Chinese workers' "willingness to accept substandard wages and conditions" even if they had little choice but to do so because of their debt or contract bondage.<sup>23</sup> Lawmakers at the time implied that the way to "protect domestic workers from unfair competition . . . was to ensure that immigrant workers entered the United States freely or not at all."<sup>24</sup> This pretext was the backdrop to the first laws limiting foreign workers, including the Chinese Exclusion Act of 1882, which "banned all Chinese laborers from entering the United States."<sup>25</sup> Several years later, the Foran Act "extended the contract labor ban to immigrants of all nationalities."<sup>26</sup>

During World War I, Mexican seasonal workers freely migrated into the United States to work in agricultural fields, though they did not receive any permanent immigrant status.<sup>27</sup> After the war and in the years leading up to and during the Great Depression, competition for agricultural jobs increased; as a result, Mexican workers were deported in large numbers and, in 1924, the U.S. Border Patrol was established.<sup>28</sup> This formally ended the ability to freely cross the United States-Mexico border, although the Border Patrol, in effect, selectively immunized agricultural laborers who crossed into the United States without authorization from enforcement action during particular periods and in selected regions.<sup>29</sup>

The Immigration Act of 1924 also ushered in a quota system that severely limited the number of immigrants legally authorized to migrate from Mexico, making the social and economic reality of U.S. dependency on Mexican labor a "legal impossibility" and effectively creating the concept of an undocumented worker.<sup>30</sup> Worldwide, more modern TFW programs were conceived in part by exclusionary sentiment: "[t]emporary immigration

---

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *See, e.g.,* Ontiveros, *supra* note 20, at 936 (describing the free movement of labor between Mexico and the United States in the early twentieth century).

28. Kristi L. Morgan, *Evaluating Guest Worker Programs in the U.S.: A Comparison of the Bracero Program and President Bush's Proposed Immigration Reform Plan*, 15 *BERKELEY LA RAZA L.J.* 125, 126-27 (2004).

29. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* 24 (1992) (noting that the government set into motion "a *de facto* legalization program, whereby they legalized on the spot [undocumented] Mexican immigrants found employed in agriculture and contracted them to their employers as braceros," leading to the legalization of 55,000 such workers in Texas in the summer of 1947).

30. MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 4 (2004).

schemes—guestworker programs—were state-brokered compromises designed to placate employers’ demands for labor and nativists’ demands for restriction.”<sup>31</sup> Even then, these programs were envisioned as limited, with no way for migrants to permanently settle and become citizens in the countries where their labor was needed.<sup>32</sup>

TFW programs in the United States began in earnest during World War II.<sup>33</sup> Agricultural lobbyists claimed a massive labor shortage due to military recruitment, manufacturing, and migration.<sup>34</sup> This represented a “seismic shift in the balance of power between growers and farm laborers,” according to Hahamovitch.<sup>35</sup> The U.S. Secretary of Agriculture negotiated with the Mexican government to meet the United States’ apparent farm labor need with Mexican nationals.<sup>36</sup> Between 1942 and 1964, hundreds of thousands of Mexican farmworkers were temporarily admitted to the United States to provide agricultural labor under what was known as the Bracero program. They were employed mostly in California and other southwestern U.S. states before returning back to Mexico at the end of the

---

31. HAHAMOVITCH, *supra* note 19, at 14.

32. See, e.g., ALEC WILKINSON, *BIG SUGAR: SEASONS IN THE CANE FIELDS OF FLORIDA* 144–45 (1989) (“The grower wrote that the farmers all favored the use of the Bahamians because . . . [such laborers] can be deported and sent home, if it does not work, which cannot be done in the instance of labor from domestic United States or Puerto Rico.”). Others have drawn analogies between public sentiment regarding the disposability of immigrant workers in the nineteenth century and the twentieth century:

The New York Journal of Commerce in 1892 had compared immigrants to farm animals, arguing that “a gift of either should be gladly received.” From this perspective, the bracero was the perfect “gift.” Not only did he arrive as “adult male labor,” but unlike European immigrants of the 19th century, he could be sent home upon completion of the contract.

CALAVITA, *supra* note 29, at 21.

33. HAHAMOVITCH, *supra* note 19, at 22–49.

34. *Id.* at 23.

35. *Id.* Hahamovitch continues: “Farm laborers hadn’t vanished, but their reduced numbers gave them the courage to demand more for their services. And farmworkers’—especially black farmworkers’—ability to make demands infuriated employers, who refused to admit that the ground beneath them had shifted.” *Id.*; see also ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS* 150–57 (2010) (describing a Black farmworker crew seeking to improve their wages in a Florida orange grove during World War II, an attempt that ended under the threat of lynching).

36. HAHAMOVITCH, *supra* note 19, at 42; see also Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER RACE & JUST. 27, 46–47 (2006) (demonstrating the pitfalls of the Bracero Program as negotiated between the United States and Mexico, and the ensuing litigation when program conditions did not live up to what was promised).

season.<sup>37</sup> Initially, the government guaranteed various employment benefits to the workers, including wages, housing, and a work guarantee.<sup>38</sup>

After World War II, each employer was supposed to contract directly with the workers and continue the earlier benefits, including fair wages, clean and safe housing, and at least one month of guaranteed work.<sup>39</sup> The lack of government oversight and enforcement primed the situation for exploitation.<sup>40</sup> Abuse of the Braceros was widespread.<sup>41</sup> There were lengthy legal battles, a media spotlight, and organized strikes against employers.<sup>42</sup> U.S. workers did not fare well during the time of the Bracero program either: employers were supposed to hire Mexican workers only when faced with a labor shortage.<sup>43</sup> In reality, employers favored the Mexican workers even when U.S. workers were available, and overall wages in agriculture decreased as a result.<sup>44</sup> In 1964, after twenty-two years and 4.5 million workers, the United States terminated the Bracero program.<sup>45</sup>

---

37. MARY BAUER, S. POVERTY L. CTR., *CLOSE TO SLAVERY: GUESTWORKER PROGRAMS IN THE UNITED STATES* 3–4 (2013), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf) [<https://perma.cc/62KH-Y6CL>]; see also Ontiveros, *supra* note 20, at 936–37 (noting that Braceros had a portion of their pay withheld by the U.S. government, which was to be paid to them upon their return to Mexico as an incentive to return, but most never saw this money).

38. Morgan, *supra* note 28, at 129–30.

39. *Id.*; see also About, BRACERO HISTORY ARCHIVE, <http://braceroarchive.org/about> [<https://perma.cc/9RS6-LNY9>] (listing theoretical Bracero Program safeguards, including “guaranteed payment of at least the prevailing area wage received by native workers; employment for three-fourths of the contract period; adequate, sanitary, and free housing; decent meals at reasonable prices; occupational insurance at employer’s expense; and free transportation back to Mexico at the end of the contract”).

40. Ronald L. Mize, Jr., *Reparations for Mexican Braceros? Lessons Learned from Japanese and African American Attempts at Redress*, 52 CLEV. ST. L. REV. 273, 286 (2005) (“[T]he Bracero Program was lived out much differently by the workers than how the program was designed to work on paper . . . . The history of the Braceros documents how the safeguards ‘guaranteed’ by the governments were rarely put into practice or enforced.”); see also Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 583–85 (2001) (detailing exploitation in the Bracero program).

41. See, e.g., Lorenzo A. Alvarado, *A Lesson from My Grandfather, the Bracero*, 22 CHICANO-LATINO L. REV. 55, 60–64 (2001) (documenting wage, contract, housing, and other legal violations experienced by Braceros and the lack of government enforcement over the program terms).

42. See, e.g., Morgan, *supra* note 28, at 129 (describing contemporary media coverage of the program); Holley, *supra* note 40, at 585–86 (explaining how procedural barriers made lodging official complaints an arduous process for Braceros).

43. BRACERO HISTORY ARCHIVE, *supra* note 39.

44. *Id.*

45. BAUER, *supra* note 37, at 3.

While the Bracero program was underway, the agriculture industry in Florida extensively lobbied the U.S. government for the ability to bring in Caribbean temporary workers.<sup>46</sup> Officials from the U.S. State Department negotiated the terms of a labor program with the British Secretary for the Colonies, despite British concern that “the scheme sounded a bit too much like indentured servitude.”<sup>47</sup> The United States eventually prevailed. The Caribbean temporary worker scheme was modeled after the Bracero program, requiring a certain wage, free transportation, housing, a work guarantee, and free repatriation back home.<sup>48</sup> In 1943, employers obtained permission to hire workers specifically from Barbados and the Bahamas.<sup>49</sup> Around the same time, employers in the northeastern United States began bringing Jamaican workers into the United States, and, within a few years, Florida employers started hiring Jamaican workers to cut sugarcane.<sup>50</sup>

It was this Caribbean worker scheme that formed the structural and legal precursor to the contemporary H-2 TFW program, codified by Congress as part of the Immigration and Nationality Act of 1952 (“INA”).<sup>51</sup> While the original H-2 program included both agricultural and non-agricultural temporary workers, in 1986, the program was split in two with the passage of the Immigration Reform and Control Act, which introduced the current H-2A (agriculture) and H-2B (non-agriculture) sub-classifications.<sup>52</sup> By providing a freestanding category for agricultural workers, the government sought to “ensure an adequate source of labor” without the “added incentive

---

46. HAHAMOVITCH, *supra* note 19, at 24–49.

47. *Id.* at 42. Hahamovitch notes that the “most remarkable thing about all this is the fact that the [Immigration and Naturalization Service] never agreed to it, as U.S. immigration law required.” *Id.* at 48.

48. *Id.* at 44–45.

49. See WILKINSON, *supra* note 32, at 144–47.

50. *Id.* For a detailed discussion of the genesis and onset of Jamaicans working in U.S. agriculture, see HAHAMOVITCH, *supra* note 19, at 50–66.

51. See, e.g., BAUER, *supra* note 37, at 4 (providing a history of H-2A and H-2B temporary foreign workers in the United States).

52. E.g., ETAN NEWMAN, FARMWORKER JUST., NO WAY TO TREAT A GUEST: WHY THE H-2A AGRICULTURAL VISA PROGRAM FAILS U.S. AND FOREIGN WORKERS 13 (2011), <https://www.farmworkerjustice.org/sites/default/files/documents/7.2.a.6%20No%20Way%20To%20Treat%20A%20Guest%20H-2A%20Report.pdf> [<https://perma.cc/F9LJ-8C7X>]. H-2B workers labor in a variety of industries, but are most often seen in landscaping, amusement park operations, forestry, and the hospitality sector. ASHWINI SUKTHANKAR, GLOB. WORKERS JUST. ALL., VISAS, INC.: CORPORATE CONTROL AND POLICY INCOHERENCE IN THE U.S. TEMPORARY FOREIGN LABOR SYSTEM 17 (2012), <https://www.justiceinmotion.org/copy-of-press-releases> [<https://perma.cc/2XYT-B7S7>]. Since the publication of this piece, Global Workers Justice Alliance changed its name to Justice in Motion. *Our Story*, JUST. IN MOTION, <http://justiceinmotion.org/our-story> [<https://perma.cc/5572-8BK9>].

to hire foreign rather than resident workers.”<sup>53</sup> Together, the H-2A and H-2B programs bring in hundreds of thousands of workers to the United States every year: the H-2B program is capped by law at 66,000 visas annually, whereas the H-2A program contains no statutory limit and has skyrocketed to over 200,000 visas issued as recently as 2019.<sup>54</sup>

In the years since the H-2 program began, other subcategories of work visas have emerged and flourished in other industries.<sup>55</sup> For example, the high-tech industry pushed for its own category of visa, giving rise to the now relatively well-known H-1B visa for workers with “special skills” in 1990.<sup>56</sup> There are special lettered visas for religious workers, athletes, skilled workers from Canada or Mexico, and intracompany transferees.<sup>57</sup> Still other visas have been introduced that are ostensibly not for the primary purposes of work, but have in practice taken on the same role of introducing temporary foreign workers to the labor market and exposing them to routine violations of their labor rights. For example, the J-1 Visitor Exchange Program was established in 1961 with a goal of facilitating cultural exchange.<sup>58</sup> The J-1 Program has more than a dozen subcategories, and, in 2010, the State Department issued more J-1 visas than H-2A and H-2B visas combined.<sup>59</sup> Some of the most problematic subcategories of the J-1 Program are the Summer Work Travel Program, the Trainee and Intern Program, and the Au Pair Program, all of which have been the subject of scrutiny by advocacy organizations.<sup>60</sup> In addition to the J-1 Au Pair Program, domestic

---

53. H.R. REP. NO. 99-682, pt. 1, at 106 (1986).

54. Briana Beltran, *The Hidden “Benefits” of the Trafficking Victim Protection Act’s Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 235–36 (2020).

55. See, e.g., *Visa Pages*, *supra* note 18 (providing an overview of the H-2A program).

56. See SUKTHANKAR, *supra* note 52, at 18.

57. *Id.* at 18–19. Temporary foreign workers also include fashion models who have a nonimmigrant visa category set aside. See Kit Johnson, *Importing the Flawless Girl*, 12 NEV. L.J. 831, 840 (2012).

58. SUKTHANKAR, *supra* note 52, at 21. See generally INT’L LAB. RECRUITMENT WORKING GRP., SHINING A LIGHT ON SUMMER WORK (2019), [https://683ba61a-c54c-40f0-acc5-a9f6c778d737.filesusr.com/ugd/64f95e\\_8c37d429fa4941e3afe88eb06d1a79c2.pdf](https://683ba61a-c54c-40f0-acc5-a9f6c778d737.filesusr.com/ugd/64f95e_8c37d429fa4941e3afe88eb06d1a79c2.pdf) [<https://perma.cc/3QPA-AGFA>] (providing a data-driven report on the realities of the J-1 visa).

59. SUKTHANKAR, *supra* note 52, at 21, 24, 27 (“The J-1 visa has 15 subcategories.”); *id.* (noting that 320,805 J-1 visas were issued by the State Department in 2010 compared to a combined 103,324 H-2A and H-2B visas in the same year).

60. See *id.* at 21–22 (noting that the Au Pair Program was initiated after lobbying by a leading provider of au pairs in the United States, which has “steadily resisted efforts at regulation of working conditions,” and that the Trainee and Intern Program is similarly “marked by a degree of minimalist regulation that invites abuse,” including the fact that the program regulations “do not even require that they be paid a wage”); see also INT’L LAB.

workers may come to the United States to work on a B-1 or A-3/G-5 visa, depending on the employer.<sup>61</sup> In total, significantly more than one million workers enter the United States on such temporary visas every year, amounting to approximately one percent of the U.S. labor force.<sup>62</sup>

### B. Ripe for Exploitation

As the above discussion indicates, it is employers and broader industry interests who push for establishing and expanding temporary foreign work visas, although such an expansion should also be considered a byproduct of the history of exploited labor in the United States. Thus, even if increasing numbers of workers in foreign countries seek the relatively higher paying jobs in the United States that these visas can provide to them, control over the visa programs ultimately rests with the employers themselves. Such an imbalance of power continues when temporary foreign workers arrive in the United States, leaving the workers vulnerable in a number of ways. Not insignificantly, temporary foreign workers are always outsiders, here temporarily and never becoming part of the civic fabric of the country where

---

RECRUITMENT WORKING GRP., *SHORTCHANGED: THE BIG BUSINESS BEHIND THE LOW WAGE J-1 AU PAIR PROGRAM* (2018), <https://cdmigrante.org/wp-content/uploads/2018/08/Shortchanged.pdf> [<https://perma.cc/3BMV-L2RV>] [hereinafter *SHORTCHANGED*] (criticizing the J-1 Au Pair Program in general); MEREDITH B. STEWART, S. POVERTY L. CTR., *CULTURE SHOCK: THE EXPLOITATION OF J-1 CULTURAL EXCHANGE WORKERS 4* (2014), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/j-1\\_report\\_v2\\_web.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/j-1_report_v2_web.pdf) [<https://perma.cc/PV5G-BDAZ>] (criticizing the J-1 visa Summer Work Travel Program and the J-1 Trainee and Intern Program).

61. See, e.g., SUKTHANKAR, *supra* note 52, at 20–22 (noting that B-1 visas allow foreign domestic workers to accompany visitors to the United States; A-3 visas allow entry into the United States for domestic workers “of a diplomat or a foreign government official”; and G-5 visas allow entry for “domestic workers of employees of international organizations”).

