IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2456

RUBEN BRACAMONTES, REYES PEREZ, and PABLO MARTINEZ,

and all others similarly situated,

Plaintiffs-Appellants

v.

THE WEYERHAEUSER COMPANY,

MARIO RODRIGUEZ, GUADALUPE RODRIGUEZ, ISABEL RODRIGUEZ,

individually and d/b/a SOUTH TEX REFORESTERS, and

JUAN SENDEJO,

Defendants-Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

The Hon. Filemon Vela, Judge Presiding

BRIEF OF APPELLANT

Marc Linder
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Weslaco, TX 78596

CERTIFICATE OF INTERESTED PERSONS
PURSUANT TO LOCAL RULE 28.2.1

Ruben Bracamontes et al. v. The Weyerhaeuser Company et al.
(No. 87-2456)

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal, to wit:

I. Parties

A. Plaintiffs

Ruben Bracamontes
Reyes Perez
Pablo Martinez

B. Defendants

The Weyerhaeuser Company
Mario Rodriguez
Guadalupe Rodriguez
Isabel Rodriguez
South Tex Reforesters
Juan Sendejo

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_____
Marc Linder
Attorney of Record
For Plaintiffs-Appellants

REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiffs-Appellants requests that the Court grant oral argument for this appeal. This appeal involves a question, never before presented to the Court, regarding coverage of a large class of workers under the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. 1801-1872, the resolution of which will have a significant impact on the employment rights of all migrant agricultural workers planting and thinning trees in the South. Because of the importance of this issue for Plaintiffs and the class they represent, the Court of Appeals should give plenary consideration to this case.

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Marc Linder

Attorney of Record
for Plaintiffs-Appellants

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I. STATEMENT OF JURISDICTION

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

II. ISSUE ON APPEAL

Whether Plaintiff-migrant workers were employed in "agricultural employment" within the meaning of 1802(3) of the Migrant and Seasonal Agricultural Worker Protection Act when they planted pine seedlings for, and on land owned by, Defendant Weyerhaeuser Company.

III. STATEMENT OF THE CASE

A. Course of the Proceedings Below

Plaintiffs filed this action on February 27, 1987 in the United States District Court for the Southern District of Texas, Brownsville Division, pursuant to the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. 1854(a) (R. 132). Plaintiffs alleged violations of the registration, disclosure, transportation, housing and confirmation of registration provisions of AWPA by Defendants The Weyerhaeuser Company ("Weyerhaeuser"), Mario Rodriguez, Guadalupe Rodriguez and Isabel Rodriguez ("the Rodriguez brothers"), and Juan Sendejo ("Sendejo") (R. 144-47).

At the same time they filed their Complaint, Plaintiffs filed a motion for preliminary injunction, seeking to restrain Weyerhaeuser from utilizing the services of any farm labor contractors to supply Plaintiffs or any similarly situated workers unless Weyerhaeuser first took reasonable steps, pursuant to 29 U.S.C. 1842, to determine that the contractors possessed a certificate of registration from the Secretary of Labor authorizing the labor recruitment activities for which Weyerhaeuser utilized them (R. 128). Plaintiffs also sought to restrain the remaining Defendants from engaging in any farm labor contracting activity related to Plaintiffs or the class they represent without the aforementioned certificates of registration (R. 128-29).

On March 25, 1987, the District Court heard both Plaintiffs'

preliminary injunction motion and Weyerhaeuser's motion to dismiss (R. 1). At the hearing Plaintiffs presented the testimony of two expert witnesses. All parties stipulated to the admission into evidence of the affidavits of a further witness and of Plaintiff Ruben Bracamontes ("Bracamontes") as if they had given that testimony live (Tr. 75:16-76:17).

On April 15, 1987, the Hon. Filemon Vela entered an Order granting Defendants' motion to dismiss. Being of the opinion that the case was factually indistinguishable from Aguirre v. Davis Forestry Corp., Civil Action No. B-81-142 (S.D. Tex. Mar. 13, 1987), the court decided to "adhere to its ruling in that case" (R. 4). The court was referring to its Order in which it had ruled that the predecessor statute to AWPA, the Farm Labor Contractor Registration Act ("FLCRA"), 7 U.S.C. 2041-2058, did "not apply to parties engaged exclusively in forestry activities" (R. 75).

On April 22, 1987, Plaintiffs timely appealed (R. 2). They seek to have this Court reverse the District Court's ruling that migrant workers employed to plant pine seedlings are not engaged in agricultural employment for the purposes of AWPA.

B. Statement of Facts

Plaintiffs are Mexican-American migrant agricultural workers who were employed by Weyerhaeuser in December of 1986 to plant pine seedlings on land owned by Weyerhaeuser in Alabama (R. 134-35). Weyerhaeuser utilized the services of three labor

contractors, the Rodriguez brothers, to recruit Plaintiffs in Texas, transport them from Texas to Alabama, and house them in Alabama (R. 135). The Rodriguez brothers, in turn, employed Defendant Sendejo to drive Plaintiffs from Texas to Alabama (R. 136). Plaintiffs alleged in their Complaint (R. 136-37), and all Defendants stipulated (Tr. 5:20-6:2), that neither the Rodriguez brothers nor Sendejo was, at any time relevant to this action, registered as a farm labor contractor pursuant to 29 U.S.C. 1811.

The recruitment process in the instant case was typical of the general situation in agricultural labor recruiting. The Rodriguez brothers, who formerly were registered to recruit and did recruit workers for fruit and vegetable farmers and have worked for Weyerhaeuser for several years (R. 141), sent their employee, Sendejo, to the Bridge to recruit workers to plant pine trees for Weyerhaeuser in Alabama (R. 142). Like many recruiters at the Bridge who recruit farmworkers, neither the Rodriguez brothers nor Sendejo had permission from the Secretary of Labor to recruit, transport or house migrant agricultural workers (Tr. 5:20-6:2). Like many recruiters, Sendejo did not provide the workers with any written disclosures of the terms and conditions of the employment being offered (R. 10, 17). In fact, he did not even tell them orally what their wages would be (R. 10). Plaintiffs, however, could ill afford to turn down this opportunity to earn money to support their families, given the oversupply of workers and their poverty, desperation and hence

vulnerability (R. 4, 125).

Plaintiffs--like migrant tree planters in general--suffered the same abuses and violations to which agricultural workers have traditionally been subjected (R. 17). Indeed, because of the greater isolation associated with winter-time work in the woods, tree planters are even more dependent on, and hence less able to resist the abuses committed by, labor contractors (R. 12).

As is typical of many other agricultural labor recruiters, Sendejo drove Plaintiffs approximately 1,000 miles to their destination in a van that did not have enough seats for all the workers. With only eight seats for ten occupants, the employees (including Plaintiffs) had to take turns lying on the floor or sitting on baggage (R. 11).

When Plaintiffs arrived in Alabama in late December, 1986, the temperature was below freezing. Nevertheless, the Rodriguez brothers housed them in a house that neither State nor local health officials had inspected or certified for occupancy (R. 143). Despite the fact that ice was still visible in mid-morning, the Rodriguez brothers furnished no heat. They did not even supply Plaintiffs with blankets (R. 11-12, 125, 143).

