UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NOHORA RIVERO, et al., Plaintiffs, vs. MONTGOMERY COUNTY, MARYLAND, et al., Defendants.	Case No.: _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Nohora Rivero and Legal Aid Bureau, Inc., a/k/a Maryland Legal Aid ("Legal Aid"), seek a preliminary injunction prohibiting Defendants in this case from interfering with their First Amendment rights to visit, speak with, and distribute literature to migrant farmworkers who reside on their employers' farm in Montgomery County, Maryland. Because the First Amendment guarantees Plaintiffs' right to speak with willing listeners in their homes, and because there exists no basis in Maryland law to prevent Legal Aid workers from visiting migrant farmworkers or to prosecute Legal Aid workers for trespass in these circumstances, and because the balance of harms lies strongly in favor of an injunction, the Court should grant the motion.

FACTUAL BACKGROUND

As alleged in the Complaint filed together with this memorandum, and as set forth in the Affidavit of Nohora Rivero attached to this memorandum as Exhibit "A", Plaintiff Nohora Rivero and

non-party Spencer Evans, both employees of Plaintiff Legal Aid, attempted on August 18, 2015 to visit migrant workers employed by Defendant Fruits and Vegetables by Lewis Orchard, LLC ("Lewis Orchards") and living on the Lewis Orchards premises at 18900 Peach Tree Road in Dickerson, MD (the "Farm"). At the time, Lewis Orchards employed and housed 12 migrant farmworkers, present in the country on H2-A visas. Legal Aid wanted to conduct outreach and provide information to the Lewis Orchards workers about their rights under labor and occupational safety laws, distribute literature about labor rights, the Affordable Care Act, and compliance with U.S. tax laws, listen to any legal or other problems the workers might have, and provide referral services if necessary.

When they arrived at the Lewis Orchards property, Rivero and Evans were confronted by Defendants Linda and Robert Lewis, who told the Legal Aid employees that they were not permitted there. Rivero indicated that they wished to visit with the migrant workers residing on the property; the Lewises responded that the workers were not permitted to have visitors. The Lewises called the police department of Defendant Montgomery County, Maryland and reported that Rivero and Evans were trespassing on their land.

Officer Alexander Kettering responded to the Lewises' call. After speaking with the Lewises and the Legal Aid employees, Kettering instructed Rivero and Evans that they were not permitted to visit the Lewis Orchards workers and would have to leave the property. He issued written no-trespass orders to both Rivero and Evans, which are intended to serve as notice for the purposes of Maryland's criminal trespass statute, Md. Code, Crim. Law § 6-403.

Rivero protested that Maryland's Attorney General had opined specifically that landowners may not interfere with the rights of legal aid workers (among other religious, social and health service personnel) to visit and speak with migrant workers living on private land. She and Evans produced to

Kettering a copy of the Maryland Attorney General's opinion (Owners of Migrant Labor Camps May Not Prevent Access By Others To Migrants Residing In Camps, 67 Md. Op. Att'y Gen. 4, 1982 WL 187845 (July 19, 1982)) which provides legal support for those rights. Kettering replied that he did not have time to read the opinion and persisted in ordering the Legal Aid employees off the property and issuing the no-trespass orders. Rivero and Evans reluctantly complied with Kettering's instructions.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 65, this Court must weigh four factors in deciding whether to grant a motion for preliminary injunction: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *U.S. Dep't of Labor v. Wolf Run Mining Co.*, 452 F.3d 275, 280 (4th Cir. 2006) (quoting *Ciena Corp. v. Jarrard*, 203 F.3d 312, 322 (4th Cir. 2000)). Each of these factors weighs strongly toward granting a preliminary injunction; because the harms at issue in this case depend strongly on the merits, this memorandum addresses the likelihood of success on the merits before addressing the other prongs.

ARGUMENT

A. Plaintiffs Will Almost Certainly Succeed on the Merits

The United States Constitution and Maryland state law each clearly guarantee the rights of legal aid workers to visit, speak with, and distribute literature to migrant farmworkers living in labor camps on their employer's land. First, the Supreme Court has time and time again upheld special protections for speakers who wish to visit other members of the public at their homes—especially on matters of core

First Amendment concern.[1] Even if the State prohibited such speech, Legal Aid's First Amendment rights would clearly trump any contrary law.

Moreover, Maryland law itself establishes Legal Aid's right to visit migrant farmworkers on private land. Neither the Lewis Defendants nor the County Defendants have any state-law basis on which they may ground their restriction of Plaintiffs' speech. Under state landlord-tenant law, migrant farmworkers have a right to quiet enjoyment of their residences, which includes the right to receive guests. The right to exclude guests belongs to the farmworkers, not their employer, and the employer may not press the right to exclude on their behalf. Moreover, no action for criminal trespass may lie against a legal aid worker who visits a migrant labor camp, *as determined by the official opinion of the Maryland Attorney General*. Though cloaked under color of state law, Kettering's issuance of a no-trespass order has no legal basis.

Defendants' attempts to prevent Plaintiffs from speaking with migrant workers are lawless, and the Court should declare the no-trespass order null and void and enjoin both the Lewis Defendants and the County Defendants from further interference with Plaintiffs' rights.