62. DANIEL COSTA & JENNIFER ROSENBAUM, *ECON. POL’Y INST., TEMPORARY FOREIGN WORKERS BY THE NUMBERS: NEW ESTIMATES BY VISA CLASSIFICATION 1* (2017), <http://www.epi.org/files/pdf/120773.pdf> [<https://perma.cc/K5TK-4VU7>]. Costa and Rosenbaum estimate that there were 1.42 million temporary foreign workers in the United States in 2013. *Id.* However, this number is sure to have risen. To take just one comparative point, Costa and Rosenbaum’s report is based on a year in which there were just shy of 75,000 workers in the United States on H-2A visas. *Id.* at 2. There are now regularly more than 200,000 H-2A workers entering the country every year. See Beltran, *supra* note 54, at 235 n.23 (summarizing the increase in the number of H-2A visas granted through the year 2019, which saw a total of 204,801 H-2A visas granted); see also BUREAU OF CONSULAR AFFS., U.S. DEP’T OF STATE, *NONIMMIGRANT VISAS ISSUED BY CLASSIFICATION (INCLUDING BORDER CROSSING CARDS): FISCAL YEARS 2016–2020*, at tbl. XV(B), [https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport\\_TableXV\\_B.pdf](https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2020AnnualReport/FY20AnnualReport_TableXV_B.pdf) [<https://perma.cc/85QD-43UY>] (documenting a total of 213,394 H-2A visas granted in 2020).

they work.<sup>63</sup> The persistence of exploitation among TFW programs has two causes that operate in a sort of feedback loop: first, the programs bind the workers to the employers who requested their labor, which drastically distorts the power dynamic in favor of the employer; and second, the inaction by federal enforcement agencies disincentivizes employer compliance with the law. Here, we discuss the first of those causes in more detail. We examine the second cause in Part I(C).

All workers who enter the United States on one of the aforementioned TFW visas are subject to several key limitations. The first is that their work visas are limited in scope: the visas are, as the name suggests, *temporary*, and the workers' temporary stay in the United States is for the purposes of work, whether explicitly acknowledged or not.<sup>64</sup> The second is that the workers' legal authorization to work—and, critically, their *legal status* in the United States—is limited to the employer or entity that petitioned the U.S. government for their labor.<sup>65</sup> In other words, the workers

---

63. Temporary foreign workers' inability to participate in the U.S. political process, which impacts their legal rights while working in the United States, is indeed a feature of these programs. See, e.g., Briana Beltran, *134,368 Unnamed Workers: Client-Centered Representation on Behalf of H-2A Agricultural Guestworkers*, 42 N.Y.U. REV. L. & SOC. CHANGE 529, 588 (2019) (arguing that H-2A workers do not have "real legal ties to the United States—no path to citizenship, regardless of how many years they may have worked in the United States on an H-2A visa—and no ability to participate directly in the political processes that affect their legal rights while in the United States"); see also Jennifer J. Lee, *Private Civil Remedies: A Viable Tool for Guest Worker Empowerment*, 46 LOY. L.A. L. REV. 31, 42 (2012) ("[S]ince H-2 visas are temporary and do not provide a path to lawful permanent residency, guest workers are a de facto underclass of immigrant workers who lack the benefits that come with integrating into U.S. society."); Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guestworkers*, 40 N.Y.U. REV. L. & SOC. CHANGE 375, 385 n.53 (2016) ("Guestworkers . . . cannot participate in the political process and the visa does not provide a means to ever gain citizenship.").

64. See, e.g., SUKTHANKAR, *supra* note 52, at 11. Sukthankar writes:  
Every year, between 700,000 and 900,000 foreign citizens come to work in the United States, on visas that are structured around the expectation that these workers will eventually return to their home countries. These individuals are not "immigrants," arriving with the expectation that they will eventually be able to make their home here, as permanent residents or citizens. Nor are they "undocumented," "unauthorized," or "illegal" workers, who may have a tourist visa, an expired visa, or have entered the country with no visa at all. Rather, "guestworkers," or "temporary foreign workers," are in the U.S. on visas that are explicitly designed to come to an end.

*Id.*

65. See *id.* at 40 ("Temporary workers' visa status is tied to the employer who sponsored them, creating an artificial marketplace for their labor. These workers cannot respond to mistreatment by leaving and looking elsewhere for fair conditions."); see also Smith, *supra* note 63, at 387 ("A guestworker's visa is linked to their employer and, if their

lack visa portability, or the ability to carry their lawful immigration status with them to other employers.

Perhaps not surprisingly, this structural imbalance between workers and employers feeds temporary foreign workers into a system of exploitation characterized by frequent violations of employment laws, regulations, and other workplace protections. One report by the Southern Poverty Law Center illuminated exactly what the limitations imposed on workers' visas means for them in practice:

Recruiters [in workers' communities of origin] often exploit workers' desperate economic situation by deceptively promising them lucrative job opportunities and even green cards or visa extensions. These abuses are exacerbated by the inherently disempowering structure of the H-2 program. The program requires that guestworkers work only for the employer who sponsored their visa and that they leave the country when their visa expires. Therefore, once the workers arrive in the United States and the recruiter's deception unravels, they face a tough decision: They can remain in an abusive situation, return to their home country where they have little chance of earning enough money to repay their debt, or leave their employer and become undocumented, risking their ability to return to the United States in the future to work. Tethered to a single employer and often unable to return home due to crushing debt, guestworkers are extremely susceptible to debt servitude and human trafficking.<sup>66</sup>

As this excerpt illuminates, the financial pressures often begin even before workers leave for the United States. Because of the gatekeeping function that employers and recruiters serve in these inherently imbalanced TFW visa programs, it is not uncommon for workers to have to pay hundreds or even thousands of dollars to obtain a visa, at times putting up land or other property as collateral to obtain a high-interest loan in their communities of origin.<sup>67</sup> The abusiveness of this practice is magnified in the context of the J-

---

job ends, the guestworker loses their immigration status . . ."); Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 330 (2013) ("For au pairs and other . . . temporary migrant domestic workers . . . , immigration status is tied to specific recruitment agencies or employers such that leaving the agency or employer renders the worker immediately deportable . . .").

66. BAUER, *supra* note 37, at 12–13.

67. *See id.* at 9 (noting that recruiters "usually charge fees to the worker—sometimes thousands of dollars—to cover travel, visas, and other costs, including profit for the recruiters" and that they "sometimes require [workers] to leave collateral, such as the deed to their house or car . . . to ensure that they fulfill the terms of their individual labor contract"); *see also* STEWART, *supra* note 60, at 3–4 (discussing recruitment fees

1 visa program, as both community-of-origin recruiters and United States-based sponsors have both been known to charge fees.<sup>68</sup> Both the practice of charging fees and the amounts that can be charged are “entirely unregulated.”<sup>69</sup> Even in a visa program with stronger protections, however, the problem remains pervasive: while the H-2A program contains explicit prohibitions against this practice, it is nevertheless highly common.<sup>70</sup> Given that so many workers who participate in TFW programs come from impoverished backgrounds, often in rural communities, these financial demands are an extreme burden for workers and their families.<sup>71</sup>

Once in the United States, the financial pressures and legal violations often continue, as temporary foreign workers regularly experience wage theft. Workers in certain sectors—e.g., agriculture, forestry, seafood industries—are frequently paid on a piece-rate system based on the quantity of units they plant, pick, or produce.<sup>72</sup> While this practice is lawful, any worker whose actual wage would fall under the applicable hourly minimum wage must have their wages supplemented to reach that threshold—but

---

charged to J-1 au pairs); NEWMAN, *supra* note 52, at 23 (noting that some H-2A workers have paid as much as \$11,000 to recruiters to secure temporary employment).

68. STEWART, *supra* note 60, at 3.

69. *Id.* at 7.

70. *See, e.g.*, Beltran, *supra* note 63, at 547–48 (discussing commonality of recruitment fees in H-2A program).

71. A particularly potent example of this situation comes from the forestry sector, which one report has illustrated as follows:

Guestworkers from Guatemala generally pay at least \$2,000 in travel, visa, and hiring fees to obtain forestry jobs in the United States. Guatemalans are recruited largely from Huehuetenango, an extremely poor region where many indigenous people live. Often illiterate, many speak Spanish as their second language, with varying degrees of proficiency. They generally work as subsistence farmers and have virtually no opportunity to earn wages in rural Guatemala. Thus, their only realistic option for raising the funds is to visit a loan shark, who will likely charge exorbitant interest rates. Given that the season for forestry work is generally three months long and workers often earn so little, they have little hope of repaying the debt doing the work for which they were hired.

BAUER, *supra* note 37, at 10–11; *see also* Beltran, *supra* note 63, at 549–51 (discussing H-2A workers' limited earning potential and recruitment options in their communities of origin and how these factors magnify the threat and consequences of retaliation among worker populations).

72. *See, e.g.*, BAUER, *supra* note 37, at 18 (referencing the commonality of piece-rate pay schemes among H-2A agricultural and H-2B forestry workers); AM. UNIV. WASH. COLL. OF LAW IMMIGRANT JUS. CLINIC ET AL., BREAKING THE SHELL: HOW MARYLAND'S CRAB PICKERS CONTINUE TO BE “PICKED APART” 24 (2020), <https://cdmigrante.org/wpcontent/uploads/2020/09/Breaking-The-Shell.pdf> [<https://perma.cc/JUV8-F6LE>] (noting the use of piece rate pay among H-2B crab pickers in Maryland).

employers frequently fail to do so.<sup>73</sup> Workers also often see unlawful deductions from their pay, whether from employers or supervisors demanding kickbacks, failing to reimburse workers for job-related expenses, charging workers for expenses such as rent that may be prohibited by program regulations, or charging above-market rates for such expenses.<sup>74</sup>

To make matters worse, this death by a thousand cuts style of wage theft also occurs in sectors that already have artificially low wages. For example, H-2B workers' wages are tied to a prevailing wage standard, which often results in depressed wage rates compared to the wages of U.S. workers laboring in such sectors.<sup>75</sup> Moreover, advocates have documented that some employers misclassify their H-2B workers, such that they fall into a category with an even lower prevailing wage, further reducing the pay given to workers.<sup>76</sup> J-1 visa holders are similarly hampered by low mandated wages: employers of J-1 visa holders are only required to pay the higher of the

---

73. A report illustrates employers' piece rate practices and obligations as follows: In theory, a piece rate encourages workers to work faster than they would under an hourly rate and produce more for the employer. But when employers set the [piece] rate low, and workers' earnings fall below the minimum H-2A rate, H-2A employers are required to supplement piece-rate earnings with "build up" pay to equal the AEWR [Adverse Effect Wage Rate] or minimum wage for every hour worked.

NEWMAN, *supra* note 52, at 24.

74. See, e.g., STEWART, *supra* note 60, at 20 (documenting a J-1 visa holder being charged \$350 per month for rent, more than the market value, and \$70 per month for transportation, on a salary of \$8 per hour); BAUER, *supra* note 37, at 18 (listing common deductions forced upon H-2A and H-2B workers, including for work tools and safety equipment); NEWMAN, *supra* note 52, at 25 ("Employers claim that employees worked fewer hours than they actually did in order to make it appear that the workers averaged the minimum wage per hour. Other times workers are forced to 'kick back' the make-up pay to a crew leader, rendering the AEWR [Adverse Effect Wage Rate] meaningless."). Some of these types of charges are permitted in certain TFW programs but disallowed in others: for example, the H-2A program does not allow employers to charge rent to workers if they are provided housing, whereas there is no such prohibition with J-1 or H-2B workers. See, e.g., SHORTCHANGED, *supra* note 60, at 8 (discussing recruitment fees charged to J-1 au pairs); Smith, *supra* note 63, at 386 (discussing recruitment fees charged by employers and recruiters of H-2A and H-2B workers).

75. See, e.g., BAUER, *supra* note 37, at 21 (summarizing critiques of prevailing wage in the H-2B context).

76. See *id.* at 23 (providing an example of misclassification as between visa categories, such that "workers who should be characterized as H-2A workers (because, for example, they are picking produce in the field) are instead brought in as H-2B workers (and labeled as packing shed workers, for example)" which "results in workers being paid substantially less than the wage rate they should be lawfully paid").

minimum wage or the wages and benefits offered to the U.S. worker counterparts of the visa holders.<sup>77</sup>

In addition to experiencing extreme financial hardship, workers on temporary visas often labor and reside in unsafe conditions. Stories of unsafe worker housing are common in all visa programs,<sup>78</sup> and the danger is compounded by the fact that workers on such temporary visas often are employed in inherently dangerous industries. Agricultural workers are frequently exposed to pesticides,<sup>79</sup> many workers in a variety of industries have to operate dangerous and heavy machinery,<sup>80</sup> and the hospitality industry is among the most dangerous service sectors, with workers experiencing skin rashes and pain from lifting mattresses repeatedly throughout the day.<sup>81</sup> To make matters worse, workers who labor in these fields on temporary work visas face either legal prohibitions or practical difficulties in accessing workers' compensation protections should they be injured on the job.<sup>82</sup> Perhaps unsurprisingly, temporary foreign workers are often subject to workplace exploitation that amounts to human trafficking,

---

77. STEWART, *supra* note 60, at 14–15 (detailing what U.S. regulations require for J-1 worker pay).

78. *See id.* at 21–22 (describing the story of a J-1 visa worker in the hospitality industry); BAUER, *supra* note 37, at 35–37 (describing unsafe and costly worker housing for guestworkers in H-2A and H-2B programs); AM. UNIV. WASH. COLL. OF L. & CENTRO DE LOS DERECHOS DEL MIGRANTE, TAKEN FOR A RIDE: MIGRANT WORKERS IN THE U.S. FAIR AND CARNIVAL INDUSTRY 37–39 (Feb. 2013), [https://cdmigrante.org/wpcontent/uploads/2018/02/Taken\\_Ride.pdf](https://cdmigrante.org/wpcontent/uploads/2018/02/Taken_Ride.pdf) [<https://perma.cc/D3E9-RUDA>] [hereinafter TAKEN FOR A RIDE] (describing the unsanitary and substandard housing conditions of H-2B carnival workers); NEWMAN, *supra* note 52, at 28–30 (describing the unsafe and unhealthy housing of H-2A agricultural workers).

79. *See, e.g.*, NEWMAN, *supra* note 52, at 27, 29 (documenting H-2A worker stories of pesticide exposure).

80. *See, e.g.*, BAUER, *supra* note 37, at 25 (“Fatality rates for the agriculture and forestry industries, both of which employ large numbers of guestworkers, are seven times the national average.”); TAKEN FOR A RIDE, *supra* note 78, at 30 (“OSHA . . . documented 92 worker fatalities or catastrophes related to amusement rides since 1984. H-2B fair workers’ long work hours, physically demanding work with large machinery and equipment . . . lack of protective gear or formal training contribute to the already dangerous working conditions.”).

81. *See, e.g.*, STEWART, *supra* note 60, at 17 (noting that “housekeeping work is physically debilitating,” and highlighting that “[a] peer-reviewed study of injury rates in the hotel industry found that housekeepers have a higher rate of injury and sustain more severe injuries than most other service workers”).

82. *See* Beltran, *supra* note 54, at 241–42 (summarizing numerous legal and practical difficulties that temporary foreign workers experience in accessing medical care for workplace injuries).

exacerbated by the U.S. government's lack of transparency and failure to enforce or even monitor worker safety standards.<sup>83</sup>

In short, temporary foreign workers regularly experience legal violations while being recruited to and once in the United States. These violations are in large part facilitated by the very design of the programs themselves, which bind workers to the employers who petitioned the U.S. government for their labor. In the next section, we explore workers' options for remedying such violations.

### C. The Need for Litigation

For individuals who come to the United States on temporary work visas and experience legal violations, the most obvious place to seek help might be the U.S. government, because it bears responsibility for both setting out and enforcing the rules for these temporary visa programs in the first place.<sup>84</sup> That approach proves insufficient, however, for two distinct reasons.

First, some of these visa programs face an uphill battle because oversight rests with U.S. government agencies that do not have a focus on protecting workers.<sup>85</sup> The problem is compounded because the government has entirely abdicated any enforcement responsibility. Specifically, recent reports have documented that the State Department has allowed abuses in

---

83. JUST. IN MOTION, *THE CASE FOR TRANSPARENCY: USING DATA TO COMBAT HUMAN TRAFFICKING UNDER TEMPORARY FOREIGN WORKER VISAS 31-33* (2020), [https://683ba61a-c54c-40f0-acc5-a9f6c778d737.filesusr.com/ugd/64f95e\\_2e583e35cefe407e9bb8a6697d059a5d.pdf](https://683ba61a-c54c-40f0-acc5-a9f6c778d737.filesusr.com/ugd/64f95e_2e583e35cefe407e9bb8a6697d059a5d.pdf) [<https://perma.cc/5J5E-338G>].