The named Plaintiffs, lifelong migrant agricultural workers from the Rio Grande Valley, have been employed to pick and pack fruits and vegetables as well as to plant pine trees (R. 124, 132, 134). Plaintiff Bracamontes, for example, has picked tomatoes, asparagus, bell peppers, strawberries, lemons and oranges in California, harvested watermelon in Arkansas, clipped

onions in Texas, and worked in a cannery in Minnesota. He has also planted pine trees in Alabama, Mississippi and Arkansas for many years both for Defendant Weyerhaeuser and Davis Forestry (R. 9-10).

Plaintiffs are recruited in identically the same manner regardless of whether the employment they are offered is picking row crops or planting pine trees (R. 10, 124). The central physical agricultural labor market in the Rio Grande Valley is located on the United States side of the International Bridge connecting Hidalgo, Texas with Reynosa, Tamaulipas, Mexico (R. 16-17). Throughout the year thousands of Mexican-American agricultural workers assemble there as early as 4:00 A.M. to be present at the shape-up for crewleaders and agricultural employers.[1] Migrant tree-planters hired in the Rio Grande Valley are part of the same pool of agricultural laborers who form the largest single source of such workers in South Texas. Crewleaders and agricultural employers recruit workers indiscriminately for local and long-distance migratory employment on farms, in fruit and vegetable packing sheds, cotton gins and canneries, and on tree farms (R. 16-17). Since these various kinds of agricultural employment are all unskilled, learned in a few minutes, and basically identical (Tr. 19:10, 50:8, and

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[1]The shape-up is a fixture of the migrant and seasonal agricultural labor market. See Farm Labor Contractor Registration Act Amendments, 1974: Hearings Before the Subcommittee on Employment, Poverty, and Migratory Labor of the Senate Committee on Labor and Public Welfare on S. 2070 and S. 3202, 93rd Cong., 2d Sess. 35 (1974) (statement of Barbara Rhine, Attorney, United Farm Workers).

24:22), many workers, including Plaintiffs, do not distinguish among them, holding themselves out to engage in all (R. 10, 16).

During the course of the year, large numbers of migrant agricultural workers are recruited in South Texas to plant seedlings all over the South for short periods interspersed with seasonal labor picking row crops or in agricultural packaging or processing operations (R. 16; Tr. 58:14-21). Many of the labor contractors or crewleaders who recruit tree planters also recruit the same workers for employment picking, packing or processing fruits and vegetables (R. 16). Other contractors specialize in the recruitment of tree planters, just as some contractors specialize in recruiting lettuce, cabbage or onion harvesters. In either case, there is no real difference between the methods and locations of recruitment or the persons involved (R. 17). Like unskilled row-crop agricultural workers, tree planters are subject to close supervision by the labor contractor as well as by the foremen of the land owner (such as Weyerhaeuser) (Tr. 51:22-53:19). Like fruit and vegetable harvesters, tree planters are commonly made to accept falsified wage statements understating the number of hours worked in order to simulate compliance with the Fair Labor Standards Act (Tr. 55:19-25). Finally, like traditional farmers, timber companies rely heavily on illegal aliens, who also harvest fruits and vegetables, to plant trees and depress wages to unlawfully substandard levels (Tr. 56:1-59:24).

IV. SUMMARY OF ARGUMENT

A. When FLCRA was enacted in 1964, Congress defined "agricultural employment," which is the threshold coverage issue, by reference to the definitions contained in the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 203(f), and the Federal Insurance Contributions Act ("FICA") provisions of the Internal Revenue Code, 26 U.S.C. 3121(g). When FLCRA was amended in 1974, the definition of "agricultural employment" was expanded in order to extend the protections of the Act to migrant workers who were subjected to the abuses of the labor contracting system but did not work on traditional farms. These work sites included packing sheds, canneries and forests. The identically same definition has been retained in AWPA.

1. FLCRA and AWPA are remedial statutes designed to confer protections and benefits on economically extremely vulnerable classes of agricultural workers whom Congress has deemed incapable of defending themselves on the labor market and at the work place. In seeking to give full effect to Congress's proscription of specified exploitative conduct by crewleaders and agricultural employers, this Court has repeatedly held that this statutory scheme must be broadly construed.

2. The definition of "agricultural employment" in 1802(3) of AWPA includes "the handling or planting of . . . any agricultural or horticultural commodity." In ordinary usage, the latter term is broad enough literally to encompass Plaintiffs'

planting of pine seedlings. In construing this capacious and hence ambiguous statutory term, the Court must therefore look to the legislative history to determine whether Congress intended to protect migrant agricultural workers planting trees.

3. This third prong of the definition of "agricultural employment," which Congress added in 1974, merely duplicated the second prong (taken from FICA) with the significant omission of the introductory phrase, "in the employ of the operator of a farm." Congress deleted this limitation in order to confer protection on migrant workers employed elsewhere than on traditional farms. The Senate report accompanying the 1974 FLCRA amendments expressed that body's intent to apply the provisions of the bill to "tree planters, thinners and other forest laborers" subject to the labor contracting system.

4. Both this Court and the Department of Labor in its administration of FLSA have recognized that "agriculture" includes forestry. As remedial statutes, FLSA, the Social Security Act, FLCRA and AWPA must all be construed broadly to fulfill their humanitarian purposes. In order to give effect to this canon of statutory construction, it is necessary to recognize the diametrically opposed functions that the term "agriculture" performs in FLSA and FICA on the one hand and in FLCRA/AWPA on the other. In FLSA and FICA "agriculture" operates to exclude workers from certain benefits (e.g., overtime) to which other workers are entitled. Since they are remedial statutes, this agricultural exclusion is construed narrowly in

order to exclude as few workers as possible. In FLCRA/AWPA, on the other hand, "agriculture" operates to trigger coverage and protection. In this statutory setting, therefore, the term should be interpreted broadly in order to effectuate congressional intent.

5. Running like a red thread through the entire legislative history of FLCRA and AWPA is the pervasive intent of Congress to control, regulate and eliminate the abuses inherent in a labor contracting system the fulcrum of which is the crewleader. This purpose of protecting the migrant victims of such a system wherever they are recruited and employed was clearly uppermost on the congressional agenda. No evidence suggests that Congress ever intended to leave migrant workers who plant trees at the mercy of the crewleader system.

6. The persons Congress intended FLCRA/AWPA to protect are the racial and ethnic minorities who make up the bulk of the migrant work force. Their poverty and lack of skill, education, opportunities and bargaining power make them peculiarly vulnerable to the abuses of the labor contracting system. Plaintiffs are all precisely such persons. They are Mexican-American, lifelong migrant farm workers, who indiscriminately seek and are recruited for employment picking and packing fruit and vegetables and planting trees. The abuses to which they were subjected in this case--no disclosures of the terms and conditions of their employment, unsafe transportation and unhealthful housing--are typical of the unlawful treatment other

migrants face.

B. In the alternative, tree planting is covered "agricultural employment" because modern methods of industrial reforestation, borrowed from agriculture, have transformed Weyerhaeuser's forests into tree farms.