1. Plaintiffs Have a Clearly Established First Amendment Right to Visit Migrant Farmworkers

"For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings." *Martin v. City of Struthers*, 319 U.S. 141, 141 (1943). This privilege "to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside

[1] Article 40 of the Maryland Declaration of Rights protects Plaintiffs' speech in parallel with the First Amendment and requires no separate analysis. *See Nefedro v. Montgomery Cty.*, 996 A.2d 850, 855 n.5 (Md. 2010).

reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Id.* at 146-47. The right of citizens to speak personally to their neighbors about matters big and small is "essential to the poorly financed causes of little people." *Id.* at 146. The Court has been especially protective of written materials, noting that "[t]o require a censorship . . . which makes impossible the free and unhampered distribution of pamphlets" like the ones given to migrant workers by Legal Aid "strikes at the very heart of the constitutional guarantees." *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939).

"For over 50 years, the [Supreme] Court has invalidated restrictions on door-to-door canvassing and pamphleteering." *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 160, (2002). The Court has again and again affirmed that neighbors may visit one another in their homes to advocate for their beliefs, be they religious, political, or social. The government may not prohibit such canvassing, *see Martin*, 319 U.S. at 149; nor may it impose license fees, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Even minor burdens cannot withstand the scrutiny required by the First Amendment: the Court has invalidated regulations requiring religious canvassers to obtain permits (whether issued ministerially, *see Watchtower*, 536 U.S. at 166-68, or at the discretion of a municipal official, *see Cantwell v. Connecticut*, 310 U.S. 296, 305-07 (1940)*; Schneider*, 308 U.S. 147). Even an ordinance requiring only written notice that one intends to canvas has failed to survive the Court's exacting requirements for burdens on the right to speak with members of the public at their doorstep. *Hynes v. Mayor and Council of Oradell*, 425 U.S. 610 (1976) (invalidating ordinance on vagueness grounds). It is evident that impositions on the right to canvass and distribute literature receive the strictest scrutiny. *See Watchtower*, 536 U.S. at 180 (Rehnquist, J., dissenting) (noting that, had the Court

applied intermediate scrutiny, the regulation at issue requiring registration of religious canvassers would be permissible).

Moreover, the Supreme Court has specifically found that public interest legal practices like Legal Aid have First Amendment expression and association interests in the process of reaching out and providing legal services to their clients. *See In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963). *Button* and *Primus* both invalidated state solicitation rules that would have subjected lawyers to discipline for seeking out clients. As the Court noted in *Primus*, "[t]he First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights,' including 'advising another that his legal rights have been infringed and referring him to a particular attorney or group of attorneys for assistance.'" 436 U.S. at 432 (quoting *Button*, 371 U.S. at 434, 437) (alterations and citations omitted). For groups whose purpose is to litigate in the public interest, solicitation of clients is "at the core of the First Amendment's protective ambit." *Id.* at 424. Subsequent courts have explicitly recognized that this protection extends to work performed by Legal Aid groups. *See Velazquez v. Legal Servs. Corp.*, 349 F. Supp. 2d 566, 597 (E.D.N.Y. 2004), *vacated in part on other grounds sub nom. Brooklyn Legal Servs.Corp. v. Legal Servs. Corp.*, 462 F.3d 219 (2d Cir. 2006); *Legal Aid Soc'y of Haw.*, 961 F. Supp. 1402, 1407-09 (D. Haw. 1997); *Westchester Legal Servs., Inc. v. Westchester Cty.*, 607 F. Supp. 1379, 1382-83 (S.D.N.Y. 1985); *N. Penna. Legal Servs., Inc. v. Lackawanna Cty.*, 513 F. Supp. 678, 684 (M.D. Pa. 1981).

It should be clear that the speech of Legal Aid employees, who seek to inform migrant farmworkers of their rights and discuss any problems the workers might have, is as protected by the Free

Speech Clause as the rights of Jehovah's Witnesses and political candidates.[2] Instruction in the rights owed to migrant workers, and the means of exercising those rights, is at the very core of First Amendment speech. It is intrinsically political, insofar as it equips the powerless with access to power. Thus, even if Montgomery County had an official ordinance regulating Plaintiffs' communications with migrant workers, the ordinance would be subject to rigorous and searching scrutiny to ensure content neutrality, compelling governmental interests, and narrow tailoring in service of those interests. *See Watchtower*, 536 U.S. at 160-69. A fortiori, the County's de facto prior restraint of Plaintiffs' speech, applied arbitrarily and at the discretion of a line officer, cannot possibly withstand constitutional scrutiny. *See New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.") (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

2. Farm Employers Have No Right to Prevent Legal Aid Employees from Speaking with Migrant Farmworkers at the Workers' Residence, Even on Employer-Owned Land, and State Authorities May Not Prosecute Legal Aid Employees for Criminal Trespass

To the extent Defendants even raise a defense on this issue, they will likely argue that Plaintiffs' First Amendment rights are immaterial because Legal Aid sought access to private land, and the owner of the land made it clear to Plaintiffs that the owner wished to exclude them.