84. Indeed, the difficulties are increased once workers return to their communities of origin after the work period ends. Critically, the regulatory frameworks of these temporary visa programs provide no generalized mechanism for workers to denounce abuses via U.S. government offices abroad—for example, at U.S. consular offices.

85. The J-1 program is administered by the State Department's Bureau of Educational and Cultural Affairs. See SUKTHANKAR, *supra* note 52, at 22. The Bureau of Educational and Cultural Affairs gives the following as its mission statement: "[t]o increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange that assist in the development of peaceful relations." *History and Mission of ECA*, BUREAU OF EDUC. AND CULTURAL AFFS., U.S. DEP'T OF STATE, <https://eca.state.gov/about-bureau/history-and-mission-eca> [<https://perma.cc/AE4B-GU8U>]. By contrast, the U.S. DOL's Wage and Hour Division, which provides oversight of the H-2 programs, publicly states that its "mission is to promote and achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce." *About Us*, WAGE AND HOUR DIV., U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/about> [<https://perma.cc/WH8W-KLY3>]; see also *infra* note 91 and accompanying text (describing U.S. DOL oversight of the H-2A and H-2B programs).

the J-1 program to run rampant, letting both direct employers of J-1 workers and the sponsors who help workers obtain the visas off the hook entirely.<sup>86</sup>

The second reason is that, even in programs in which federal agencies have clear and explicit authority to enforce visa program rules and federal employment laws to protect workers, the agencies often fail workers due to a combination of agency incompetence and resource scarcity.<sup>87</sup> As to the former, recent investigative reports have extensively documented the problem of repeat offender employers being allowed to continue their participation in the H-2A and H-2B programs.<sup>88</sup> Other branches of the federal government have similarly noted U.S. DOL's failure on this issue.<sup>89</sup> With regards to the latter, agencies such as the U.S. DOL's Wage and Hour Division—which has general oversight over the enforcement of federal wage and hour laws contained in the Fair Labor Standards Act as it relates to all

---

86. See, e.g., STEWART, *supra* note 60, at 12–14 (explaining the State Department's position that it only has the authority to sanction sponsors of J-1 visas, not direct employers, and the critiques the Department has received for the resulting lack of oversight); see also SHORTCHANGED, *supra* note 60, at 7 (noting that, as of 2014, a sponsor had not been sanctioned or banned from the J-1 program for eight years).

87. A separate but not wholly unrelated point is the woefully insufficient prioritization given to prosecution of labor trafficking cases in the United States by law enforcement, despite the fact that temporary foreign workers are often the victims of trafficking. See, e.g., Annie Smith, *The Underprosecution of Labor Trafficking*, 72 S.C. L. REV. 477, 507 (2020) (noting that TFW programs “create[] inherent vulnerability for workers that can be and is exploited by traffickers and other bad actors”); *id.* at 492–93 (noting that the State Department's annual Trafficking in Persons Report has listed “increasing the number of prosecutions of labor trafficking” among the top recommendations for the United States since 2014 and listed “increas[ing] investigation and prosecution of labor trafficking cases” first in 2018, 2019, and 2020).

88. Ken Bensinger et al., *Employers Abuse Foreign Workers. U.S. Says, by All Means, Hire More.*, BUZZFEED NEWS (May 12, 2016), <https://www.buzzfeednews.com/article/kenbensinger/the-pushovers> [<https://perma.cc/L39T-VMZW>].

89. See U.S. GOV'T ACCOUNTABILITY OFF., H-2A AND H-2B VISA PROGRAMS: INCREASED PROTECTIONS NEEDED FOR FOREIGN WORKERS 1 (Mar. 2015), <https://www.gao.gov/products/GAO-15-154> [<https://perma.cc/44NC-D8GC>] (noting that “certain limitations hinder the effectiveness” of U.S. DOL's ability to “debar[]—or temporarily ban[] from program participation—employers who commit certain violations,” including limitations on information sharing between federal government agencies involved in the process of approving employers' petitions for H-2A and H-2B workers, a lack of focus on H-2B employers, and slow investigative timelines that push results beyond the two-year statute of limitations on debarment of employers); see also U.S. DEP'T OF LAB., DOL NEEDS TO IMPROVE DEBARMENT PROCESSES TO ENSURE FOREIGN LABOR PROGRAM VIOLATORS ARE HELD ACCOUNTABLE 1 (Sept. 20, 2020), <https://www.oig.dol.gov/public/reports/oa/2020/06-20-001-03-321.pdf> [<https://perma.cc/LDP2-38RP>] (noting “concern[] about the Department's debarment process,” and including recommendations about how to improve debarment processes in the H-1B, H-2A, and H-2B programs).

workers in the United States<sup>90</sup> as well as explicit authority over certain TFW programs<sup>91</sup>—are simply unable to keep up with the increasing demands brought about by the exponential growth in the H-2A program.<sup>92</sup> For example, even in cases in which there is an investigation or—even more rarely—a positive outcome for workers, the Wage and Hour Division is often unprepared for the special care required to make workers whole when they reside abroad and may be hard to reach.<sup>93</sup> Such a failure to develop specialized services in the face of ever-growing TFW programs might even be classified as a lack of political will to truly serve all workers who labor in the United States.

In short, U.S. government agencies are, at best, poorly positioned to help temporary foreign workers who experience legal violations. These workers are thus left to seek legal remedies on their own behalf, though even those are also limited in scope.<sup>94</sup> Fortunately, many of these workers are able to access the remedies, however limited, with the assistance of a tenacious group of lawyers in the United States who have built a practice on exactly this type of work: representing temporary foreign workers in civil litigation to obtain redress for violations of workplace rights.

---

90. See *Wages and the Fair Labor Standards Act*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/flsa> [<https://perma.cc/Q675-8C8Q>].

91. See *Major Laws Administered/Enforced*, WAGE AND HOUR DIVISION, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/laws-and-regulations/laws> [<https://perma.cc/RF8Z-7TFC>] (“Wage and Hour has certain responsibilities under the [INA]. These include enforcement of the labor standards protections for certain temporary nonimmigrant workers admitted to the U.S. under several programs (D-1 Crewmembers; H-1B, Professional and Specialty Occupation Workers; H-1C, Nurses; H-2B Non-Agricultural Workers; and H-2A Agricultural Workers).”).

92. See, e.g., FARMWORKER JUS., U.S. DEPARTMENT OF LABOR ENFORCEMENT IN AGRICULTURE: MORE MUST BE DONE TO PROTECT FARMWORKERS DESPITE RECENT IMPROVEMENTS 8–9 (2015), <https://www.farmworkerjustice.org/sites/default/files/FarmworkerJusticeDOLenforcementReport2015%20%281%29.pdf> [<https://perma.cc/JQU7-PEMD>] (comparing data from Wage and Hour Division enforcement actions from 2005 to 2008 and 2010 to 2013, and finding an increase in investigations, case hours, penalties assessed, and cases resulting in violations with respect to the H-2A program, but noting that part of the increase is accounted for by the significant increase in the H-2A program’s size over the relevant time period).

93. See, e.g., Beltran, *supra* note 63, at 555–56 (detailing practical problems faced by H-2A workers and their advocates when obtaining relief for legal violations via investigations conducted by the U.S. DOL’s Wage and Hour Division); see also Holley, *supra* note 40, at 598–99 (detailing the “inadequate” administrative remedy provided to H-2A workers).

94. See, e.g., Beltran, *supra* note 63, at 575–76 (outlining limitations on federal claims available to H-2A workers).

#### D. The Rise of Niche Practitioners

The value of legal counsel for temporary foreign workers cannot be overstated. From a practical perspective, they need the guidance of a lawyer to first understand the full spectrum of their rights under U.S. law. From there, they need legal representation to navigate private enforcement mechanisms, which generally result in lengthy civil litigation processes that outlast the time a TFW plaintiff is allowed to remain in the United States under the rules of the TFW visa program. Because of the complexities involved in representing temporary foreign workers who must necessarily depart the United States during litigation of disputes, this task has largely fallen to a specialized sector of the plaintiffs' bar.

This niche practice area has grown out of the establishment and robust implementation of federally funded civil legal services for the poor through the Legal Services Corporation ("LSC").<sup>95</sup> Every year since the early 1970s, Congress has appropriated funds to the LSC, which awards financial grants to independently run non-profit legal services organizations set up in each state to provide free legal assistance to indigent clients (commonly referred to as "LSC grantees").<sup>96</sup> In many states, there is an LSC grantee office dedicated to representing migrant agricultural worker clients.<sup>97</sup> All LSC

---

95. See *id.* at 556–57. The first federally funded legal services program to serve the poor was created by the Office for Economic Opportunity ("OEO") after the passage of the Economic Opportunity Act of 1964, which over the next decade evolved into the LSC. See Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 UDC/DCSL L. REV. 35, 36 (2007).

96. 42 U.S.C. §§ 2996–2996(i) (2021). These organizations—also known as "legal services" or "legal aid"—remain active in all 50 states and U.S. territories. Some states have more than one legal services program, depending on geography and leadership structure. See *Our Grantees*, LEGAL SERVS. CORP., <https://lsc.gov/grants-grantee-resources/our-grantees> [<https://perma.cc/E27U-BQZ3>] (noting that currently over 75 grantees provide free legal services throughout the United States and its territories.). Eleven board members appointed by the President and confirmed by the Senate sit on the LSC board, and the LSC is funded by Congress through the appropriations process. James R. Smerbeck, *The Impact of Prohibiting Legal Service Corporation Offices from Representing Undocumented Immigrants on Migrant Farmworker Litigation*, 45 IND. L. REV. 513, 516–17 (2012). Note that most LSC grantees receive funding from other sources, in addition to the federal government, including states, private foundations, and individual donors.

97. The LSC provides a specific carve-out for funding for legal services to migrant farmworkers, which originated with the OEO. See Holley, *supra* note 40, at 613; Smerbeck, *supra* note 96, at 516–17. Through agency study, the LSC has continually found that the transience, cultural isolation, and language barriers were all issues that made serving migrant populations more difficult and required a specialized legal services delivery model. See 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); see also Smerbeck, *supra* note 96, at 526–27 (noting that hiring summer interns helps to "[ameliorate] the barriers that indigent and immigrant workers face in accessing the legal

grantee offices are subject to extensive federal regulations regarding the boundaries of their activities and client representation.<sup>98</sup>

Many of these restrictions have developed out of political battles of years past. For example, in the mid-1990s, the Farm Bureau contacted members of Congress with purported concerns about LSC grantees educating migrant workers about their rights and taking action to enforce them.<sup>99</sup> When the Republican Party won control of both the House of Representatives and the Senate in the 1994 mid-term elections, these critics had “unprecedented influence over changes to be made to LSC.”<sup>100</sup> Lawmakers were incensed over impact litigation brought by grantees that sought systemic change, swayed by the notion that the original focus of the LSC was merely to assist indigent clients in “individual” cases.<sup>101</sup> This brouhaha led to additional restrictions on LSC grantees; two are significant here because they demonstrate how and why this niche practice area developed.

First, the new rules limited the universe of clients that LSC grantees could represent. Specifically, the restrictions only allowed representation of certain noncitizen clients who were “present” in the United States, including temporary foreign workers with an H-2A visa with conflicts arising out of the employment contract.<sup>102</sup> Temporary foreign workers with B-1, A-3/G-5, J-1, H-1B, and most H-2B non-immigrant visas were excluded from this

---

system” by increasing staff capacity for outreach to workers during the critical summer harvest season).

98. See 45 C.F.R. pt. 1600 (2017). History provides context showing how hard it has been for immigrant workers generally to get access to lawyers. In the 1980s, Congress added restrictions prohibiting LSC grantees from using appropriated funds to represent clients who did not have lawful immigration status; that initial prohibition evolved into a list of categories of noncitizens ineligible for representation. See, e.g., Alan W. Houseman, *Restrictions by Funders and the Ethical Practice of Law*, 67 *FORDHAM L. REV.* 2187, 2194–96 (1999).

99. Smerbeck, *supra* note 96, at 528.

100. *Id.* at 530.

101. Henry Rose, *Class Actions and the Poor*, 6 *PIERCE L. REV.* 55, 62 (2007); see also *id.* at 61 n.50 (quoting Senator Pete Dominici as stating, “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.”).

102. See 45 C.F.R. § 1626.11(a) (2014); see also Letter from Mattie C. Condray & Victor M. Fortunato, Gen. Couns., Off. of Legal Affs., Legal Servs. Corp., to Terri Thomas, Esq., Alan Norton & Blue P.A. (Aug. 8, 2000) (on file with the *Columbia Human Rights Law Review*) (“The availability of such representation is intended to prevent the exploitation of H-2A workers and to ensure that the wages and working conditions of U.S. workers are not undermined.”).

framework.<sup>103</sup> Even still, in the late 1990s, the LSC established a special commission to determine the precise bounds of the presence requirement.<sup>104</sup> The crux of the issue, of course, is that under the H-2A visa's terms, these temporary foreign workers must depart the United States when their visa ends, and that date rarely—if ever—corresponded with the resolution of claims against their employers.<sup>105</sup> The commission concluded that LSC grantees could continue representation for the entire course of litigation related to employment in the U.S. under the H-2A contract, even after their clients were no longer present in the United States.<sup>106</sup> As a result, these lawyers developed a practice focused on representing H-2A workers.

The second significant rule change was the restriction prohibiting LSC grantees from using non-federal money, such as states' Interest on Lawyers' Trust Account program ("IOLTA") funds, to represent undocumented immigrant clients or to file class action lawsuits. From 1996 to 2009, lawyers representing such clients also could not seek attorneys' fees in civil litigation under fee-shifting statutes.<sup>107</sup> In response, trustees of the IOLTA programs in several U.S. states began to redirect the funds away from LSC grantees and toward existing non-profit legal services organizations that did not receive LSC funding, and to new non-LSC entities that were created specifically to receive these IOLTA funds and carry out LSC-prohibited representation.<sup>108</sup> This occurred in at least seven states, and the majority of

---

103. Since the restriction was enacted, the scheme has changed slightly, allowing for representation of temporary foreign workers with an H-2B visa employed in the forestry sector to be eligible for representation from LSC grantees on matters related to their contract. See 45 C.F.R. § 1626.11(b) (2014); see also Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 137 (2009) (noting that those who receive LSC federal funding may represent H-2B forestry workers, but not H-2B workers employed in other sectors). Individuals, including temporary foreign workers, who have survived human trafficking are also eligible for representation. See 45 C.F.R. § 1626.4 (2014).

104. See LEGAL SERVS. CORP., THE ERLNBORN COMMISSION REPORT, at i (1999), <https://www.lsc.gov/sites/default/files/LSC/pdfs/jnecrpt.pdf> [<https://perma.cc/5VV4-LTS6>] (describing the formation of a special commission).

105. See *id.* ("Of particular interest . . . was the situation of seasonal agricultural workers, [including] . . . H-2A workers. [Such] workers frequently leave and re-enter the United States; thus the 'presence' requirement would have a substantial and direct impact on their ability to receive legal representation from LSC grantees.").

106. *Id.* at iv ("LSC grantees are authorized to litigate this narrow range of claims to completion, despite the fact that the [noncitizen] may be required to depart the United States prior to or during the course of the representation.").

107. See *Statutory Restrictions on LSC-Funded Programs*, LEGAL SERVS. CORP., <http://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs> [<https://perma.cc/H5AM-8QRN>].

108. Email from Anonymous Survey Respondent to Nan Schivone, Legal Director, Just. in Motion (Nov. 16, 2020, 01:17 PM EST) (on file with authors).

those newly created non-LSC-funded legal services organizations were led and staffed by former lawyers and paralegals from LSC grantees who had experience in the specialized delivery systems for migrant workers.<sup>109</sup> In time, these lawyers began to represent both undocumented clients as well as temporary foreign workers in both the H-2A and in other nonimmigrant visa program contexts.<sup>110</sup>

Even with the access-to-counsel hurdle eased for H-2A workers and expanded for other TFW plaintiffs, challenges remain. Lawyers representing temporary foreign workers, whether at LSC grantee organizations or elsewhere, are successful because of this specialized experience and personal commitment. They have specific expertise to help their TFW clients hold defendants accountable for wrongdoing. A hallmark of this niche practice area is the lawyers' preparation to navigate a litigation process full of the challenges inherent in representing temporary foreign workers. Regardless of the type of dispute and claims pursued, creating and maintaining the attorney-client relationship with TFW clients throughout the course of litigation is difficult due to two *definitional* factors rooted in TFW programs themselves.