1. As a subset of agriculture, modern large-scale tree production is rooted in the same basic sciences and technology as agriculture. Consequently, silvicultural practices with respect to genetic planning, planting, soil selection, site preparation and weeding are indistinguishable from those of agriculture. Indeed, greater differences can obtain within agriculture than between agriculture and silviculture.

2. Defendant Weyerhaeuser has been the pioneer in the forestry industry in treating timber as a crop like any other crop. It is the self-proclaimed and widely acknowledged industrial originator of the systematic, scientific sustained-yield reforestation known as tree farming.

V. Argument

A. Both AWPA and its Predecessor, the Farm Labor Contractor Registration Act (FLCRA), were Intended to Apply to All Migrant Workers Subject to the Abuses of the Labor Contracting System in "Agriculture" in its Broadest Possible Meaning, Including Tree Planters

The single, straightforward and narrow issue on appeal is the scope of the term "agricultural employment" within the meaning of AWPA. More precisely still, the Court must decide whether migrant workers, who perform labor on all kinds of farms across the United States, continue to enjoy the rights and protections of AWPA when they are subjected to the identically same abuses of the labor contractor system while hand-planting pine seedlings for Weyerhaeuser, the wealthiest industrial timberland owner in the United States.[2]

1. As Remedial Statutes Designed to Protect Extraordinarily Vulnerable Classes of Agricultural Workers, FLCRA and AWPA Must be Interpreted Broadly

Decades of experience have demonstrated to Congress that the unskilled, uneducated, impoverished, "uprooted, unprotected, underprivileged group of workers"[3]--largely made up of members of insulated racial and ethnic minorities--who form the agricultural labor force, face such a perennially and decidedly unfavorable labor market that abandoning them to unregulated contractual

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[2] See Grant Sharpe, Introduction to Forestry 484-85 (5th ed. 1986).

[3] H.R. Rep. No. 358, 88th Cong., 1st Sess. 3 (1963).

relations with their employers and recruiters has always resulted and will continue to result in labor and living standards below those deemed consistent with late twentieth-century American civilization.[4] Consequently, Congress enacted the predecessor to AWPA, the Farm Labor Contractor Registration Act of 1963 (FLCRA), Pub. L. No. 88-562, 78 Stat. 920 (1964), codified at 7 U.S.C. 2041-2058. FLCRA required, inter alia, labor contractors to register, obtain adequate insurance for vehicles used to transport workers, disclose the terms and conditions of employment to workers at the time of recruitment, keep payroll records, furnish wage statements to workers, and pay them promptly in full. In replacing FLCRA with AWPA in 1983,[5] Congress mandated a more comprehensive system of regulation of the recruitment, transportation, housing, employment and payment of several million migrant and seasonal agricultural workers.

In urging passage of the 1974 FLCRA amendments, the House Committee on Education and Labor stated that FLCRA "must be expanded to provide the broadest feasible coverage. . . . " H. Rep. No. 1493, 93rd Cong., 2d Sess. 7 (1974). And as this Court has repeatedly held, FLCRA "'should be broadly construed because it is remedial in nature.'" Almendarez v. Barrett-Fisher

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[4]The House Committee on Education and Labor concluded that "these workers live and work under conditions sharply contrasting with and inferior to the general standards of living." Id. at 2. Consequently: "There has been a growing public awareness in recent years that the plight of the migrant worker is totally unacceptable in an affluent democratic society." Id. at 3.

[5]Pub. L. No. 97-470, 96 Stat. 2584 (1983).

Co., 762 F. 2d 1275, 1278 (5th Cir. 1985) (quoting Soliz v. Plunkett, 615 F. 2d 272, 275 [5th Cir. 1980]). In order to effectuate such a broad construction of FLCRA/AWPA, it is necessary to interpret its coverage as extending to all those whom Congress perceived as subject to the evils and in need of the remedies of the act.[6]

2. Because the Scope of the Term "Agricultural" in the Three-Pronged Statutory Definition of "Agricultural Employment" is Ambiguous, the Legislative History Must be Examined to Determine whether Tree Planting is Included Within "Agricultural Employment"

FLCRA originally defined "'migrant worker'" as "an individual whose primary employment is in agriculture, as defined in section 3(f) of the Fair Labor Standards Act of 1938 (29

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[6]This mischief-remedy approach is an ancient canon of Anglo-American statutory construction:

> [F]or the sure and true interpretation of all statutes in general . . . four things are to be discussed and considered:--
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth.
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief and . . . to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.

Heydon's Case, 3 Co. 7a, 7b, 76 Eng. Rep. 637 (1584).

U.S.C. 203(f)), or who performs agricultural labor, as defined in section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g)), on a seasonal or other temporary basis." 7 U.S.C. 2042(g). "'[A]gricultural employment," in turn, was defined as "employment in any service or activity included within the provisions of section 3(f) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(f)), or section 3121(g) of the Internal Revenue Code of 1954 (26 U.S.C. 3121(g))." 7 U.S.C. 2042(d).

The FLSA or first prong of this definition is worded as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. 203(f).

The Internal Revenue Code ("IRC") or second prong of the definition, which serves as the taxation counterpart to the benefits conferred by the social security old-age and survivors insurance and unemployment compensation systems, defines "'agricultural labor,'" in pertinent part, to include "all services performed":

> (1) on a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or

> horticultural commodity, including the raising . . . of livestock, bees, poultry, and fur-bearing animals and wildlife;
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> . . .
>
> (3) . . . in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways . . . used exclusively . . . for farming purposes;
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> (4)(A) in the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;
>
> . . .
>
> (C) the provisions of subparagraphs (A) and (B) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing . . . .
>
> As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

26 U.S.C. 3121(g).

The first decade's operation of FLCRA revealed to Congress that the act was not achieving its purpose of preventing the abuse of migrant agricultural workers. S. Rep. No. 1295, 93rd Cong., 2d Sess. 3 (1974). In response to extensive testimony concerning these inadequacies, Congress amended FLCRA to broaden its coverage and strengthen its enforcement mechanisms. Id. at 6, 8. When the Senate first considered S. 3202, which ultimately became the 1974 amendments to FLCRA, it had not yet revised the definition of "agricultural employment" to extend the scope of the latter beyond the definitions of FLSA and the IRC. At the

Senate hearings, however, testimony was elicited to the effect that coverage should be expanded to "include all recruiters" so that migrant workers recruited through the labor contracting system to work, for example, in canneries, packing sheds and poultry processing plants could also be protected. Farm Labor Contractor Registration Act Amendments, 1974, supra n.1, at 220 (statement of A. Samudio, Wisconsin Dept. of Labor).

Following this hearing the Senate amended the bill by adding a third prong to the definition of "agricultural employment":

> and the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.

120 Cong. Rec. 33743 (1974). This third prong was then incorporated intact into 2042(d) of FLCRA.

When Congress replaced FLCRA with AWPA in 1983, it retained the three-fold definition of "agricultural employment" from the 1974 version of FLCRA.[7] It is the scope of that definition, codified in AWPA at 29 U.S.C. 1802(3), that is at issue here.