First, by definition, *temporary* foreign workers are temporarily in the United States and, absent a swift resolution to the conflict, their representation will most certainly require cross-border delivery of legal services. By statute, regulation, or federal agency operational guidance, every nonimmigrant visa program time-binds a temporary foreign worker's presence in the United States, after which the temporary foreign worker must depart the United States.<sup>111</sup> Second, being that *foreign* workers hail from abroad, cultural and language differences often require a specialized delivery of legal services. Not only are temporary foreign workers unlikely to speak English fluently, but they are also unlikely to be familiar with U.S. laws and the legal system. Furthermore, like many vulnerable workers, temporary foreign workers fear retaliation from their employer if they bring claims. This fear is exacerbated for temporary foreign workers because their very

---

109. *Id.*

110. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 921–23 (2008); *see also* Beltran, *supra* note 63, at 557.

111. The length of stay of any individual temporary foreign worker depends on their specific nonimmigrant visa status and, depending on the program type, a federal agency's acceptance of the employer's demonstrated term of need for foreign labor. By way of example, temporary foreign workers with a J-1 visa to engage in employment pursuant to the Summer Work Travel program are routinely allowed to stay in the United States for a three-month period, and a J-1 visa for an au pair is usually set for a one-year period. Dep't of State Summer Work Travel Rule, 22 C.F.R. § 62.32 (2021); Dep't of State Au Pair Rule, 22 C.F.R. § 62.31 (2021).

presence in the United States is dependent on their employer. While retaliation is illegal, it is a valid concern and hard to combat. The concerns are especially heightened when temporary foreign workers experience the retaliation back in their community of origin, such as when an U.S. employer decides not to re-hire a worker because they have complained. Such retaliatory actions can carry consequences not just for the individual worker for years to come, but also for others in their community,<sup>112</sup> and any efforts to bring claims premised on these acts would face a host of practical and strategic hurdles in litigation. These concerns necessitate a special kind of advocacy.

Lawyers who practice in this niche area know that this special attention commences even before the attorney-client relationship begins. Routine outreach activities and community legal education efforts are necessary to ensure that culturally, linguistically, and often geographically-isolated temporary foreign workers know that they can enforce their legal rights. This is no small feat and requires after-hours work in rural areas. When temporary foreign workers live in employer-provided housing, outreach visits may result in disputes with the employers—or even law enforcement—over the lawyers' access to TFW housing to provide legal services.<sup>113</sup>

Once a lawyer decides to represent a temporary foreign worker to resolve an employment issue, they must then build a trusting relationship with their client, ensuring that they can maintain communication after the client leaves the United States. Lawyers have the added challenge of ensuring the availability of ready and accurate language interpretation and translation for the duration of the representation if they are not fully bilingual in both English and the temporary foreign worker's spoken language. Furthermore, lawyers who represent temporary foreign workers must engage in client education about the U.S. civil litigation paradigm. This includes explaining the role of the lawyers and the court system, as well as the lengthy process and the responsibilities of individual plaintiffs during the discovery period to participate and respond to the other party's requests. In addition, skilled lawyers can help clients battle their fears of employer retaliation by taking

---

112. See, e.g., Beltran, *supra* note 63, at 550–51 (describing the layered retaliation concerns of H-2A workers and the effects such actions can have on communities at large).

113. See *id.* at 551–52 (describing isolation of H-2A workers and difficulties advocates have in reaching such workers); Chuang, *supra* note 65, at 336 (describing isolation of au pairs on J-1 visas); see also *Rivero v. Montgomery Cnty.*, 259 F. Supp. 3d 334, 343–348 (D. Md. 2017) (discussing a § 1983 suit by legal aid workers against a police officer, a county, and certain farm owners alleging violation of their First Amendment rights when they were issued a trespass notification after speaking with temporary foreign workers regarding potential wage and hour law violations at the workers' labor camp).

action to prevent it and instilling confidence in the lawyer's commitment to fight it if it happens. Their strategies may include counseling their clients to take notes of interactions with their employers, ensuring that the pretext for any adverse employment actions is mitigated by exacting attention to behavior and work rules, and assuring their clients that any retaliatory acts will be aggressively denounced in the litigation process. Such focused attention on the client relationship may certainly encourage a TFW plaintiff to follow through with a long, unfamiliar, and risky litigation process.

In sum, politically-driven funding constraints combined with the realities of the temporary foreign work programs have forced lawyers to specialize in TFW litigation. Over time these lawyers have risen to meet the unique challenges of providing zealous representation when temporary foreign workers assert their rights.

## II. Scorched Border Litigation

Next, we turn to a more detailed examination of "scorched border" litigation itself. What does this tactic look like in practice? How exactly do employers and their lawyers use workers' foreign status against them during the course of litigation? First, we consider two case studies that illustrate this phenomenon. Second, we discuss our database of TFW cases and the survey we developed to learn about lawyers' experiences litigating cases on behalf of TFW plaintiffs. In so doing, we provide background on the methodology we used to both prepare and distribute our practitioner survey. Third, we take a closer look at what the survey results illustrate about the lawyers who represent TFW plaintiffs and the tactics used by their adversaries during the course of litigation. Finally, we step back to consider the costs borne by TFW plaintiffs and their lawyers when defendants attempt to evade accountability and subvert access to justice.

### A. Examples of Scorched Border Litigation

Litigation is, of course, an adversarial process, and that can manifest in innumerable ways as it unfolds. In TFW cases, however, the plaintiffs' absence from the United States during litigation—and foreign nationality more generally—often serves as an additional hammer in defense lawyers' tool belt. In the two examples that follow, we highlight two specific ways in which defendants use this tactic: first, by attempting to shut off the case from the start, and second, by using plaintiffs' absence to complicate discovery.

For our first example, let us circle back to the case of the Fish Farms workers that opened this Article. In that case, more than a dozen H-2A workers traveled from their homes in Mexico to provide seasonal

agricultural labor at Fish Farms in Tennessee in 2010.<sup>114</sup> While there, they were subjected to illegal working and housing conditions; in response, they filed complaints with the U.S. DOL and the Tennessee Department of Agriculture.<sup>115</sup> Thereafter, the three individuals who ran Fish Farms retaliated against the workers by firing them and sending them back to Mexico.<sup>116</sup> A lawsuit on behalf of fifteen workers, styled as *Lopez v. Fish*, ensued. The plaintiffs brought retaliation and discrimination claims under state and federal law, as well as a claim for breach of contract pursuant to the terms of their H-2A visas.<sup>117</sup>

The three defendants then filed a motion to dismiss the plaintiffs' claims on two grounds, arguing that the court lacked jurisdiction over the claims and that the plaintiffs had failed to state a claim pursuant to Rule 12 of the Federal Rules of Civil Procedure.<sup>118</sup> A defendant filing a motion to dismiss a plaintiff's claims, on either or both of these grounds, is a typical move in federal litigation. However, the precise arguments made by the *Fish* defendants and the assumptions that undergirded them reveal the ways in which employers and their lawyers view former workers and how they react to temporary foreign workers who stand up for their rights. The *Fish* defendants relied extensively on the text of the INA, as it relates to the H-2A program in particular, to argue that the plaintiffs lacked standing to bring their claims and that the U.S. DOL, acting in its enforcement capacity, is the exclusive method by which H-2A workers may pursue relief for violations of the program's terms.<sup>119</sup>

As to the jurisdiction issue, the defendants argued that H-2A workers—as non-U.S. citizens who are only authorized to work in the United States because of their H-2A visas—essentially have no rights, claiming that “Congress did not intend to grant employment ‘rights’ to foreign residents” by establishing the H-2A program and its substantive provisions.<sup>120</sup> Indeed, the defendants assumed that non-U.S. citizen workers have *no employment rights at all*: “but for their authorization to work” pursuant to their H-2A visas, the “[p]laintiffs’ employment would have been illegal, with no ‘rights’

---

114. *Lopez v. Fish*, No. 2:11-CV-113, 2012 WL 2126856, at \*1 (E.D. Tenn. May 21, 2012) (denying motion to dismiss).

115. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 1–2, *Lopez v. Fish*, No. 2:11-CV-113 (E.D. Tenn. July 5, 2011) [hereinafter *Lopez*, Plaintiffs’ Memorandum].

116. *Id.* at 2.

117. *Id.*

118. Defendants’ Motion to Dismiss at 1–2, *Lopez v. Fish*, No. 2:11-CV-113 (E.D. Tenn. June 14, 2011).

119. *Id.*

120. *Id.* at 1.

protected by law.”<sup>121</sup> Instead, the *Fish* defendants argued, the only people who have rights under the H-2A provisions are U.S. workers, given Congress’ stated purpose of “ensur[ing] the protection of employment opportunities and working conditions for residents of the United States.”<sup>122</sup> As such, the “plaintiffs, as permanent residents of a foreign country, are simply not the intended beneficiaries of H-2A . . . regulation[s]; they are incidental beneficiaries at best.”<sup>123</sup>

The second strand of the *Fish* defendants’ argument was premised on another assumption: that the ability to undertake litigation in response to violations of one’s rights ends at the border. As such, the defendants argued that the INA did not authorize “private lawsuits by H-2A workers, and particularly not by former H-2A workers, who have necessarily returned to their home country at the end of their H-2A employment.”<sup>124</sup> Instead, the defendants argued that, because the U.S. DOL is given enforcement authority over the H-2A program, it should be read as *exclusive*—even to the point of precluding claims under other federal statutes such as the Fair Labor Standards Act.<sup>125</sup> In sum, as the plaintiffs put it to the district court: “[c]lose

---

121. Memorandum in Support of Defendants’ Motion to Dismiss, at 1–2, *Lopez v. Fish*, No. 2:11-CV-113 (E.D. Tenn. June 14, 2011) [hereinafter *Lopez*, Defendants’ Memorandum].

122. *Id.* at 9.

123. *Id.* While the argument that H-2A workers are only “incidental beneficiaries” of the regulations that lay out their employment rights is unpersuasive from the point of view of the standing analysis put forth by the *Fish* defendants, it is not entirely outlandish. As commentators have noted, this argument has been used to deny H-2A workers’ attempts to read a private right of action into the H-2A regulations, which would provide a freestanding mechanism for H-2A workers who have experienced violations of their rights under the regulations to file suit in federal court. *See, e.g.*, Holley, *supra* note 40, at 607–08 (discussing development of case law that resulted in the holding that the H-2A regulations lack an implied private right of action). The remedy for such violations, instead, is a breach of contract claim under state law, though lawyers filing suit on behalf of such workers tend to bring cases involving other federal claims—violations of the Fair Labor Standards Act, the Trafficking Victims Protection Act, or federal anti-discrimination laws, for example—in order to be able to file suit in a more favorable forum. *See* Beltran, *supra* note 63, at 575–76 (discussing H-2A workers’ typical options for federal claims and the difficulties presented by such options including, for example, the decreasing likelihood of finding a federal minimum wage violation because of the increasing gap between the H-2A minimum wage and the federal minimum wage).

124. *Lopez*, Defendants’ Memorandum, *supra* note 121, at 7.

125. *See id.* at 11–13. Boldly, the defendants implied that the existence of such enforcement authority within the U.S. DOL is actually *helpful* to H-2A workers, because they otherwise would have no lawful means to enter the United States to pursue civil claims. In other words, workers would be able to overcome what the defendants termed a “procedural hurdle,” and luckily have some way to seek remedies because of U.S. DOL’s enforcement power. *Id.* at 13. In their response brief, the plaintiffs specifically explained how such authority is actually rather meaningless:

to one million foreign workers receive visas each year for temporary, authorized employment in the United States. Defendants' motion to dismiss implies that the doors of federal courthouses are blocked to all of them."<sup>126</sup>

The defendants' approach did not win the day. In the end, the court denied the motion, characterizing the defendants' arguments as "represent[ing] a gross misunderstanding of the law";<sup>127</sup> noting that the "defendants fail[ed] to cite a single case that stands for, or even supports," one of their key arguments;<sup>128</sup> and reiterating basic legal principles, such as "it [being] well established" that the Fair Labor Standards Act applies to non-U.S. citizens<sup>129</sup> and that "there are federal cases too numerous to count which have held that H-2A workers" may use a contract theory to enforce the H-2A provisions.<sup>130</sup> The court concluded by saying it saw "no need . . . to delve any further into [the] defendants' argument, as it is completely unsubstantiated and devoid of merit."<sup>131</sup> In short, this was a decisive win for the plaintiffs.

The second example comes from a case filed on behalf of a former H-2A tobacco worker, *Hernandez Sanchez v. Williams*. In that case, the defendant sought to force the plaintiff to come to the forum, the Eastern District of Kentucky, from his home in Mexico for his deposition.<sup>132</sup> In the back and forth briefing submitted to the court on the issue of the deposition location, the plaintiff extensively documented the hardship that such travel would entail, both financially and due to the near impossibility of obtaining authorization under U.S. immigration laws to even make such a trip in the

---

The enforcement scheme established by the H-2A regulations, such as it is, is far from comprehensive. The pertinent regulations provide that if an H-2A worker files a complaint with the agency, the [U.S. DOL] "may investigate" "as may be appropriate," neither guaranteeing an investigation nor even a remedy in the event of an investigation and meritorious claim, with no time limit and no procedure for reporting back to the H-2A worker on the status of the complaint. Such a scheme is not comprehensive; it is a "black hole."

*Lopez*, Plaintiffs' Memorandum, *supra* note 115, at 16 (citations omitted). For further discussion of the enforcement black hole, including that of the U.S. DOL, see *supra* Part I(C).

126. *Lopez*, Plaintiffs' Memorandum, *supra* note 115, at 1.

127. *Lopez v. Fish*, No. 2:11-CV-113, 2012 WL 2126856, at \*2 (E.D. Tenn. May 21, 2012).

128. *Id.*

129. *Id.* at 2 (quotation and citation omitted).

130. *Id.*

131. *Id.*

132. See Memorandum in Support of Defendant's Motion to Compel Personal Appearance & Testimony of Plaintiff Antonio Hernandez Sanchez at Deposition at 1, *Hernandez-Sanchez v. Williams*, No. 5:10-cv-00117-JMH (E.D. Ky. Feb. 14, 2011) [hereinafter *Hernandez-Sanchez*, Defendant's Memorandum].

first place, and also cited numerous cases supporting the position that the plaintiff's deposition should be taken by other means (e.g., remotely, or in Mexico).<sup>133</sup>

The defendant, on the other hand, largely sidestepped the weight of authority and dismissed the plaintiff as having previously "left the forum voluntarily,"<sup>134</sup> despite the obvious fact that his H-2A visa was time-limited<sup>135</sup> and allegations that the defendant had confiscated the plaintiff's passport.<sup>136</sup> Instead, the defendant put all of his eggs in one basket, arguing that Mexico was just too dangerous a forum for a deposition. The defendant claimed that he and his lawyer "would be putting their lives at risk if compelled to take the [p]laintiff's deposition in or near Mexico."<sup>137</sup> In a subsequent brief, the defendant spent nearly a full page extensively quoting from news reports to paint a grim picture of Mexico, implicitly "otherizing" the plaintiff, in contrast to the hard-working Kentucky farmer who once employed him.<sup>138</sup> In the end, despite the defendant's efforts to force the issue,

---

133. See generally Plaintiff's Memorandum in Response to Defendant's Motion to Compel & in Support of Plaintiff's Motion for Protective Order at 1, *Hernandez-Sanchez v. Williams*, No. 5:10-cv-00117-JMH (E.D. Ky. Feb. 22, 2011) [hereinafter *Hernandez-Sanchez*, Plaintiff's Memorandum]. TFW plaintiffs who need to return to the United States for purposes of litigation must apply for a visitor visa or humanitarian parole, but the process of seeking this permission is complicated and costly, with no guarantee of success for indigent migrants who must show nonimmigrant intent. See, e.g., Beltran, *supra* note 63, at 583 n.249 (summarizing the difficulty plaintiffs' lawyers encounter when trying to have H-2A worker clients present in the United States during the course of litigation).

134. *Hernandez-Sanchez*, Defendant's Memorandum, *supra* note 132, at 2.

135. See *Hernandez-Sanchez*, Plaintiff's Memorandum, *supra* note 133, at 12.

136. See *id.* at 9.

137. *Hernandez-Sanchez*, Defendant's Memorandum, *supra* note 132, at 3.

138. Specifically, the defendant wrote as follows:

In this case, requiring the Defendant to travel to Mexico would put his life at risk due to the host of dangers caused by the activities of drug cartels and other gang activities at the Mexican border and throughout much of the interior of the country. Recent figures unveiled by the Mexican government in January of this year show that, in the last four years there have been over 34,000 individuals killed in Mexico, over 30,000 of which were "execution-style killings," with an especially high concentration of murders near the [United States]-Mexico border. That number of dead includes many "innocent bystanders," and the violence is spreading to new areas of Mexico. In addition, there has been "a reported rise in drug-related shootings and kidnappings in some [United States] cities and towns" near the border. The violence has been escalating during the past several years, with an especially frightening increase recently. As recently as the 3-day period from Thursday, February 17, through Saturday, February 19, fifty three people were murdered in a 72-hour span in Juarez, Mexico. Plaintiff, in his

the plaintiff appears to have won out—just weeks later, the case was resolved when a motions hearing proceeded immediately to a settlement conference facilitated by the magistrate judge, resulting in a full settlement of the case.<sup>139</sup>

Fortunately, these cases resolved favorably for the TFW plaintiffs, with a court victory in the first, and a negotiated resolution in the second. However, they illustrate the core problem with defendants' scorched border tactics, and how such a strategy goes beyond a defense lawyer's obligation to zealously represent their clients. In short, defendants try to have their cake and eat it too: they eagerly seek out temporary foreign workers to fill purported labor needs, thus benefitting from workers' temporary presence in the United States. But, when a temporary foreign worker attempts to hold an employer responsible for legal violations, the employers use the temporariness of the status *they willed into existence* against the workers. Employers seek to head off any responsibility based on the workers' foreign status as if such status were a surprise complication in a case, when in reality, the workers' absence from the United States is not just entirely foreseeable, but in fact *legally mandated* by the very programs under which the employers brought the workers into the country. This is patently unfair and must end.

---

response, attempts to minimize the danger and the risk to life, even implying that, if counsel once travelled to Mexico City that he should continue to feel safe throughout Mexico at present. However, the truth remains that any travel into or near Mexico brings with it a number of attendant dangers.

Supplemental Brief in Support of Defendant's Motion to Compel Personal Appearance & Testimony & Defendant's Response to Plaintiff's Motion for Protective Order at 2–3, *Hernandez-Sanchez v. Williams*, No. 5:10-cv-00117-JMH (E.D. Ky. Mar. 8, 2011) (citations omitted). As this excerpt indicates, the plaintiff's lawyer had previously documented the defendant's lawyer's willingness to travel to Mexico City for an international sporting event, highlighting the hypocrisy in these arguments:

Defendant claims that travel to Mexico is "extremely dangerous" and that "Defendant and his Counsel would be putting their lives at risk if compelled to take the Plaintiff's deposition in or near Mexico." Mexico is a large country, and Defendant's claims fail to distinguish between those parts of the country which have seen increased violence and those which remain relatively safe. Finally, Defendant's attorney's alleged terror at the prospect of traveling "to or near Mexico" is belied by his apparent willingness to travel to Mexico City less than a year ago to participate in an international sporting event.

*Hernandez-Sanchez*, Plaintiff's Memorandum, *supra* note 133, at 14–15 (citations omitted).

139. See Docket Entry Nos. 47–49, *Hernandez-Sanchez v. Williams*, No. 5:10-cv-00117-JMH (E.D. Ky. Mar. 28, 2011).

## B. Research Methodology

We developed two sources to identify the cases discussed above and to explore the nuances of federal litigation involving procedural disputes about TFW plaintiffs' physical presence abroad. The first is a dataset of all identifiable federal litigation with TFW plaintiffs from 1999 through 2016 ("the Temporary Foreign Worker Federal Litigation Dataset"). The second is a survey of TFW plaintiff-side lawyers, which reveals detailed information on litigation disputes involving TFW plaintiffs who are no longer present in the United States.

### 1. Temporary Foreign Worker Federal Litigation Dataset

We aimed to catalog every identifiable instance of federal litigation involving temporary foreign workers from the period 1999 through 2016. We began with a list created and maintained for many years by a lawyer with experience representing temporary foreign workers in litigation. Based on the litigation experience of two of the authors (Beltran and Schivone), we added categories and further populated the dataset. We then searched the Bloomberg federal caselaw database<sup>140</sup> and the Human Trafficking Legal Center Database,<sup>141</sup> which confirmed our list and yielded a few additional examples. Our team revisited each case in Bloomberg, confirmed the details in our dataset, added the plaintiffs' lawyer(s) involved in each case, and used internet searches to obtain current contact information for each lawyer. The dataset tracks the short name for each case, court, docket number, defendant name(s), number of plaintiffs, whether the case was a class action, the visa category involved in the case, the substantive issues involved in the case (tracking more than a dozen claim categories including minimum wage, overtime, RICO, and the Trafficking Victims Protection Act), plaintiffs' nationality, the industry, the date litigation commenced and ended, the disposition, and name and contact information (then and current) for plaintiffs' lawyer(s).

### 2. Survey of Plaintiffs' Lawyers

As described above, federal litigation on behalf of temporary foreign workers is a highly specialized legal practice area.<sup>142</sup> The bar is too small, too

---

140. Our research assistant ran federal case law searches using primarily visa terms such as "H-2A," "H-2B," "J-1," and "H-1B."

141. See *Case Database*, HUM. TRAFFICKING LEGAL CTR., <https://www.htlegalcenter.org/resources/case-database/> [<https://perma.cc/8MD6-EUV7>].

142. See *supra* Part I(D).

dispersed, and too under-resourced to generate accessible information about their practice through the standard channels of bar committees and publications. To explore the impact of scorched border tactics, we developed a practitioner survey to learn about lawyers' experiences litigating cases on behalf of TFW plaintiffs. We designed two versions of this practitioner survey (one long version that asked for information regarding specific cases as well as lawyer background and experiences, and one short version that focused only on the lawyers' backgrounds and experiences), with input from two additional experienced lawyers. We also sought review from the Cornell Institutional Review Board, resulting in approval as "exempt."

Obtaining data through the survey required identifying the small pool of experts with the information we sought. We distributed the long version to the 295 lawyers identified in the Temporary Foreign Worker Federal Litigation Dataset and the short version to TFW lawyers more generally. The vast majority of the lawyers in our dataset work for non-profit legal services organizations, with relatively lower means than other lawyers might have. Therefore, we offered a nominal compensation in the form of entry of all respondents into a drawing to win a prize.

We distributed the long version to the 295 lawyers identified through the dataset on August 15, 2019. After correcting for a majority of the initial seventeen bounce-backs received, and after additional individual outreach to a subset of non-responsive survey recipients, the distribution resulted in a total of fifteen survey responses. Our distribution of the short version took place on April 30, 2020 and yielded an additional thirteen responses. One of the respondents to the short version had already responded to the long version, yielding a total of twenty-seven respondents. As noted above, two of the authors have experience in the specialized practice area of federal litigation on behalf of temporary foreign workers, and thus appear in the dataset, but they only participated in this project as data gatherers and not as data providers.

### C. Survey Results

Below, we take a closer look at what we learned from the survey about the lawyers who represent TFW plaintiffs and the tactics used by their adversaries in such cases.

#### 1. Respondents to Our Survey: Plaintiffs' Lawyers

The practitioners who responded to our survey included lawyers with years of experience representing TFW clients in litigation, primarily working at non-profit legal services organizations but also specialized

plaintiffs' employment law firms. Of the legal services organizations, just two are LSC grantees. Most of the lawyers who responded to our practitioner survey handled TFW cases while working for non-LSC-funded legal services organizations that created litigation projects to compensate for the LSC restrictions discussed above.<sup>143</sup>

Most survey respondents said they take logistics into account when contemplating litigation. As one respondent confirmed, "with all things that go into deciding to pursue litigation on behalf of a client, you certainly contemplate the logistics involved in the fact that the client may not be in the [United States]." The survey also asked if this consideration had ever dissuaded respondents from initiating litigation. In response to this question, half of the twenty-four respondents to this question stated that they had made the decision not to initiate litigation in at least one prior case, precisely because the logistics seemed too costly, too complicated, or too risky. One lawyer called this type of litigation "an expensive proposition" involving "travel . . . with a U.S. court reporter, federal court certified interpreter and often a videographer . . . to the plaintiff's location abroad to videotape depositions for use at trial." Another respondent stated that such a case "typically require[s] a law firm to co-counsel to provide significant litigation resources for expenses such as international travel or handling international video depositions." In one case, the lawyer recalled, "even serving the defendants internationally proved to be very costly and complicated (over \$7,000), which we were able to do with a law firm as co-counsel."

In turn, as one private firm survey respondent noted, non-profit legal services organizations (whether LSC-funded or not) play a distinct role in TFW litigation:

Partner [organizations] are particularly crucial at the point of class certification and settlement; at both stages, they greatly facilitate getting word to the clients . . . and collecting signatures . . . when the clients are outside the [United States], especially when (as is often the case), the clients have limited internet access or are in remote areas.<sup>144</sup>

In addition to cost, multiple survey respondents mentioned the difficulty for their clients in obtaining visas to enter the United States to testify, reporting that judges required plaintiffs to take the time-consuming step of unsuccessfully applying for a visa before allowing accommodations such as videoconferencing for testimony. One survey respondent stated, "[it]

---

143. See *supra* notes 108–09 and accompanying text.

144. E-mail from Anonymous Survey Respondent to Beth Lyon, Clinical Professor of Law, Cornell Law School (Jan. 13, 2021, 12:59 PM) (on file with authors).

is difficult to obtain visas for foreign-based workers to travel to the [United States]. It has made more sense, economically and logistically, to travel . . . to the plaintiff's location abroad to videotape depositions." Another reported that, in their experience, defense lawyers "probably realized that it would be difficult for people to get visas to travel to the [United States] and may have thought they could use that to their advantage."

Respondents also stated that their clients' lack of U.S. presence affected case outcomes. One raised the concern that some clients living abroad may fall out of touch with their lawyers. Another reflected that not having developed a relationship with clients may have affected their desire to fight for more settlement money:

We ended up taking an offer of judgment for the two [TFW plaintiffs who were back in their community of origin]. My recollection is that we just developed less of a relationship with them . . . and they wanted out of the case once we got the offer of judgment, even though it was less than what the other clients got after depositions and settlement.

Another explained:

I think that lack of presence always impacts settlement in terms of thinking about the complications of legal proceedings with clients outside of the [United States]. Of course, we never tell clients that they cannot proceed but we find that often clients too are worried and want to settle their case earlier than later.

Other responses affirmed the importance of prioritizing cases that involve out-of-country clients and moving forward with filing these claims. As one respondent commented: "[p]ersonally, I believe that letting a case go because the prospective plaintiff is not present locally rewards the Defendant for exploiting non-U.S. workers. As a result, we do everything we can to overcome this obstacle (and I can't recall a time where we let it stop us)." Outside of the survey, one lawyer noted their commitment to representing TFW plaintiffs irrespective of "litigation cost, complexity, or procedural obstacles."<sup>145</sup> Indeed, these are lawyers who are deeply dedicated to assisting temporary foreign workers and whose work is negatively impacted by scorched border tactics.

## 2. Tactics Reported: Defense Lawyers

One of the critical components of our survey was to obtain the respondents' views as to whether the plaintiffs' lack of U.S. presence is

---

145. Comment from Anonymous Lawyer (Feb. 18, 2021, 12:12 PM) (on file with authors).

weaponized by the defense, and if so, the likely reason for such a strategy. On the one hand, TFW cases are certainly atypical compared to what normally fills courts', and especially federal courts', dockets.<sup>146</sup> As a result, disagreements might arise between the parties simply because defense lawyers—unlike the experienced lawyers representing TFW plaintiffs<sup>147</sup>—have unreasonably rigid and out-of-place expectations of what litigation *should* look like. On the other hand, given the inherently abusive nature of TFW programs, as summarized above,<sup>148</sup> it is also possible that defendants continue this behavior in litigation, seeking to exploit TFW plaintiffs' lack of U.S. presence for an advantage.

In an attempt to glean perspective on this question of defendants' motivation, the survey asked respondents why, in cases in which this happened, they believed that opposing counsel used this tactic. There were four answer options that provided potential reasons for opposing counsel's behavior, ranging in the degree to which they attributed the behavior to a nefarious motive, and a fifth, "other," option that provided them an opportunity to add their own answer. They were able to select as many options as applied.

The greatest number of survey respondents—sixteen of the nineteen who answered this question—indicated that they believed defense lawyers made an issue of plaintiffs' lack of U.S. presence in order to whittle down the number of plaintiffs, for example, by assuming that those individuals who were not in the United States would be unable to comply with the obligations of litigation and be dismissed from the case. Several other respondents indicated that still more nefarious motives might be at play—four respondents indicated that defense lawyers take this approach to convey either racist or anti-immigrant views to gain leverage or appease the ideological interests of their clients. In a text box provided for additional commentary, one respondent noted that they have not seen such a racist or anti-immigrant motivation come up during litigation in this way, but they have seen it arise in other moments in a case, for example, "discovery demands involving [Social Security numbers], work history, etc." In addition, one respondent shared a similar experience: "[m]ost of my clients are immigrants so [there] has been no distinction to date in the attacks on my clients—they're lazy, not good workers, want to win the lottery, etc." These responses validate that defendants and their lawyers benefit from a system

---

146. See, e.g., Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 147–48 (2011) (noting that litigation in federal court tends to involve corporate entities as parties).

147. See *supra* Part I(D).

148. See *supra* Part I(B).

when it is useful to them—when they are extracting labor from individuals coming from outside of the United States—but then turn the workers' foreign status into a weapon when *that* becomes beneficial to them during litigation.

A number of respondents also indicated that more standard litigation posturing can drive opposing counsel's positions. Specifically, fifteen of the nineteen<sup>149</sup> survey respondents who answered this question selected the response stating that opposing counsel made an issue of plaintiffs' absence from the United States to zealously represent their clients. In addition, a number of survey respondents indicated that opposing counsel's ignorance as to the TFW programs in which their clients participated might be driving the issue. A total of four survey respondents selected "other" as an option. One indicated that the lawyers' "ignorance as to the practices and business models of their clients" was an issue, a second cited "arrogance" and "stupidity" as the problem, and a third indicated that it was more a problem of defendants' "stubbornness" than anything: "[i]t will depend on the Defendant but in my case where it was an issue I think the Defendants legitimately felt like 'I have been sued here and the Plaintiffs need to come here.'" A fourth survey respondent indicated that the desire to "show [that] the plaintiffs would not be appropriate class representatives" was the motivation.

Responses to another survey question regarding the influence of defense lawyers' familiarity with TFW programs on their litigation positions provide additional detail. In a space for commentary, one survey respondent indicated that they believe some defense lawyers "truly believe that poor foreign workers can't press charges from abroad," which they attribute to "racism/classism," but also underscore that "some knowledge of the visa[] system would help them understand the plaintiffs' rights." Another respondent explicitly discussed racist motivations, stating that opposing counsel tends to "use a plaintiff's immigration status—whether it is a temporary status or no status—as a way to 'other' the plaintiff in the eyes of the court, creating a narrative that the plaintiff does not belong/is taking advantage of the U.S. court system/resources, and is not credible." A defense lawyer's familiarity with these types of programs is often helpful, according to one survey respondent since, based on their experience, lawyers with clients who "regularly hire visa holders" are "less obnoxious about taking advantage of the situation." However, another survey respondent came to the opposite conclusion, stating that an opponent's "lack of familiarity was

---

149. Because respondents were able to select more than one answer, the majority of respondents selected both this "zealous representation" option as well as the "whittle down the plaintiffs" option discussed in the immediately preceding paragraph.

helpful” because the defense lawyer did not “know the immigration system and the uphill battle it would be to get a client back for trial.”

Still another survey respondent summarized the variety of motivations that might animate defense lawyers’ litigation positions as follows:

I have had opposing counsel whom I believe are genuinely worried about logistics—for example, I have clients who are . . . [in countries] which [are] very expensive to travel to, and the hours difference make[s] remote video depositions challenging. However I have been involved in cases where it seems clear that opposing counsel is trying to intimidate/wear down the plaintiffs by bringing frivolous motions to dismiss the case or compel the plaintiffs to come to the [United States].

As this survey respondent notes, and as we have summarized above,<sup>150</sup> the lawyers who litigate these types of cases on behalf of temporary foreign workers have developed an expertise in TFW cases. The same survey respondent quoted immediately above remarked, “In most cases we try to head off this issue by bringing it to the attention of opposing counsel early on and providing substantial case law supporting our position that plaintiffs do not need to be in the [United States] to proceed.” In short, the TFW plaintiffs’ lawyers with experience in this niche practice area generally approach these cases in a way that attempts to balance efforts to vindicate their clients’ rights against the reality that these cases will become more complex because of their clients’ location abroad.