With respect to the aforementioned third prong of the definition, Judge Burns, in the only published decision disposing of this precise issue, has held that "forestry activities such as the planting of seedlings and related work could literally come

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[7]In reporting out H.R. 7102, which became AWPA, the House Committee on Education and Labor stated that 1802(3) "adopts without change the definitions of agricultural employment as contained in FLCRA, and affirms the Congress' intent that those involved in the . . . planting . . . of any agricultural or horticultural commodity in its unmanufactured state are so included." H. Rep. No. 885, 97th Cong., 2d Sess. 5 (1982).

within the terms of this definition as 'the handling or planting of an agricultural or horticultural commodity,' as those terms are used in common parlance." Bresgal v. Brock, 637 F. Supp. 271, 273 (D. Or. 1985), appeal docketed, No. 86-3996 (9th Cir. July 23, 1986). Since the scope of the statutory term, "agricultural or horticultural commodity," is both capacious and ambiguous, "[i]t is . . . proper to look to the legislative history for assistance in divining Congressional intent . . . . " Bresgal v. Brock, 637 F. Supp. at 273.[8]

3. Congress's Express Intent was to Include Tree Planters among other Off-the-Farm Agricultural Employees Within the FLCRA/AWPA Definition of "Agricultural Employment"

The broadened coverage afforded by the third prong of the definition of "agricultural employment" added by Congress in 1974 can be analyzed into two distinct components:

> Obviously, one effect of this new language is to extend coverage "vertically" within the industry, to cover all steps in the production chain of products previously covered under the FLSA and IRC definitions. Thus, while the 1963 Act may clearly have covered contractors supplying labor to pick tomatoes, for example, the new language would also reach contractors supplying migrant labor to the tomato cannery. The real issue here is whether the new language expanded coverage horizontally as well, to growing operations not previously covered, such as forestry.

Bresgal v. Brock, 637 F. Supp. at 274-75.

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[8]Even in the absence of a facial ambiguity, "literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute or statutory scheme or with clear legislative history." Almendarez v. Barrett-Fisher Co., 762 F. 2d at 1278 (construing 7 U.S.C. 2042[d] [FLCRA]).

In the context of resolving the issue of whether coverage was extended horizontally, the most striking aspect of the third component of the definition of "agricultural employment" added in 1974 is that it repeats virtually verbatim the second component--with one crucial exception:

IRC (2nd prong)	FLCRA (1974)/AWPA (3rd prong)
"[A]gricultural labor" includes all service performed . . . (4)(A) <u>in the employ of the operator of a farm</u> in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage . . . in its unmanufactured state, any agricultural or horticultural commodity. . . .	The term "agricultural employment" means . . . the handling, planting, drying, packing, packaging, processing, freezing, or grading prior to delivery for storage of any agricultural or horticultural commodity in its unmanufactured state.
26 U.S.C. 3121(g) (emphasis added)	29 U.S.C. 1802(3)

The new language of the 1974 FLCRA amendments is thus revealed to be a reproduction of the second prong minus the key phrase, "in the employ of the operator of a farm." In other words, whereas for Social Security purposes employees engaged in handling, planting, packing, etc., agricultural or horticultural commodities are deemed to be performing "agricultural labor" only when they are "in the employ of the operator of a farm," Congress dropped this limitation on the coverage of FLCRA/AWPA.

The reason Congress chose to structure coverage under the Social Security tax provisions and the FLCRA/AWPA protective

scheme in these two different ways is both manifest and central to the resolution of this appeal. Although both the Social Security Act and FLCRA/AWPA are broadly remedial schemes intended to impose protections that--as experience has shown--market forces could not guarantee, Congress provided for small farmers a minor exemption from the Federal Insurance Contributions Act (FICA)[9] and a more significant exemption from the Federal Unemployment Tax Act ("FUTA").[10] Since Congress did not intend to confer this tax relief on even small commercial canneries or packing sheds (i.e., those not operated as adjuncts to farms), a fortiori it did not intend to exempt billion-dollar timber corporations. When, therefore, Congress dropped the limiting language, "in the employ of the operator of a farm," in the 1974 FLCRA amendments, it signaled the incorporation into "agricultural employment" of such off-the-farm agricultural operations as packing and tree planting.

Since the whole purpose of the third prong of the definition

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[9]The definition of "agricultural labor" in 26 U.S.C. 3121(g) is linked to the definition of "wages" subject to FICA taxation. 26 U.S.C. 3111. Wages "paid by an employer in any calendar year to an employee for agricultural labor are excluded from taxable wages unless (i) the cash remuneration . . . is $150 or more, or (ii) the employee performs agricultural labor for the employer on 20 days or more during such year . . . ." 26 U.S.C. 3121(a)(8)(B).

[10]For FUTA purposes "agricultural labor" is defined by reference to 26 U.S.C. 3121(g). 26 U.S.C. 3306(k). Whereas "employer" in general means any person who paid wages of $1,500 or more during a calendar quarter or employed at least one individual on each of twenty days in a different calendar week, the corresponding limits for employers of agricultural labor are $20,000 and ten individuals. 26 U.S.C. 3301(a), (b)(1) and (2), and (c)(1)(A).

of "agricultural employment" in the 1974 FLCRA amendments is to protect the migrant wherever she or he is recruited and employed in non-farm agricultural operations, Congress was logically compelled to delete the phrase "in the employ of the operator of a farm" while maintaining intact the enumerated categories of agricultural operations in which migrants would be protected. Had Congress intended simply to expand coverage with respect to processing of those products that were already covered, the word "planting" would have been superfluous since the planting of those products considered to be "agricultural or horticultural" under FLSA was subsumed under the first prong of the definition of "agricultural employment" under FLCRA.[11] Thus in order to avoid violating a basic canon of statutory construction by imputing to Congress an intention to accomplish nothing,[12] Congress must be presumed to have intended to expand the reach of "planting" beyond the reach of the FLSA or IRC prongs of the definition of "agricultural employment."

In expanding the meaning of "planting" beyond that of IRC 3121(g)(4)(A)[13] in 1974, Congress left no doubt as to its

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[11]Planting of agricultural or horticultural products comes within the definition of "[a]griculture" pursuant to 29 U.S.C. 203(f). 29 C.F.R. 780.206(a).

[12]"We cannot ascribe to Congress such an intention to enact meaningless or futile legislation. '[W]hen Congress amends a law the amendment is made to effect some purpose.'" Almendarez v. Barrett-Fisher Co., 762 F. 2d at 1280 (quoting Argosy Limited v. Hennigan, 404 F. 2d 14, 18 [5th Cir. 1979]).

[13]The current version of 26 U.S.C. 3121(g)(4)(A) derives from the Social Security Tax Amendments of 1950, which revised the definition of "agricultural labor" in the then 1426(h) of

intention to include tree planters within the third prong. For the Senate report accompanying the FLCRA Amendments did "address this question head-on"[14]:

> The Committee has been informed by the Commissioner of the Immigration and Naturalization Service that some government agencies have permitted the employment of illegal aliens as tree planters, thinners, and other forest laborers by awarding contracts to forestry contractors who regularly employ aliens who have illegally entered the United States. The provisions of this bill and its penalties are intended to apply to such contractors.