#### D. Collateral Damage

What do we make of defendants’ frequent use of scorched border tactics in TFW cases? Even if the outcome of any one dispute is in favor of the TFW plaintiffs, as in the *Lopez v. Fish* and *Hernandez-Sanchez v. Williams* cases, and even if the lawyers are well-prepared for any such fights over the effect of their clients’ location on the ability to participate in litigation, as the survey responses indicate, it would be much too simplistic to see the final outcome as indicative of a true and complete win for TFW plaintiffs and their lawyers. As with most legal fights, there are other considerations to take into account when assessing the outcome.

A closer look at the *Lopez v. Fish* case illustrates this point. Of course, the outcome of the defendants’ motion to dismiss was a win for the plaintiffs—the defendants’ motion to dismiss their claims was denied in its

---

150. See *supra* Part I(D).

entirety, and forcefully at that. But, it took nearly a *full year* for the plaintiffs to get there: the defendants' motion was filed on June 14, 2011, and the court did not issue its order until May 21, 2012. And there were other costs borne by the plaintiffs, in addition to more than eleven months of lost time. The defendants sought to squash the plaintiffs' lawsuit premised on arguments that presented a view of the world in which non-U.S. citizen workers have no rights, temporary foreign workers have no rights the minute they are sent home—including if effectuated as a retaliatory move by the defendants—and the U.S. DOL is meant to be the saving grace for all such aggrieved workers, but really only because it is meant to protect *U.S. citizen* workers. These arguments were surely difficult to tolerate on a moral level for the plaintiffs' lawyers and, indeed, all advocating for workers' rights, but they nevertheless must be dignified with a formal response in court. The plaintiffs in *Lopez v. Fish* thus undertook what surely must have been extensive time and effort to pick apart the defendants' arguments in a detailed response brief,<sup>151</sup> a job almost certainly made more difficult because of how off-base the defendants' arguments actually were—so “devoid of merit” that the court actually spared itself from the same task.<sup>152</sup> In short, although the plaintiffs won this issue, it certainly was not without cost—in terms of time, resources, and the indignities that they had to endure while expending both.

This case is one of many in which lawyers for temporary foreign workers responded to challenges—strategic, nefarious, or both—from employers by citing to the accumulating case law in favor of plaintiffs. Whether the dispute is regarding the worker's ability to participate in his own case, as in *Hernandez-Sanchez v. Williams*, or the ability to even pursue a case at all, as in *Lopez v. Fish*, courts have generally sided with the workers.<sup>153</sup> This consistency in rulings means that, each time there is a successful outcome, the weight of authority tips more and more in TFW plaintiffs' favor.

---

151. See generally *Lopez*, Plaintiffs' Memorandum, *supra* note 115.

152. *Lopez v. Fish*, No. 2:11-CV-113, 2012 WL 2126856, at \*4 (E.D. Tenn. May 21, 2012).

153. See, e.g., *Murillo v. Dillard*, No. 1:15-CV-00069-GNS, 2017 U.S. Dist. LEXIS 15391, at \*4–13 (W.D. Ky. Feb. 3, 2017) (denying defendants' motion for a protective order seeking to prohibit plaintiffs from conducting trial depositions in Mexico on the grounds that the defendants' preference for conducting the depositions in Kentucky was significantly outweighed by the burden and expense on plaintiffs, who were impoverished migrant workers with potentially no legal option to travel to the United States); *Paulus v. Rigstaff Texas LLC*, No. CIV 08-1104-BB-GBW, 2009 LEXIS 137168, at \*2–3 (D.N.M. Dec. 1, 2009) (requiring defendants to conduct depositions of two plaintiffs, who resided in Indonesia, either in person in Houston, rather than Albuquerque, and pay for 75% of the plaintiffs' travel and lodging, or to conduct the depositions by video conference, telephone, or written questions if the defendants did not wish to incur such costs).

That accumulating authority does not always work to head off the fights, however. Despite TFW plaintiffs' lawyers' efforts to bring the clear authority to the attention of defense lawyers and negotiate a workable agreement on how to proceed, defendants are not always amenable to such an approach. Too often, defendants make an issue of the TFW plaintiffs' absence from the United States during the course of litigation. This results in the parties—and the courts—going down a rabbit hole to resolve the dispute. Time and resources are thus unnecessarily expended on arguments about where a plaintiff should be deposed or whether the plaintiff even has the legal right to file the lawsuit in the first place.

What if this rabbit hole could be avoided entirely? We believe it is possible to establish clear rules that dictate how to proceed when an individual litigant does not reside in the United States. With such a framework in place, the parties would not have to spend a year or more waiting on a decision on a motion to dismiss, and plaintiffs' lawyers need not work around the clock seeking to prevent a defendant from forcing a worker to come to the United States for a deposition on one month's notice. In the next section, we try to imagine just such a world. Drawing on federal court rules that adapted litigation practices due to COVID-19, we suggest several concrete proposals for how litigation involving temporary foreign workers could be handled differently and more justly, resulting in a fairer, more efficient, and more predictable system.

### III. Putting Temporary Foreign Workers on a More Equal Footing

Temporary foreign workers are hamstrung by the limitations of TFW visa programs and the ways in which the legal system favors their employers. The inherent vulnerability of temporary foreign workers and the short duration of their visas, coupled with the lack of robust federal government oversight and the length of time and logistics involved with federal court litigation, sets up a quandary that chills vindication of worker rights. Pointless litigation battles—premised on defendants' unfair reliance on TFW plaintiffs' foreign status—raise litigation costs, discourage lawyers' case acceptance, and degrade judicial efficiency.

A sympathetic legislature or executive branch could overhaul the whole workplace-based immigration system to make workers less vulnerable. Some ideas include, for example, public information about TFW programs that would enable more efficient—and targeted—outreach and advocacy; allowing temporary foreign workers to switch employers once they are in the United States; enacting more severe consequences for employer noncompliance, including criminal sanctions; and demanding better administrative agency enforcement authority, funding, and priority-

setting for active enforcement of laws.<sup>154</sup> Expanding LSC regulations to allow for the provision of free legal services to all temporary foreign workers and ensuring that they are either explicitly covered under worker protection statutes, or at least not specifically exempted from coverage, would also be extremely beneficial. Immigration-related fixes to broaden TFW plaintiffs' ability to stay in the United States in a lawful immigration status throughout the duration of the litigation are also possible.<sup>155</sup> Much controversy surrounds a complete re-design of TFW visa programs, and while there is renewed hope given the outcome of the November 2020 elections, the possibility and practicality of a redesign remains uncertain.

However, we do have confidence in the practicability of improvements to the litigation piece of the puzzle that would even the playing field between TFW plaintiffs and their employers. Specifically, we believe federal district courts should establish clear rules that dictate how to proceed when an individual litigant does not reside in the United States, thereby preventing needless negotiation and motions practice.

#### A. Jurisprudence on Scorched Border Tactics

Decades of federal district court rulings reflect a pattern of pre-trial disputes over how to proceed when an individual litigant does not reside in the United States. In the following discussion, we argue that, in virtually every case, these disputes result in accommodations that permit the presentation of plaintiff and witness testimony from abroad. The description of authority focuses on two key areas of contention: deposition testimony and trial testimony.

---

154. See, e.g., MIGRATION THAT WORKS, COMPREHENSIVE RECOMMENDATIONS FOR THE PRESIDENTIAL TRANSITION TEAM ON PREVENTING ABUSES OF INTERNATIONALLY RECRUITED WORKERS 13–28 (2020), <https://migrationthatworks.org/resources/our-transition-memo-for-the-biden-administration/> [<https://perma.cc/5ZEJ-CXVM>] (suggesting improvements for TFW programs).

155. While an in-depth exploration of this suggestion is beyond the scope of this current Article, it is worth noting that there is some precedent for this idea. For example, Congress legislated additional protections by way of deferred action and employment authorization for temporary foreign workers in the United States on A-3/G-5 visas who are pursuing civil litigation as part of the 2008 reauthorization of the Trafficking Victims Protection Act. See 8 U.S.C. §§ 1375c(c)(1), 1375c(c)(2); see also Martina E. Vandenberg & Alexandra F. Levy, *Human Trafficking and Diplomatic Immunity: Impunity No More?*, 7 INTERCULTURAL HUM. RTS. L. REV. 77, 96–97 (2012) (explaining the process by which temporary authorization is granted through the 2008 amendments to the Trafficking Victims Protection Act).

## 1. Deposition Testimony

Evidence gathered during discovery is critical to dispositive motions, settlement posture in negotiations or mediation, and of course, trial. The Federal Rules of Civil Procedure (“Rules”) direct the parties to confer shortly after responsive pleadings to go over each side’s position, assess prospects for settlement, and come up with a discovery plan.<sup>156</sup> Rule 26(f) directs the parties to jointly “develop a proposed discovery plan,”<sup>157</sup> allowing parties to develop a plan that both suits everyone’s needs and is in the best interest of efficiently adjudicating the case.<sup>158</sup> Rule 28 contemplates that foreign discovery may take place.<sup>159</sup> Some local federal court rules also guide the issue of non-resident plaintiffs and the manner of taking their depositions.<sup>160</sup> If the parties cannot agree on a discovery plan with regard to a plaintiff’s deposition, motions practice ensues.

---

156. FED. R. CIV. P. 26(f). Most evidence-gathering takes place pursuant to the Rules. The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, also known as the Hague Convention on Evidence (“Hague Convention”), also establishes a set of procedures for obtaining evidence outside of the country where a case is pending. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. S. Dist. of Iowa*, 482 U.S. 522, 530–32 (1987); William D. Wood & Brian C. Boyle, *Obtaining Foreign Discovery in U.S. Litigation*, 63 THE ADVOC. 12, 12 (2013). However, there is a concern that using the Hague Convention may be “unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules.” *Aerospatiale*, 482 U.S. at 542. When deciding whether to order discovery under the Rules or Hague Convention, courts look at several factors. In *SEC v. Stanford Int’l Bank*, for example, the court looked at (1) the importance of the documents or other information requested to the litigation; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; (5) the competing interests of the nations whose laws are in conflict; (6) the hardship of compliance on the party or witnesses from whom discovery is sought; and (7) the good faith of the party resisting discovery under the Rules. 776 F. Supp. 2d 323, 330 (N.D. Tex. 2011) (showing that the court used the Restatement (Third and Second) of Foreign Relations Law of the United States, case law, and *Aerospatiale* to come up with the balancing factors); see also *Aerospatiale*, 482 U.S. at 544 n.28 (listing the Restatement factors).

157. FED. R. CIV. P. 26(f)(2).

158. FED. R. CIV. P. 26(f).

159. FED. R. CIV. P. 28(b).

160. For example, the Middle District of Florida Local Rules state that it is the “general policy” of the court that a plaintiff living outside Florida can reasonably expect to be deposed at least once within the District. M.D. FLA. LOCAL R. 3.04(b). The court’s rules also show that, while a plaintiff’s in-person deposition testimony is standard, it is not an absolute requirement. The rules imply that the court may have discretion to be lenient. See *id.* 1.01(c) (“The Court may suspend application and enforcement of these rules, in whole or in part, in the interests of justice in individual cases by written order.”). Note that this local rule relates to non-residents of the Middle District of Florida and thus does not

Under the Rules, “[t]here is a general presumption that a plaintiff who chooses a particular forum should be prepared to be deposed in that forum.”<sup>161</sup> However, “[u]ltimately, the trial court has broad discretion to determine the appropriate place for a deposition.”<sup>162</sup> Under Rule 26, motions for a protective order are available “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”<sup>163</sup> Thus, even though “ordinarily, a defendant is entitled to depose a plaintiff in the forum where the case is pending,” through a protective order, a court may determine “that a plaintiff’s deposition be taken in a different location, or by alternative means, if justice so requires.”<sup>164</sup> Failure to move for a protective

---

address the various issues about immigration status and transnational litigation that often arise in TFW litigation.

161. *Connell v. City of New York*, 230 F. Supp. 2d 432, 436 (S.D.N.Y. 2002) (citation omitted). The rationale is that, because the plaintiff traditionally selects the forum where their lawsuit is filed, they should not complain about appearing there. 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2112 (3d ed. 2010); see also *Trinos v. Quality Staffing Servs. Corp.*, 250 F.R.D. 696, 699 (S.D. Fla. 2008) (quoting *Luna v. Del Monte Fresh Produce (Se.), Inc.*, No. 1:06-CV-2000-JEC, 2007 WL 1500269, at \*2 (N.D. Ga. May 18, 2007)) (“With regard to the location of a deposition, defendants are generally ‘entitled to depose a plaintiff in the forum where the plaintiff has chosen to sue.’”); *id.* (“[D]efendants are generally ‘entitled to depose a plaintiff in the forum where the plaintiff has chosen to sue.’”); *McGinley v. Barratta*, No. 06-510, 2006 U.S. Dist. WL 2346301, at \*1 (E.D. Pa. Aug. 11, 2006) (quoting *Sampathachar v. Fed. Kemper Life Assurance Co.*, No. 03-5905, 2004 WL 2743589 at \*1 (E.D. Pa. Nov. 24, 2004)) (“Normally, a plaintiff will be required to make himself or herself available for examination in the district in which suit was brought because the plaintiff selected the forum.”); *Seuthe v. Renewal Prods., Inc.*, 38 F.R.D. 323, 324 (S.D.N.Y. 1965) (“[A] defendant is entitled to examine a plaintiff in the forum where plaintiff has chosen to sue.”); *McKinzie v. Brown*, No. 4:09CV627 FRB, 2010 U.S. Dist. WL 750069, at \*1 (E.D. Mo. Mar. 2, 2010) (citing *Instituto Per Lo Sviluppo Economico Dell’Italia Meridionale v. Sperti Prods., Inc.*, 47 F.R.D. 530, 533 (S.D.N.Y. 1969)) (“Ordinarily, a defendant is entitled to examine a plaintiff in the forum where plaintiff has chosen to sue.”); *Grotrian, Helfferich, Schulz, Steinweg Nachf v. Steinway & Sons*, 54 F.R.D. 280, 281 (S.D.N.Y. 1971) (citations omitted) (“Since plaintiff has chosen this forum, it cannot impose upon defendant the extraordinary expense and burden of traveling to a foreign country to conduct a deposition except on a showing of burden and hardship to the plaintiff.”).

162. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994) (cited by *Egan v. Resort*, No. 17-00322 DKW-KJM, 2018 WL 1528779, at \*2 (D. Haw. Mar. 28, 2018)); see also *Lomax v. Sears, Roebuck & Co.*, No. 99-6589, 2000 U.S. App. LEXIS 33884, at \*8 (6th Cir. Dec. 19, 2000) (“District courts have wide discretion to limit discovery to prevent annoyance, embarrassment, oppression, or undue burden or expense, including with regard to the designation of the time and place of the depositions.”) (citations omitted).

163. FED. R. CIV. P. 26(c)(1).

164. *Palma v. Safe Hurricane Shutters, Inc.*, No. 07-22913-CIV, 2009 U.S. Dist. WL 653305, at \*4 (S.D. Fla. Mar. 12, 2009) (cited by *Fenerjian v. Nong Shim Co.*, No. 13-cv-04115-WHO, 2016 WL 1019669, at \*2 (N.D. Cal. Mar. 15, 2016)).

order weighs negatively in the court's consideration of the request to have a deposition taken from abroad or by alternative means.<sup>165</sup>

There is no standard test to satisfy when arguing that a plaintiff should not have to return to the United States for their deposition. Rather, courts typically look to various factors: 1) the plaintiff had no choice but to file the case in the United States; 2) immigration considerations and the costly, uncertain process of obtaining U.S. entry documents impose an undue burden on the plaintiff; 3) returning to the United States would cause financial hardship to the plaintiff, either because of poverty or because the costs associated with travel are great compared with the damages sought; 4) there are satisfactory alternatives, including conducting the depositions abroad or using remote means, such as telephonic or video conferencing, which do not prejudice the defendant; and 5) the defendant is abusing the discovery process by demanding that the plaintiff return for a deposition.<sup>166</sup>

If a plaintiff cannot return to the United States for a deposition, there are alternatives available. All parties can travel to a location abroad, some of the parties can travel while others participate by video conference or telephonically, or some combination thereof. Courts are unlikely to rule that a deposition on written questions will suffice, even if the factual issues involved are limited.<sup>167</sup>

In light of the significant obstacles to TFW plaintiffs' return to the jurisdiction and other factors, courts regularly find good cause for accommodation and rule in favor of the plaintiffs in these procedural disputes.<sup>168</sup> With more TFW plaintiff-friendly rules, the valuable time used in

---

165. See *P.Y.M.T. v. City of Fresno*, No. 1:15-CV-710-JAM-BAM, 2016 U.S. Dist. WL 2930539, at \*3 (E.D. Cal. May 19, 2016) (denying plaintiffs' request to have the deposition taken in Mexico, noting that, "in order for the Plaintiffs to avoid having their deposition taken in the United States, they must move for a protective order . . . which Plaintiffs have not done.").