S. Rep. No. 1295, 93rd Cong., 2d Sess. 4 (1974) (emphasis added).[15] "This passage[, which] appears to be the only place in the entire legislative history where forestry is mentioned in particular,"[16] also served to persuade the Eleventh Circuit that, "There is little doubt that the 1974 Amendments to FLCRA were intended to apply to forestry contractors who employ 'tree

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the IRC. Act of Aug. 28, 1950, ch. 809, 64 Stat. 477, 204(d). The term "planting" was first incorporated into this provision by the Social Security Act Amendments of 1939, Pub. L. No. 379, 53 Stat. 1361, 1377, 209(1)(4) (1939) (first introduced at 84 Cong. Rec. 8838 [1939]). The original Social Security Act, Pub. L. No. 271, 49 Stat. 620, 625, 639, 210(b)(1) and 811(b)(1) (1935), did not define "agricultural labor," which was wholly excluded from coverage. Before the 1939 amendments the Treasury Department promulgated regulations, which in pertinent part referred only to "packing and packaging." Regulation 90, Art. 206(1), 1 Fed. Reg. 4-5 (1936); Regulation 91, Art. 6(b), 1 Fed. Reg. 1765 (1936).

[14]Bresgal v. Brock, 637 F. Supp. at 275.

[15]This language first appeared in S. Rep. No. 1206, 93rd Cong., 2d Sess. 4 (1974), and was printed at 120 Cong. Rec. 33748 (1974)--the same day (Oct. 3, 1974) on which the Senate added the third prong to the definition of "agricultural employment," supra, at p. 17.

[16]Bresgal v. Brock, 637 F. Supp. at 276.

planters, thinners and other forest laborers.'" Davis Forestry Corp. v. Smith, 707 F. 2d 1325, 1328 n. 3 (11th Cir. 1983).[17] And as Judge Burns said of the passage:

> If the committee had thought that it was simply "borrowing" the narrow definition of "agricultural or horticultural commodity" from the FLSA and incorporating it into Section 3 of the new bill, the quoted passage would be a non sequitur. The only way that the bill could reach the workers mentioned in this passage would be if the language of Section 3 were given a plain, non-technical construction.

Bresgal v. Brock, 637 F. Supp. at 276.

Finally, Congress's original intent to include workers such as Plaintiffs was unambiguously reaffirmed as recently as last year in the course of the House debates on the Immigration Reform and Control Act of 1986, which amended AWPA:

> Mr. Weaver. If the gentleman would yield further: As the gentleman knows, trees grown for lumber are not considered an agricultural commodity under longstanding interpretations of the Fair Labor Standards Act. While forestry is sometimes included in the definition of agriculture, this has been done only in broadly remedial statutes like the Migrant and Seasonal Agriculture Worker Protection Act. The gentleman's program, as I understand it, is not remedial in nature and therefore including forestry labor or trees grown for lumber within its provisions would be inappropriate. Is that correct?
> Mr. Schumer. The gentleman is correct.

132 Cong. Rec. H9870 (daily ed. Oct. 10, 1986).

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[17]Although it is "technically correct" that this statement is dictum inasmuch as the 11th Circuit disposed of the case on the grounds of lack of standing, "it is puzzling to wonder why the 11th Circuit spent several pages in a complex analysis of standing doctrine when the case could have been decided in about two sentences if it was clear that forestry was not covered by the FLCRA. From the quoted footnote, it is obvious that the 11th Circuit found the language in S.Rep. 93-1295 to be significant." Bresgal v. Brock, 637 F. Supp. at 276.

4. Pine Seedlings Planted in Forests are an "Agricultural or Horticultural Commodity" within the Meaning of 1802(3) of AWPA

The unambiguous and specific command of the Senate Labor and Public Welfare Committee to the responsible agencies to enforce FLCRA on behalf of "tree planters, thinners and other forest laborers" constitutes the legislative history background against which this Court must determine whether Congress considered pine seedlings on land owned by non-farm agricultural entities to be an "agricultural or horticultural commodity," the planting of which would qualify as "agricultural employment."

First, this Court itself has ruled that "agriculture includes . . . forestry." United States v. Turner Turpentine Co., 111 F. 2d 400, 405 (5th Cir. 1940).[18] Moreover, it is judicially recognized that "[s]ince trees are a product of the soil, we see no reason to exclude forestry . . . from the definition of an agricultural operation . . . especially in light of the modern methods of planting . . . trees."[19]

Second, even the Department of Labor in its own FLSA regulations acknowledges not only that "'agriculture' is sometimes used in a broad sense as including the science and art of cultivating forests," 29 C.F.R. 780.200, but also that

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[18] Accord, Sancho v. Bowie, 93 F. 2d 323, 324 (1st Cir. 1937); Fromm Brothers v. United States, 35 F. Supp. 145, 147 (W.D. Wisc. 1940); Forsythe v. Village of Cooksville, 356 Ill. 289, 190 N.E. 421, 422 (1934).

[19] Wisconsin v. Hamel Forest Products, Inc., 110 Wis. 2d 352, 328 N.W. 2d 884, 886 (Ct. App. 1982).

"[t]he planting of trees . . . is within the scope of agriculture where it constitutes a step in the production, cultivation, growing, and harvesting of agricultural . . . commodities. . . . " 29 C.F.R. 780.206(a). In addition, at the 1974 FLCRA hearings, the acting Wage and Hour Administrator testified that the Department of Labor subsumed "pulpwood logging" under "agriculture" and "farm operations" for the purpose of promulgating standards pursuant to the Occupational Safety and Health Act.[20]

Third, extensive testimony furnished at trial by expert witnesses revealed that the basic sciences as well as the planting and cultivating techniques in modern tree production and agriculture are indistinguishable. See infra B.1. This overlap explains why the U.S. Forest Service is organizationally subordinate to the Secretary of Agriculture. 36 C.F.R. 200.1.

Although the Department of Labor in its administration of FLSA has long excluded trees grown in forests from the definition of "agricultural or horticultural commodities,"[21] this

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[20] Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 93rd Cong., 1st Sess. 8 (1973) (statement of Ben Robertson).

[21] "Trees grown in forests and the lumber derived therefrom are not 'agricultural commodities.' . . . It follows that employment in the production, cultivation, growing, and harvesting of such trees or timber products is not sufficient to bring an employee within section 3(f) unless the operation is performed by a farmer or on a farm as an incident to or in connection with his or its farming operations." 29 C.F.R. 780.115. This interpretation was first promulgated at 12 Fed. Reg. 5961 as 29 C.F.R. 780.62 (1947). See also 29 C.F.R. 780.200 ("It follows that employees of an employer engaged

interpretation is not relevant for purposes of AWPA.[22] Indeed, to graft this FLSA interpretation onto FLCRA/AWPA would invert and pervert its original function. The Department of Labor itself has expressly conceded this position:

> Your suggestion that there is a relationship between exemptions under the Fair Labor Standards Act and the Farm Labor Contractor Registration Act is not supported by the legislation. They embody different statutory provisions with different purposes. Thus the exemptions to the statutes cannot be read together.

Wage-Hour Adm'r Op. Letter No. 1540 (WH-487) (May 18, 1979), [Wages-Hours 1978-1981 Transfer Binder] Lab. L. Rep. (CCH) ¶31,275 at 43,205.

Judge Burns explained why FLSA must be interpreted differently:

> [T]he principal features of the Fair Labor Standards Act are the establishment of minimum wages, overtime pay, and equal pay. From this remedial thrust, Congress provided an exception in Section 3(f) of the Act for agricultural employment. The Supreme Court has directed that the exemption be narrowly construed.
>
> > Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly within its terms and spirit is to abuse the interpretive process and to frustrate the announced will of the people.

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exclusively in forestry or lumbering operations are not considered agricultural employees").

[22]Despite the promulgation of extensive regulations interpreting the definitions contained in AWPA, 29 C.F.R. §500.20, the Department of Labor has never published an interpretation of "agricultural or horticultural commodity" within the meaning of §1802(3).

Bresgal v. Brock, 637 F. Supp. at 275 (quoting Phillips Co. v. Walling, 324 U.S. 490, 493 [1945]). And the Department of Labor has expressly incorporated this ruling into its own FLSA regulations. 29 C.F.R. 780.2. As Judge Burns also noted:

> Imposing a narrow definition on the term "agricultural or horticultural commodity" in the context of the FLSA makes sense because it limits the exception and furthers the general remedial rule. The opposite result is achieved, however, when one attempts to take the entire body of administrative and case law under one statute (FLSA or IRC) and transplant it directly into the text of another statute (FLCRA). Any neutral and detached reading of the latter . . . can only compel the conclusion that the purpose of this legislation was to protect migrant workers from abuse by unscrupulous labor contractors. This remedial purpose is emasculated by the juxtaposition of statutory terms and administrative definitions from an entirely different context . . . .

Bresgal v. Brock, 637 F. Supp. at 276 (citations omitted).

The legislative history of the Social Security Act is also clearly consistent with the position that Congress intended to include tree planting within the protections of FLCRA/AWPA. When the Treasury Department first promulgated regulations in 1936 in aid of its administration of the imposition and collection of social security taxes, it defined "agricultural labor," which at the time was wholly excluded from the social security program, as performed, inter alia,

> [b]y an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute agricultural labor, however, unless they are performed by an employee of the owner . . . of the farm on which the materials in their raw or natural state were produced, and unless such

> processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations . . . .

Reg. 91, Art. 6(b), 1 Fed. Reg. 1765 (1936). The regulation then proceeded expressly to exclude forestry and lumbering from the agricultural exemption.[23]

When Congress decided to incorporate a definition of "agricultural labor" directly into the Social Security Act in 1939, it revised the Treasury regulation significantly. "Agricultural labor" now was defined to include, inter alia, all service performed:

> In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations . . . .

Social Security Act Amendments of 1939, Pub. L. No. 379, 53 Stat. 1361, 1377, 209(l)(4) (1939).[24]

In eliminating the express exemption of forestry from the agricultural exclusion, Congress created an implicit exemption by virtue of the phrase "ordinary farming operations." When, in 1950, it formulated the current wording by amending the provision with a view to partially incorporating "agricultural labor" into the social security system, Congress added the phrase, "[i]n the

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[23]The current version of this regulation reads as follows: "The term 'agricultural labor' . . . does not include services performed in connection with forestry, lumbering, or landscaping." 26 C.F.R. 31.3121(g)-1.

[24]The current version of this provision is codified at 42 U.S.C. 410(f)(4)(A).

employ of the operator of a farm."[25] Hence those engaged in the planting of agricultural or horticultural commodities but not "in the employ of the operator of a farm," such as workers planting pine trees for forestry entities, were exempt from the remaining coverage restrictions for agricultural laborers. Thus once Congress deleted the limiting words, "in the employ of the operator of a farm," for purposes of broadening coverage under FLCRA, all those--such as tree planters--who had been exempt from the agricultural exclusion under the Social Security Act insofar as they were planting agricultural or horticultural commodities for non-farm operators, came under the protective aegis of FLCRA.

Moreover, had Congress wished to exclude tree planters from the protection of the statute, it could have added them to the list of the expressly excluded workers. For whereas the definition of "agricultural employment" in 1802(3) of AWPA refers to very broad generic categories of work, the exemptions are specific and concrete: custom combine, hay harvesting, or sheep shearing operation. 29 U.S.C. 1803(a)(3)(E).[26] Thus under a venerable rule of statutory construction, according to which "[t]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded,"[27] Congress must be presumed to have

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[25]Act of Aug. 28, 1950, ch. 809, 64 Stat. 477, 204(d).

[26]These exemptions were first included in the 1976 amendments to FLCRA and codified at 7 U.S.C. 2042(b)(8).

[27]Sutherland Stat. Const. 47.23 (4th ed. 1984).

intended to include tree planters.

5. The Purpose of FLCRA/AWPA is to Protect Migrant Workers From the Abuses of the Labor Contracting System Wherever Migrants Work in "Agriculture" in its Broadest Possible Sense

In order to determine the intended reach of the third prong of the definition of "agricultural employment," it is necessary to consider whom the drafters of the 1974 FLCRA amendments meant to bring within the protections of the Act. In point of fact, their principal concern was to regulate the abuses inherent in a labor contracting system that has crewleaders as its keystone. The legislative history is replete with appeals to eliminate exploitation of migrant workers by labor contractors.[28] Indeed, many witnesses urges outlawing labor contracting altogether.[29]

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[28]See Farm Labor Contractor Registration Act Amendments of 1973, supra n.20, at 88 (1973) (statement of Rep. Lehman); Farm Labor Contractor Registration Act Amendments, 1974, supra n.1, at 34-36 (statement of B. Rhine, United Farm Workers); id. at 115 (opening statement of prime sponsor, Sen. Nelson); id. at 165, 167 (statement of David Sweeney, Int'l. Brotherhood of Teamsters); 120 Cong. Rec. 13403 (1974) (statement of Rep. Ford); id. at 13406 (statement of Rep. Lehman); id. at 13408 (statement of Rep. Steiger); id. at 37375 (statement of Rep. Ford); id. at 33745 (statement of Sen. Williams); id. at 33746 (statement of Sen. Javits); H. Rep. No. 1024, 93rd Cong., 2d Sess. 4 (1974); S. Rep. No. 1206, 93rd Cong., 2d Sess. 2 (1974); H. Rep. No. 1493, 93rd Cong., 2d Sess. 4 (1974).

[29]Rep. Lehman stated that "[t]here is something in the whole idea of contracting human labor . . . that is feudalistic and less than human, and I just wondered, maybe we have come to a point where we don't need a lot of regulators but a law to abolish it." Farm Labor Contractor Registration Act Amendments of 1973, supra n.20, at 88; id. at 154-55 (statement of W. Wilcox, Sec. Pa. Dept. of Community Affairs); Farm Labor Contractor Registration Act Amendments, 1974, supra n.1, at 107 (statement of Luke Danielson, former investigator, Colorado Legal Services Agency); id. at 230 (statement of Elijah Boone, Reg.

No witness or legislator argued that coverage should be confined to migrants working on traditional farms or with specified farm crops.

In point of fact, the legislative history makes clear that Congress meant to regulate the subjection of migrant workers to the labor contracting system wherever it occurs. Thus Congressman Lehman engaged one witness in the following colloquy:

> Rep. Lehman: We have labor contractors for agriculture, but where else in our society do we have, in any other economic area, labor contractors? I know we used to have them with stevedores and things like that, but is there any area besides this in which we have labor contractors?
> Father Vizzard: Not to my knowledge. Perhaps someone else knows about it, but it is certainly well hidden if it exists.