166. See, e.g., Plaintiff's Memorandum of Law in Support of Motion for Protective Order, *Luna v. Del Monte Produce*, No. 1:06-cv-0200-JEC (N.D. Ga. filed Oct. 30, 2006) (on file with authors) (describing plaintiffs' indigence, poor prospects for obtaining a visa, and risk of seeking entry to the plaintiffs' future work visas prospects); see also *SEC v. Aly*, 320 F.R.D. 116 (S.D.N.Y. 2017) (noting safety risk to plaintiff of travel to United States); *Angamarca v. Da Ciro, Inc.*, 303 F.R.D. 445, 446 (S.D.N.Y. 2012) (noting that compelling an in-person deposition might have forced plaintiff to violate immigration laws); *Tangtiwatanapaibul v. Tom & Toon, Inc.*, No. 1:17-CV-00816, 2017 WL 10456190, at \*2-4 (S.D.N.Y. Nov. 22, 2017) (holding plaintiffs had "no genuine choice" of forum, and testimony by videoconference is feasible).

167. See, e.g., *Fenerjian*, 2016 WL 1019669, at \*13 n.3, \*20 n.4 (showing several examples where the court found that the plaintiffs did not demonstrate "undue hardship or exceptional or compelling circumstances to justify their refusal to travel").

168. See, e.g., *Angamarca*, 303 F.R.D. at 446 (denying the defendant's motion to dismiss because of the plaintiff's "failure to appear in person"); *Tangtiwatanapaibul*, 2017

reaching these conclusions could be spent simply holding a transnational deposition and moving the litigation forward. In the current situation, even though TFW plaintiffs often win these motions, going through motions practice drains the resources of the parties, their lawyers, and the court.

## 2. Trial Testimony

Trials are costly and time-consuming—but powerful—events for temporary foreign workers seeking access to justice in the United States. When a temporary foreign worker no longer resides in the United States or the testimony of a witness residing abroad is necessary, expense and immigration status quickly become issues. Rule 43 governs taking testimony at trial.<sup>169</sup> While this rule introduces the possibility of remote testimony,<sup>170</sup> it is axiomatic that the preference is for a witness' attendance at trial.<sup>171</sup> However, bringing a TFW plaintiff back to the United States for trial is complicated, can take months to complete, and has no guarantee of success. Thus, even before the pandemic, remote testimony was often necessary after fruitless visa application attempts and motions practice.

Although the case law on live remote testimony at trial is less consistent than the case law on depositions (likely because fewer cases get to the point of trial versus discovery), pre-pandemic federal courts generally viewed remote testimony by contemporaneous transmission favorably upon

---

WL 10456190, at \*2–4 (granting the plaintiffs' motion to allow videoconference depositions to be "entered into evidence in lieu of live testimony").

169. FED. R. CIV. P. 43(a).

170. *See id.* ("At trial, the witnesses' testimony must be taken in open court unless... [the relevant rules] provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the Court may permit testimony in open court by contemporaneous transmission from a different location.").

171. *See Garcia-Martinez v. City & Cnty. of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004). As the Advisory Committee's note on Rule 43(a) states: "The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition." FED. R. CIV. P. 43 advisory committee's note to 1996 amendment. While this discussion focuses on remote testimony in civil cases, much has been written about the use of video conference technology in the courtroom, and specifically in criminal cases. *See, e.g.*, Francis A. Weber, *Complying with the Confrontation Clause in the Twenty-First Century: Guidance for Courts and Legislatures Considering Videoconference-Testimony Provisions*, 86 TEMP. L. REV. 149, 177–179 (2013) (addressing use of technology in courtrooms, the constitutional implications of prosecution witnesses testifying against criminal defendants via videoconference, and the mechanics of presenting videoconference testimony across jurisdictions).

of a showing of good cause and appropriate safeguards.<sup>172</sup> Most U.S. courts seemed to readily agree that a witness' appearance at trial via modern videoconference technology appropriately safeguards the integrity of the testimony.<sup>173</sup> For example, in its 2010 decision in *Lopez v. NTI*, the District of Maryland had no concern with the jury evaluating the Honduran plaintiffs' credibility, finding that the jury would be able to observe their demeanors and thus evaluate their testimony in the same manner as through traditional live testimony.<sup>174</sup>

---

172. *Garcia v. Bana*, No. C 11-02047, 2012 U.S. Dist. LEXIS 87727, at \*2 (N.D. Cal. June 25, 2012) (citing, *inter alia*, *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479–80 (D. Md. 2010); *United States v. Beaman*, 322 F. Supp. 2d 1033, 1035 (D.N.D. 2004); *Dagen v. CFC Grp. Holdings Ltd.*, No. 00 Civ. 5682(CBM), 2003 WL 22533425, at \*1–2 (S.D.N.Y. Nov. 3, 2007); *In re Hensen*, 302 B.R. 884, 890–91 (Bankr. N.D. Cal. 2003); *F.T.C. v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 2 (D.D.C. 2000)); *Edwards v. Logan*, 38 F. Supp. 2d 463, 465–67 (W.D. Va. 1999) (holding that video conferencing was an acceptable alternative to in-person attendance at trial); *see also Thornton v. Snyder*, 428 F.3d 690, 698–99 (7th Cir. 2005) (affirming trial court's decision to allow trial by video conference due to plaintiff's incarceration and high escape risk, as well as the need for twenty additional witnesses to travel from different parts of the state); 9A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 2414 3d, Westlaw (database updated 2021) ("Federal courts have shown consistent sensitivity to the utility of evolving technologies that may facilitate more efficient, convenient, and comfortable litigation practices."). Rule 43's advisory committee notes suggest that appropriate safeguards should be adopted to provide for: (1) accurate witness identification, (2) prevention of influence from individuals present with the witness, and (3) accurate transmission. *See* FED. R. CIV. P. 43 advisory committee's note to 1996 amendment.

173. *FTC v. Swedish Match N. Am., Inc.*, 197 F.R.D. 1, 3 (D.D.C. 2000). Note that some courts have held that telephonic testimony may not provide appropriate safeguards. *See, e.g., Garza-Castillo v. Guajardo-Ochoa*, No. 2:10-cv-00359-LDG (VCF), 2012 U.S. Dist. LEXIS 190821, at \*5 (D. Nev. Jan. 4, 2012) ("[W]hile Guajardo-Ochoa is requesting a telephonic appearance, Rule 43(a) requires appropriate safeguards. Along similar reasoning, the commentary recognizes that video transmission ordinarily should be preferred. Guajardo-Ochoa has not made any effort to show that video transmission of the testimony of her mother and brother cannot be accomplished."); *Matovski v. Matovski*, No. 06 Civ. 4259 (PKC), 2007 WL 1575253, at \*3 (S.D.N.Y. May 31, 2007) ("Telephonic testimony from the petitioner would not permit the Court to use all reasonably available tools to assess credibility.").

174. *Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479–80 (D. Md. 2010); *see also United States v. Beaman*, 322 F. Supp. 2d 1033, 1035 (finding, in a criminal case, that there were appropriate safeguards such that prosecution witness testimony via real-time video conference would not deprive the defendant of his right to confront the witness, where the witness was under oath, subject to cross-examination, and observable by the jurors, counsel, defendant, and the court); *Dagen v. CFC Grp. Holding Ltd.*, 2003 WL 22533425, at \*3 ("Even before the Federal Rules were amended in 1996, 'federal trial courts have repeatedly, in civil cases, taken testimony by telephone and closed circuit television. The jury has never had any difficulty in evaluating such testimony.'").

As the foregoing discussions reflect, lawyers for TFW plaintiffs frequently have to battle for simple accommodations through additional written pleadings and oral arguments. In addition, when courts require proof of a failed attempt to secure a visitor's visa,<sup>175</sup> they force remote plaintiffs and witnesses to go through a costly and time-consuming endeavor. Indeed, even when outcomes are favorable to TFW plaintiffs, these fights about trial participation take up considerable time and resources.<sup>176</sup> Rather than having to fight these battles each time, courts can create both greater equity and efficiency through adaptation of emergency rules they adopted during the COVID-19 pandemic.

### B. Reshaping Court Rules to Protect TFW Plaintiffs

Resolving cross-border procedural issues in TFW cases requires experienced plaintiffs' lawyers to educate judges and opposing counsel who are not accustomed to dealing with TFW plaintiffs litigating from abroad. The cases appear rarely enough in any given district or defense lawyer's caseload to cause contention.<sup>177</sup> In our experience, the exoticism of a foreign, limited-English proficient TFW plaintiff is an obvious target for defense lawyers attempting to gain an advantage for their client. The problem is partly one of scale. Non-U.S.-based parties often appear in large-scale international corporate litigation that attracts large international law firms<sup>178</sup> and plays

---

175. See, e.g., *Rodriguez v. SGLC*, No. 2:08-cv-01971, 2012 U.S. Dist. LEXIS 120862, at \*10 (E.D. Cal. Aug. 24, 2012) (applying advisory committee's note when denying Rule 43 motion for Mexico-based plaintiffs and noting that plaintiffs' motion would have been more compelling if they had shown evidence that they had attempted to obtain a visa, but were denied).

176. Cf. *supra* Part II(D) (discussing the burdens faced by TFW plaintiffs even when their claims are successful).

177. For example, of the 312 unique cases contained in the Temporary Foreign Worker Federal Litigation Dataset, spanning 1994 to 2016, nearly half (153) occurred in courts that heard ten or fewer such cases. Thirty-three of the cases took place in courts that had only one recorded case.

178. Catherine A. Rogers, *When Bad Guys Are Wearing White Hats*, 1 STAN. J. COMPLEX LITIG. 487, 490-91 (2013) (explaining that large corporate law firms are "more geographically diverse, culturally agile, and transnationally experienced" in representing multi-national corporations in transnational litigation). The Legal 500's list of international litigation firms mostly consists of large law firms serving corporate clients. See *International Litigation*, THE LEGAL 500, <https://www.legal500.com/c/united-states/dispute-resolution/international-litigation/> [<https://perma.cc/T2M4-V7D8>]. A Google search for "transnational litigation practice area" shows results of large law firms that defend corporate clients in foreign countries, or against foreign parties in the United States. See, e.g., *Transnational Litigation*, GIBSON DUNN, <https://www.gibsondunn.com/practice/transnational-litigation/> [<https://perma.cc/54BJ-TX8H> ]; *International & Transnational Litigation*, DEBEVOISE & PLIMPTON, <https://www.debevoise.com/capa>

out in federal jurisdictions with large commercial and financial centers.<sup>179</sup> By contrast, TFW cases, seeking smaller damages in non-metropolitan jurisdictions,<sup>180</sup> draw small and mid-level civil defense litigation firms that generally lack familiarity with transnational litigation.<sup>181</sup>

As our practitioner survey responses reflected, examined in the aggregate, the issues that arise in these cases are fairly predictable and could be managed through a handful of specialized rules. By anticipating the issues, courts are best positioned to educate the defense bar and streamline management of cases involving TFW plaintiffs.<sup>182</sup>

The avalanche of experimentation that occurred during the COVID-19 pandemic can facilitate such an adoption of standard practices. Courts' responses to COVID-19 provide an opening for preserving and formalizing

---

bilities/practice-areas/arbitration-international-disputes/international-transnational-litigation [https://perma.cc/PC3H-EQHU]; *Transnational Litigation*, QUINN EMANUEL, <https://www.quinnemanuel.com/practice-areas/international-disputes/transnational-litigation/#overview> [https://perma.cc/E8DJ-P5QZ].

179. See, e.g., Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 13–14 (2008) (suggesting a tendency for multinational corporations to choose Delaware and New York courts in their contracts, as these courts have provided a “global ‘market’ for judicial services”). A study of 2,800 commercial contracts in which at least one party was a U.S. corporation found that, of the contracts that did not call for arbitration and specified a particular state for its choice of forum, 43% chose New York, 11% chose Delaware, and 8% chose California. *Id.* at 32. These percentages were computed from figures in Theodore Eisenberg & Geoffrey Miller, *The Market for Contracts* 10, 17, 19 (N.Y.U. Ctr. for L. & Econ. Working Paper, Paper No. 06-45, 2006), <http://ssrn.com/abstract=938557> [https://perma.cc/6WS7-KCAK].

180. See 1 LNPG: Wash. Cont. Litig. § 5.06[2] (2020) (“[I]f the claims involve complex commercial dealings, the courts in the larger, urban counties may have more experience handling complex, commercial litigation than those in the rural, smaller counties.”); see also Holley, *supra* note 40, at 609 (“H-2A workers are generally forced to resort to the rural, Southern state trial courts where local bias is widely perceived to be a significant factor in litigation.”).

181. See, e.g., Rogers, *supra* note 178, at 488 (describing the stark difference between “the relative size and newness of plaintiff firms to transnational legal practice, particularly in comparison to the legal conglomerates that generally represent multinational defendants . . . . It is relatively unusual for attorneys in smaller firms . . . to have extensive experience with foreign legal systems . . . .”).

182. Currently, the Rules contain enough flexibility to allow courts to accommodate these cases, but the Rules could be clarified to give more precise guidance. Even though local experimentation has generated good ideas, they could be formally codified at the national level. There may also be good reason to consider incorporating these protections in the Federal Rules, rather than relying on local federal district court rules. TFW plaintiffs who bring these claims are in the United States because of a statutory scheme set down by the INA, and the cases involve vulnerable migrants in matters often arising in rural jurisdictions, buttressing the argument for national solutions. Unfortunately, the reality is that changing the Federal Rules is extremely unlikely.

flexibility for long-distance litigation. A review of local federal district court rule changes enacted through November 30, 2020 in civil cases<sup>183</sup> revealed that the courts found ways to operate remotely, creating access that lawyers for temporary foreign workers have long sought, but that was unthinkable in most courts before 2020. As the pandemic ebbs and the courts begin to evaluate these impromptu regimes, it is important to use the lens of TFW plaintiff access—namely, indigent plaintiffs living in rural communities of origin suing U.S.-based defendants for actions that took place in U.S. workplaces. Integrating the new procedures into courts' now decades-long experience with TFW cases provides guidance for uniform rules in handling these cases. Of most importance to TFW cases are management of depositions and trial testimony.

### 1. Deposition Testimony

Before the pandemic, fewer than a dozen district courts had local rules in place contemplating remote conferences or depositions.<sup>184</sup> During the pandemic, several courts instituted special procedures to facilitate remote depositions, including the Southern District of New York (“SDNY”), the District of Rhode Island, and the District of Hawaii.<sup>185</sup> The District of

---

183. This information was taken from orders and announcements on each court's website and it is summarized in a chart entitled COVID-19 Litigation Federal Court Rules: Rules enacted regarding civil cases through November 30, 2020 (Jun. 17, 2021) (on file with the authors). Of note, there was significant variation in the amount and frequency of information each court posted about their practices during the pandemic: some courts regularly uploaded information about all of these areas, while others had only one general order. In addition, the vast majority of court updates concerned criminal cases, particularly after the passage of the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. Thus, information about the handling of civil cases was often even more limited. While many courts naturally updated their policies past our reporting period as circumstances changed, we elected to use November 30, 2020 as an end date in part out of the need to draw a line for research purposes, but also because the March to November 2020 time period captured the experimentation we wished to analyze in this Article.

184. See S.D.N.Y. & E.D.N.Y. J.L.R. 30.2 (stating motions to take remote depositions will be presumptively granted); N.D.N.Y. L.R. 37.1 (permitting discovery conferences to be conducted via video or teleconference); D.N.J. L.Civ. R. 16.1(g)(3) (permitting counsel to resolve pretrial case management disputes and motions by phone); C.D. Cal. R. 37-1 (stating if both parties are not in the same country, pre-filing conferences may be telephonic); Cal. S.D. Cal. Civ. R. 16.1(d) (stating case management conferences can be telephonic); S.D. Fla. L.R. 16.1(b)(1) (stating scheduling conferences may be telephonic).

185. *General Order Regarding Depositions in Civil Cases During Coronavirus Pandemic* (D.R.I. May 22, 2020), <https://www.rid.uscourts.gov/sites/rid/files/General%20Order%20-%20Depositions%20%20%20Civil%20Cases.pdf> [<https://perma.cc/5KUP-HK28>]; Maj. J. Lehrburger, *Sample Protocols for Remote Depositions* (S.D.N.Y. May 11, 2020), [https://nysd.uscourts.gov/sites/default/files/practice\\_documents/RWL%20Lehrburger%20Sample%20Remote%20Deposition%20Protocol.pdf](https://nysd.uscourts.gov/sites/default/files/practice_documents/RWL%20Lehrburger%20Sample%20Remote%20Deposition%20Protocol.pdf) [<https://perma.cc/3CJS-6RML>]

Hawaii stated, “COVID-19 creates an immediate and perhaps long term need to conduct depositions remotely.”<sup>186</sup> The court encouraged parties “to agree to protocols for remote depositions” and warned counsel to be wary of new issues that could violate ethical boundaries, such as reviewing exhibits with deponents in advance.<sup>187</sup> In the SDNY, Magistrate Judges Sarah L. Cave and Robert W. Lehrburger offered sample protocol agreements,<sup>188</sup> which included several notable provisions. The sample agreements require parties to agree on vendors for court reporting, remote deposition services, and technical support.<sup>189</sup> The sample agreements also allow parties to either mail or email documents to the deponent.<sup>190</sup> By the terms of the samples, counsel are instructed to mail sealed documents to be unsealed on camera at the deposition.<sup>191</sup> Emailed documents are to be sent in a compressed .zip file with a password shared immediately before the deposition begins.<sup>192</sup> The procedures laid out in the samples require that counsel share exhibits through screen sharing, Lexitas LegalView document-sharing technology, or via email.<sup>193</sup> Under the procedures, the parties also pledge not to initiate private conversations or messages “with any deponent while a question is pending.”<sup>194</sup> Parties are sent to “breakout rooms” during breaks.<sup>195</sup> A stenographer records the testimony as an official record, while a vendor videotapes the deposition.<sup>196</sup> These shifts could transform pre-trial discovery in TFW cases.

---

[hereinafter Lehrburger Protocols]; *Guidance Regarding Civil Case Management During the COVID-19 Emergency*, U.S. DIST. CT. FOR THE DIST. OF HAW. (D. Haw. May 18 2020) <https://www.hid.uscourts.gov/files/temp/Civil%20Guidance%20Memo%20Final.pdf> [<https://perma.cc/QY6J-LCBV>] [hereinafter Hawaii Guidance].

186. Hawaii Guidance, *supra* note 185, at 2.

187. *Id.* at 2–3.

188. Lehrburger Protocols, *supra* note 185; Maj. J. Cave, *Stipulation and Proposed Order Concerning the Protocol for Conducting Remote Depositions* (Mag. J. Cave, S.D.N.Y. May 5, 2020), [https://www.nysd.uscourts.gov/sites/default/files/practice\\_documents/SLC%20Cave%20Proposed%20Remote%20Deposition%20Stipulation.pdf](https://www.nysd.uscourts.gov/sites/default/files/practice_documents/SLC%20Cave%20Proposed%20Remote%20Deposition%20Stipulation.pdf) [<https://perma.cc/X9FH-ERRB>] [hereinafter Cave Protocols].

189. Lehrburger Protocols, *supra* note 185, ¶ 2; Cave Protocols, *supra* note 188, ¶ 2.

190. Lehrburger Protocols, *supra* note 185, ¶ 17(i)–(ii); Cave Protocols, *supra* note 188, ¶ 18(i)–(ii).

191. Lehrburger Protocols, *supra* note 185, ¶ 17(i); Cave Protocols, *supra* note 188, ¶ 18(i).

192. Lehrburger Protocols, *supra* note 185, ¶ 17(ii); Cave Protocols, *supra* note 188, ¶ 18(ii).

193. Lehrburger Protocols, *supra* note 185, ¶ 17(iii); Cave Protocols, *supra* note 188, ¶ 18(iii).

194. Lehrburger Protocols, *supra* note 185, ¶ 5; Cave Protocols, *supra* note 188, ¶ 5.

195. Lehrburger Protocols, *supra* note 185, ¶ 6; Cave Protocols, *supra* note 188, ¶ 6.

196. Lehrburger Protocols, *supra* note 185, ¶ 8; Cave Protocols, *supra* note 188, ¶ 8.

## 2. Trial Testimony

At the height of the pandemic, motions hearings, settlement conferences, and bench trials in civil cases were almost always conducted remotely.<sup>197</sup> As of early 2021, almost all federal district courts left the decision regarding the manner in which to conduct such events to the judge's discretion, but encouraged judges to hold non-jury proceedings remotely.<sup>198</sup> The outliers demonstrated significant independence and experimentation across the district courts. For example, a few courts appear to have maintained in-person hearings throughout the pandemic,<sup>199</sup> and a small wave of courts resumed in-person hearings a few months into the

---

197. See *supra* note 183 and accompanying text. As we flagged above, our research on court rules was limited to civil cases, but the passage of the CARES Act in March 2020 also had effects on the remote operation of courts in criminal cases that are beyond the scope of this Article.

198. See, e.g., Order in the Matter of Refilling Master Jury Wheel at ¶ 2, No. 20-AO-0002-P, (Feb. 10, 2021), <https://www.iand.uscourts.gov/sites/iand/files/Public%20Administrative%20Orders.pdf> [<https://perma.cc/9U9M-HHGK>] (describing the process for finding new jurors for the Master Jury Wheel); *Special Order #10, In re: Administrative Orders of the U.S. District Court*, U.S. DIST. CT. S. DIST. OF MISS. (Sept. 11, 2020), <https://www.mssd.uscourts.gov/sites/mssd/files/Special%20Order%20%23%2010%20as%20docketed.pdf> [<https://perma.cc/8592-ZXVH>] (encouraging judges to take every precaution for safety during court proceedings). Though both of these orders we cite as examples date from 2020, they appeared to still be in effect as of June 2021.

199. For example, the Southern District of Alabama does not appear to have any orders continuing any matters remotely during the pandemic. See *News & Announcements*, U.S. DIST. CT. S. DIST. OF ALA., <https://www.alsd.uscourts.gov/news/> [<https://perma.cc/LG32-DGFZ>]. The court did post guidance on procedures to access one of the courthouses as early as May 1, 2020, including guidance for jurors. See *In Re: Screening Procedures During the Public Health Emergency Caused by the COVID-19 Virus*, DIST. CT. S. DIST. OF ALA. (May 1, 2020), <https://www.alsd.uscourts.gov/sites/alsd/files/Order-re-ScreeningProcedures.pdf> [<https://perma.cc/R4ER-TXH5>]. In-person proceedings in the Southern District of Georgia appear to have carried on uninterrupted, though discretion was left with each presiding judge. See *Standing Order, In re: COVID-19 Public Health & Safety 3*, DIST. CT. S. DIST. OF GA. (Mar. 17, 2020), <https://www.gasd.uscourts.gov/sites/gasd/files/MC120-004.pdf> [<https://perma.cc/MP8L-K2QU>] (“Individual judges will continue to hold hearings, conferences, and jury or bench trials, unless ordered otherwise by the presiding judge.”).

pandemic.<sup>200</sup> Most courts prioritized resumption of in-person criminal proceedings over civil proceedings.<sup>201</sup>

By contrast, most district courts refused to hold jury trials remotely and either postponed them or had limited in-person trials.<sup>202</sup> An exception is the Western District of Washington, which became the first federal court to have remote civil jury trials in early October 2020.<sup>203</sup> In *Dallo v. Holland America Line N.V.*, the court ordered the entire trial, with the exception of

---

200. For example, the Western District of Michigan appears to have returned to all in-person bench trials beginning on May 18, 2020. See *Coronavirus (COVID-19) Information for Jurors*, WESTERN DISTRICT OF MICHIGAN (May 28, 2021) (on file with the *Columbia Human Rights Law Review*) (noting that “the Court has returned all of its facilities in this District to normal public access effective May 18, 2020” and providing information for potential jurors about building access and rules). Several other courts stopped issuing continuances in civil cases fairly early into the pandemic, suggesting that civil cases resumed relatively quickly. See, e.g., *Standing Order, In Re: Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic* ¶ 2, U.S. DIST. CT. E. DIST. OF N. CAL. (Mar. 18, 2020), <http://www.nced.uscourts.gov/data/StandingOrders/20-S0-5.pdf> [https://perma.cc/P9KT-T495] (postponing civil jury trials through May 1, 2020); *Court Operations Under Exigent Circumstances Created by the COVID-19 Pandemic* ¶ 1, U.S. DIST. CT. E. DIST. OF TEX. (Mar. 16, 2020), [http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2020-03%20%20COVID-19\\_signed.pdf](http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%2020-03%20%20COVID-19_signed.pdf) [https://perma.cc/H73E-463D] (continuing civil trials through May 1, 2020); *General Order Regarding Extension and Modification of Prior General Orders* ¶ 1, U.S. DIST. CT. E. DIST. OF TEX. (Apr. 22, 2020), [http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%202009%20Extension%20and%20Modification%20of%20Prior%20GOs\\_signed.pdf](http://www.txed.uscourts.gov/sites/default/files/goFiles/GO%202009%20Extension%20and%20Modification%20of%20Prior%20GOs_signed.pdf) [https://perma.cc/UUD5-436F] (extending General Order 20-03 through May 31, 2020).

201. For example, the District of Minnesota allowed limited in-person criminal bench trials, but encouraged remote civil bench trials. *General Order In Re: Updated Guidance to Court Operations Under the Exigent Circumstances Created by COVID-19* at 2-3, U.S. DIST. CT. DIST. OF MINN. (Aug. 27, 2020), [https://www.mnd.uscourts.gov/sites/mnd/files/2020-0827\\_COVID19-General-Order-No18.pdf](https://www.mnd.uscourts.gov/sites/mnd/files/2020-0827_COVID19-General-Order-No18.pdf) [https://perma.cc/MV94-C6HW].

202. Most courts continued jury trials until anywhere from November 2020 to January 2021. See, e.g., *In Re: Coronavirus COVID-19 Public Emergency*, U.S. DIST. CT. N. DIST. OF N.Y. (Aug. 6, 2020), [https://www.nynd.uscourts.gov/sites/nynd/files/general-orders/GO58\\_3.pdf](https://www.nynd.uscourts.gov/sites/nynd/files/general-orders/GO58_3.pdf) [https://perma.cc/AZ9Z-BKJP] (jury trials continued through October); *In Re: Court Operations Under the Exigent Circumstances Created by COVID-19*, U.S. DIST. CT. DIST. OF N.J. (Sept. 23, 2020), <https://www.njd.uscourts.gov/sites/njd/files/SO2020-12SeptExtensionOrder.pdf> [https://perma.cc/782Q-7SCH] (jury trials continued until January 4, 2021). The Southern District of Florida continued jury trials to April 5, 2021 back in October 2020. *In Re: Coronavirus Public Emergency, Seventh Order Concerning Jury Trials and Other Proceedings*, U.S. DIST. CT. S. DIST. OF FLA. (Oct. 20, 2020), <http://web.flsd.uscourts.gov/uploads/adminOrders/2020/2020-76.pdf> [https://perma.cc/HUY4-CMEF].

203. Madison Alder, *Loaner Laptops, Dry Runs: Virtual Federal Civil Trials on Tap*, BLOOMBERG L. (Sept. 29, 2020), <https://news.bloomberglaw.com/daily-laborreport/loaner-laptops-dry-runs-virtual-federal-civil-trials-on-tap?context=article-related> [https://perma.cc/6XKR-7R8P].

potential jury deliberations, to be held virtually.<sup>204</sup> At trial, the plaintiff logged in from California while witnesses testified from all over the world.<sup>205</sup> The court loaned court laptops to jurors who did not have one.<sup>206</sup> Exhibits were shared with all participants on Zoom.<sup>207</sup> The trial went smoothly overall, with the plaintiff's lawyer saying that "[i]t worked remarkably well."<sup>208</sup> For subsequent trials, the court planned to find a way to limit who can see exhibits and improve connectivity issues.<sup>209</sup> At the state level, Texas was an early adopter, being one of the first states to move proceedings online.<sup>210</sup>

### 3. Post-Pandemic Prospects for Change

The pandemic-era shift to remote depositions and trials represents much-needed flexibility that could re-cast future TFW litigation. In an informal survey of judges and litigants over summer 2020, litigator Lisa Wood found a generally favorable attitude:

virtual litigation, while new, has been surprisingly effective . . . . We will retain many of these practices when we get to the other side of this pandemic because they level the playing field (between counsel who are local and those who are out of state or from another country), and make litigation far more efficient.<sup>211</sup>

These are observations that TFW plaintiffs' lawyers have made for decades, and permanent adoption could have a significant inclusive impact on temporary foreign workers.

Going forward, we anticipate that courts will be more hostile to scorched border tactics because COVID-19 has normalized remote depositions and trials and demonstrated that they can work. However, it is important for courts to not merely rule in the TFW plaintiffs' favor, but also

---

204. Order for Remote/Virtual Civil Jury Trial, *Dallo v. Holland Am. Line*, No. 2:19-CV-00865, at 1 (W.D. Wash. Sept. 16, 2020).

205. Alder, *supra* note 203.

206. *Id.*

207. Madison Alder, *Zoom Trial Judge Recommends Jurors Get Time for Virtual Chitchat*, BLOOMBERG L. (Oct. 9, 2020), <https://news.bloomberglaw.com/financial-accounting/zoom-trial-judge-recommends-jurors-get-time-for-virtual-chitchat?context=article-related> [<https://perma.cc/B6US-ENL4>].

208. *Id.*

209. *Id.*

210. See, e.g., Jenia Turner, *Remote Criminal Justice*, 53 TEX. TECH. L. REV. (forthcoming 2021) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3699045](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3699045) [<https://perma.cc/9T2G-QPKA>].

211. Lisa C. Wood, *Best Practices for Virtual Litigation*, 35 ANTITRUST 97, 99 (2020).

to use the rule-setting function to set baseline expectations for all parties. As courts review their new rules for retention in the post-pandemic era, they can and should seize the opportunity to consider the needs of TFW and similarly situated plaintiffs and witnesses: namely, individuals living in deep poverty in isolated, rural communities with patchy communications infrastructures.<sup>212</sup> By way of example, the SDNY Sample Deposition Protocol states, “[e]very deponent shall endeavor to have technology sufficient to appear for a videotaped deposition (e.g., a webcam and computer or telephone audio), and bandwidth sufficient to sustain the remote deposition.”<sup>213</sup> Few TFW plaintiffs can guarantee this capacity. Therefore, key additional accommodations for testimony from remote locations with limited infrastructure include scaling back technological requirements, and/or allotting time to allow plaintiffs to travel to the nearest city with appropriate arrangements. Soliciting feedback from organizations with relevant expertise will assist with providing alternative samples, language, or changes to the Rules contemplating these situations.

Similarly, a typical TFW plaintiff—indigent and living in a remote rural village—would not be able to participate in a trial in exactly the same way that the *Dallo* litigants did. However, with appropriately-tailored logistical arrangements, access to justice for temporary foreign workers could expand dramatically. Incorporating the norms and lessons of the pandemic into cases involving remote, indigent plaintiffs such as TFW plaintiffs will create a litigation atmosphere of default accommodation, making litigation more efficient, cost-effective, and fair. With this increased certainty, temporary foreign workers and their lawyers could rely on courts to appropriately manage matters that are critical to the United States’ treatment of immigrant workers.

#### CONCLUSION

Temporary foreign workers do not come to the United States for glamour or glory. They come from situations of deep poverty to support their families by engaging in some of the dirtiest, most difficult, and most dangerous work in our economy. That the U.S. labor market has long depended on a ready supply of vulnerable workers, including in the modern era through TFW visa programs, does not mean the litigation process has to continue indulging needless battles over the TFW plaintiff’s location, which further alienates them from the rights enforcement process. When they make

---

212. See *supra* notes 71, 144 and accompanying text.

213. Lehrburger Protocols, *supra* note 185, ¶ 15; Cave Protocols, *supra* note 188, ¶ 16.

the difficult choice to engage in litigation, temporary foreign workers are simply seeking to recover the hard-earned wages they are legally owed. Adding unnecessary procedural roadblocks perpetuates a patently unfair system.

Defendant employers and their lawyers should not be allowed to further exploit TFW plaintiffs by scorching the border through such abusive litigation tactics. We believe that sensible change is possible, based on the experiences of tenacious lawyers like those who responded to our survey and the remarkable pandemic-era changes to federal court rules. Through inexpensive rule-setting that is sensitive to temporary foreign workers' realities in their communities of origin, the United States can promote greater accountability within the TFW programs upon which its economy relies by increasing access to justice for temporary foreign workers.