FLCRA Amendments of 1973: Hearings, supra n.20, at 88. The prime sponsor of S. 3202, Sen. Nelson, echoed this view:

> The use of farm labor contractors to provide seasonal farmworkers for American growers and processors is unique in our modern labor experience. In no other industry in the United States do those who finally utilize labor rely as extensively upon a middleman to hire, transport, and, in many instances, house, feed, and pay their workers.

FLCRA Amendments of 1974: Hearings, supra n.1, at 115.

Since Congress in 1974 both expressly took notice of the use of labor contractors in tree planting, see supra p. 23, and believed that the contractor system was confined to "agriculture," the compelling conclusion is that Congress included tree planting within "agriculture." Congress gave

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Dir., Community Action Migrant Program); id. at 248 (statement of Alfredo DeAvila, U. Farm Workers of America).

effect to its intention to protect migrant tree planters who were subject to the abuses of the crewleader system by subsuming their labor under the "planting" provision of the third prong of the definition of "agricultural employment."[30] This interpretation accords with the congressional goal of eliminating the abuses of labor contracting wherever it raises its ugly head.

6. Plaintiffs are Migrant Farm Workers who have been Subjected to Precisely those Evils which FLCRA and AWPA were Intended to Eliminate and which are Committed by the Same Labor Contractors whom FLCRA and AWPA were Intended to Regulate

When Congress enacted the 1974 FLCRA amendments, it focused on the exploitation of the "discrete and insular minorities"[31]--the "Mexican Americans, Puerto Ricans, West Indians, and native born black Americans"--who make up "the bulk of the migrant workforce." S. Rep. No. 1295, 93rd Cong., 2d Sess. 1 (1974). Congress viewed racial and ethnic insularity as significant

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[30] In his testimony before Congress, the Secretary of Community Affairs of Pennsylvania inserted into the record a copy of S.B. No. 1019 (1973), the Commonwealth's proposed Seasonal Farm Labor Act, which regulated farm labor contractors. It defined "seasonal farm laborer" to include "an individual employed in . . . planting . . . in its unmanufactured state, any agricultural commodity as defined in . . . the Pennsylvania Agricultural Commodities Marketing Act of 1968 . . . . " 103(7). Farm Labor Contractor Registration Act Amendments of 1973, supra, n. 20, at 122, 125-26 (1973). The Pennsylvania Agricultural Commodities Marketing Act, in turn, defines an "agricultural commodity" to include "forestry and forestry products." 3 P.S. 1002(6). The relevant provision of the Pennsylvania Seasonal Farm Labor Act, containing language identical with that of S.B. 1019, is codified at 43 P.S. 1301.103.

[31] United States v. Carolene Products Co., 304 U.S. 144, 153-54 n.4 (1938).

because it enabled the crewleader to exploit his position "as a sort of cultural broker, mediating between the worker and the outside, often alien, community." Id. at 2.[32] This is precisely the relationship that obtained among the Rodriguez brothers, Weyerhaeuser and Plaintiffs. It is relevant to the examination of the need for protection of migrant tree planters that the Rodriguez brothers were formerly labor contractors for fruit and vegetable farmers (R. 141) and have a litigated history of systematic violations of FLSA and AWPA while working for Weyerhaeuser (R. 142). Their unlawful conduct is representative of the range of violations committed by agricultural labor contractors (R. 17).

As Plaintiff Bracamontes revealed in his testimony, the abuses he and his co-plaintiffs suffered in this case are identical to those to which they are subjected when they pick fruit and vegetables (R. 10-12). In amending FLCRA in 1974, Congress was responding, inter alia, to testimony revealing:

> that in many cases the contractor . . . when he recruits workers in their home base . . . fails to inform them of their working conditions at all; tends to transport them in unsafe vehicles; . . . furnishes substandard and unsanitary housing . . . .

H. Rep. No. 1493, 93rd Cong., 2d Sess. 5 (1974). Here Plaintiffs

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[32]The Secretary of the Pennsylvania Dept. of Community Affairs testified to Congress that "the situation is so bad that it is proper to view the crew chief system, except for a minority of crew chiefs, as an underground system operating without license outside the normal structure of society and exploiting in his own interest a group of citizens who have not the normal protections in society that all the rest of us have." Farm Labor Contractor Registration Act Amendments of 1973, supra n. 20, at 155.

suffered all three of these proscribed abuses (R. 10-12).

The central problem faced by vulnerable migrant workers, namely, that of being recruited to isolated, distant locations on the basis of vague or false take-it-or-leave-it promises, was uppermost in the mind of Rep. William Ford, the Chairman of the Subcommittee on Agricultural Labor, during the hearings on the proposed FLCRA amendments:

> [Migrant workers] are brought under a false assumption to some remote place, they change their position in such a way so they are virtually captured and they have to stay at the new location after they get there, and take the best they can, because they have no way of getting back.
>
> I guess this is the kind of problem that we would like to get to first.

Farm Labor Contractor Registration Act Amendments of 1973, supra n.20, at 86.[33]

The overlap or continuity between agriculture and forestry is underscored by the fact that the "unskilled labor"[34] migrant workers perform in both areas can be taught in "[f]ive minutes"[35] and "is basically identical."[36] Stephen Myers, the head of the

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[33]As a senior partner of the law firm representing Weyerhaeuser in the instant case testified before Congress:"[B]ut when you have been transported to a housing facility several thousand miles away, you really do not have the freedom to negotiate, to work or not to work, that you would have living at your own home." Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcommittee on Agricultural Labor of the House Committee on Education and Labor, 94th Cong., 1st Sess. 78 (1976) (statement of Scott Toothaker, representing The Texas Citrus & Vegetable Growers & Shippers).

[34]Tr. 19-10.

[35]Tr. 50:8.

[36]Tr. 24:22.

second largest tree planting company in the United States, testified to this interchangeabilty as follows:

> People who work in the forest industry tend to work from one crop to another. It is just another crop for them to go and plant or harvest, either end of it. They work--they go in Arkansas. You work the tomato fields and watermelon fields and then proceed to go on into the tree planting fields.

(Tr. 58:14-19.)

Pine tree planting, which takes place in the South in the winter,[37] creates conditions of extraordinary dependence. Plaintiff Bracamontes, who was working for Weyerhaeuser at the end of the month of December, testified as follows:

> Because we were living in the woods we were even more isolated and dependent on the crewleaders than we are when we work on farms. We need them to drive us into town for anything we have to buy or to make a call home, so we can't afford to get into arguments with them over work.
>
> In the winter I have to rely on pine work because since the freeze in 1983 killed the citrus work here in the Valley there has been very little work for farmworkers.

(R. 12.)

When migrants such as Plaintiffs "illustrate in pathetic details stories of exploitation at the hands of forest labor contractors," it is no wonder that Judge Burns held that:

> It is inconceivable that Congress intended to protect workers planting fruit trees in an orchard, and to disregard workers planting fir trees on a hillside, when both groups suffer from the same clearly identified harm.

Bresgal v. Brock, 637 F. Supp. at 277.

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[37] Tr. 53:24-25.

B. Argument in the Alternative: Plaintiffs' Tree Planting is Covered "Agricultural Employment" Because it Took Place "On a Farm"

Whereas heretofore Plaintiffs have argued that their coverage under AWPA is created by the third prong of the Act's definition of "agricultural employment," in this section they argue in the alternative that they are brought within the Act by the FLSA prong of the definition inasmuch as they worked "on a farm."

1. The Basic Sciences as well as the Planting and Cultivating Techniques in Modern Tree Production and Agriculture are Indistinguishable

Under FLSA:

> "Agriculture" includes farming in all it branches and among other things includes the cultivation and tillage of the soil, . . . and any practices (including any forestry or lumbering operations) performed . . . on a farm as an incident to or in conjunction with such farming operations. . . .

29 U.S.C. 203(f) (emphasis added).

As Dr. Norman Richards, Professor in Silviculture in the Faculty of Forestry at the State University of New York College of Environmental Science and Forestry at Syracuse, testified at the preliminary injunction hearing below (Tr. 9:23-25), it is not possible to distinguish clearly between modern silviculture and modern agriculture because "[t]he basic technology blends together": "the basic plant sciences are the same." (Tr. 11:15,

21.)[38] This area of overlap between agricultural and silvicultural practices begins in the seedling nursery, where the methods of genetic planning used to select the best genetic material for the purpose and location intended are similar to those applied in fruit and vegetable seed nurseries (Tr. 14:1-16). Like apple or orange seeds, only those pine seeds are planted the genetic sources of which have been strictly controlled (Tr. 14:24-15:3). With regard to the underlying soil sciences and site preparation techniques, Prof. Richards responded in the affirmative to Judge Vela's question as to whether "there is really no distinction between forestry and the planting procedures that are going to be employed therein and what is generally or traditionally agriculture." (Tr. 16:1-6.) In the South, for example, the common fertilizer for forestry and agriculture is phosphorous (Tr. 17:15-17). Indeed, given the common site preparation practices between agriculture and silviculture and the common practice of alternating land use of the same site between the two, there may be no additional site preparation necessary for silvicultural use (Tr. 17:18-18:22).

In the actual planting process itself, the configuration of and spacing between seedlings and rows of seedling are tightly

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[38]As this Court has noted: "The Encyclopedia Britannica, 14th Edition, Forestry as a Science, declares: 'the science underlying the growing of timber crops is therefore nothing but a branch of general plant science,' while the Cyclopedia of American Agriculture says of forests, 'if agriculture is the raising of products from the land, then forestry is a part of agriculture.' Vol. 2, page 312." United States v. Turner Turpentine Co., 111 F. 2d at 405.

controlled and governed by the same research that underlies agricultural planting techniques (Tr. 21:1-15).[39] "[T]here is certainly far more difference between planting fruit trees and planting lettuce than there is between planting a forest tree and planting a fruit tree." (Tr. 36:21-24.) Not only is weeding for the purpose of removing undesirable species similar in silviculture and agriculture, but the herbicides and their methods of application are common to both (Tr. 21:19-22:18). Overlap also exists with regard to the insects and pests attacking the plants as well as to the chemicals used to contend with them (Tr. 22:19-23:11).

2. Weyerhaeuser's Forests are Tree Farms

For the past fifty years the forestry industry in the United States has been engaged in systematic, scientific sustained-yield reforestation known as "Tree Farming."[40] As Weyerhaeuser announced in a full-page advertisement in the Seattle Post-Intelligencer on July 25, 1937: "Timber is a crop, like any other crop."[41] Indeed, "'Timber is a Crop,' became the Weyerhaeuser

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[39]Optimal weather conditions are also the same for agricultural and silvicultural planting. Tr 54:3-18 (testimony of Stephen Myers).

[40]As formulated by Gifford Pinchot, the first head of the reorganized U.S. Forest Service: "Forestry is Tree Farming. Forestry is handling trees so that one crop follows another. To grow trees as a crop is Forestry." Gifford Pinchot, Breaking New Ground 31 (1947).

[41]Cited in Twining, "Weyerhaeuser and the Clemons Tree Farm: Experimenting with a Theory," in History of Sustained-Yield Forestry: A Symposium 33, 38 (Harold Steen gen. ed. 1984). Prof.

trademark."[42] Two years later, the chief executive officer of Weyerhaeuser wrote that: "During the past four decades the company has been engaged in the tremendous task of gradually transforming this virgin forest into a tree farm, a farm which will produce successive crops of trees maturing at regular intervals . . . ."[43]

Later, "J.P. Weyerhaeuser, Jr., head of the biggest U.S. lumber company, . . . declared that 'tree farming and treating lumber as a crop became practicable only after it became profitable.'"[44] After having made this discovery, Weyerhaeuser itself initiated the Tree Farm movement in the beginning of the 1940s.[45] As the Weyerhaeuser tree farm operations proved successful, "the forest-products industries rapidly prepared to follow Weyerhaeuser precedent."[46]

The extent to which "timber as a crop has become the basic

Richards also testified that "[t]rees are a crop." Tr. 34:24.

[42]Ralph Hidy, Frank Hill & Allan Nevins, Timber and Men: The Weyerhaeuser Story 490 (1963). See also Charles Twining, Phil Weyerhaeuser: Lumberman 183 (1985).

[43]Memo from J.P. Weyerhaeuser Jr. to Carl Kempe (July 18, 1939), cited in Twining, "Weyerhaeuser and the Clemons Tree Farm: Experimenting with a Theory," supra n.41, at 39 (preserved in Weyerhaeuser Comp. Archives).

[44] Fritz, "Winning the Battle of Timber," Fortune, August 1950, at 63, 63.

[45]Tilley, "American Tree Farms," 42 J. Forestry 796, 796 (1944); Sharp, "The Tree Farm Movement: Its Origin and Development," 23 Agric. Hist. 41, 41 (1949); F.K. Weyerhaeuser, Trees and Men 23-24 (1951).

[46]Hidy, Hill & Nevins, Timber Men, supra n. 42, at 505.

practice and the promise of the industry"[47] emerged during cross-examination, when counsel for Weyerhaeuser engaged the expert witness, Prof. Richards, in the following interrogation:

> Q. Are you aware that within the definition of agriculture, as it is contained within the Fair Labor Standards Act, that Forestry is included as agriculture only if it is done on a farm or by a farmer? Are you aware of that?
>
> A. I think I have heard that at one point. These properties are normally called tree farms. That is a widely recognized term, tree farm.

(Tr. 29:16-23.)

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[47] Id. at 508.

VI. Conclusion

For all the foregoing reasons Plaintiffs urge the Court to:

1. Reverse the District Court's Order granting Defendants' Motion to Dismiss;

2. Rule that Plaintiffs were engaged in agricultural employment within the meaning of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1802(3), when they planted pine seedlings for, and on land owned by, Defendant Weyerhaeuser; and

3. Remand the case to the District Court for further proceedings consistent with this ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of September, 1987, I mailed, by United States Postal Service, certified mail, return receipt requested, copies of the foregoing Brief of Appellant to the following counsel of record:

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