Had Plaintiffs sought to speak with the Lewis Defendants themselves at *their* residence, this might be a reasonable argument. Plaintiffs do not contest the right of individuals to refuse to speak with Legal Aid employees. However, the Lewis Defendants simply do not have an absolute right to exclude

[2] Indeed, even the federal government has recognized Plaintiffs' speech as particularly necessary, inasmuch as Legal Aid's Farmworkers Program is funded in large part by a contract with the Legal Services Corporation, a federal entity. *See* Affidavit of C. Shawn Boehringer, attached to this memorandum as Exhibit "B".

Plaintiffs from all Lewis Orchards land simply by virtue of the migrant farmworkers' tenancy on Lewis Orchards property. Rather,

> it is the right of the migrant, not the camp owner, to refuse to receive uninvited visitors. While the migrant may assert his or her own personal right to privacy and, in doing so, refuse to admit into the migrant's living quarters clergy, lawyers, social workers, nurses, politicians, news reporters, and other uninvited individuals, the camp owner may not purport to exercise this personal right 'on behalf of' the migrant.

67 Md. Op. Att'y Gen. 4, 1982 WL 187845, at *4 n.15 (July 19, 1982).

Maryland courts recognize the unequivocally established common-law rights of tenants to receive invited guests, regardless of the wishes of their landlord.[3] In *In re Jason Allen D.*, the Maryland Court of Special Appeals recognized that "[a] landlord generally does not have the right to deny entry to persons a tenant has invited to come onto his property." *In re Jason Allen D.*, 733 A.2d 351, 367 (Md. Ct. Spec. App. 1999) (quoting *L.D.L. v. State*, 569 So.2d 1310, 1312 (Fla. App. 1990)), *overruled in part on other grounds by In re Antoine M.*, 907 A.2d 158 (Md. 2006); *accord in relevant part Antoine M.*, 907 A.2d at 166-67. Indeed, it noted that "[m]oreover, the law is clear that an invitee or licensee who [enters a property], even after a specific prohibition by the landlord, is not a trespasser and does not violate a criminal trespass statute." *Id.* at 368 (quoting *State v. Dixon*, 725 A.2d 920, 922-23 (Vt. 1999) (emphasis omitted).

The *Jason Allen D.* court was not cherry-picking the common law: courts have universally held, since time immemorial, that a tenant's invited guest may be neither excluded by a landlord nor prosecuted by the government for trespassing. *See Commonwealth v. Nelson*, 909 N.E.2d 42, 45 (Mass.

[3] Although Rivero's invitation to visit Lewis Orchards was not extended prior to her arrival on the property, her status as an invitee was confirmed by the Lewis Orchards workers' continued willingness to speak with her. *See* Rivero Affidavit, Exhibit "A" ¶¶ 7-8. Moreover, the First Amendment cases regarding canvassing and pamphleteering clearly establish a limited license to enter private property for the purpose of making contact with residents there, at least until such time as the residents have expressed a desire not to speak. *See Watchtower*, 536 U.S. at 160, and cases cited therein at n.10.

App. Ct. 2009) (holding that tenants have a right to receive guests "notwithstanding objections of the landlord, who c[an] not revoke the license any more than he c[an] an invitation extended by the tenant to one calling upon any legitimate business." (quoting *Commonwealth v. Richardson*, 48 N.E. 2d 678, 683 (Mass. 1943))); *accord Folgueras v. Hassle*, 331 F. Supp. 615, 624-25 (W.D. Mich. 1971); *State v. Hoyt*, 304 N.W.2d 884, 890 (Minn. 1981); *State v. Fox*, 510 P.2d 230, 232 (Wash. 1973); *Colbee 52nd St. Corp. v. Madison 52nd Corp.*, 8 Misc. 2d 175, 179, (N.Y. Sup. Ct. 1957), *aff'd*, 5 A.D.2d 971 (N.Y. App. Div. 1958); *State v. Lawson*, 7 S.E. 905, 905 (N.C. 1888) ("But we think that the tenant, being in possession, had the right, in the absence of any evidence to show that there were restrictions upon his tenancy to the contrary, to invite such persons as his business, interest, or pleasure might suggest to come upon the premises so in his possession, for any lawful purpose."); *see also Diggs v. Hous. Auth. of City of Frederick*, 67 F. Supp. 2d 522, 534 (D. Md. 1999) (enjoining enforcement of a public housing trespass regulation because of its imposition on tenants' rights to receive guests, though on statutory rather than common law grounds); *Seattle v. McCready*, 877 P.2d 686, 689-90 (Wash. 1994) (tenants, not landlords, have power to consent to search of their apartments); *see generally* 49 Am. Jur. 2d Landlord and Tenant § 403.

Obviously, because landlords lack authority to exclude tenants' guests from tenants' premises and common areas, guests are not subject to prosecution for criminal trespass. Each of the cases cited above dismisses an attempted prosecution for criminal trespass or enjoins enforcement of regulations allowing guests to be prosecuted as trespassers.

As noted, the Maryland Attorney General has specifically opined that (1) landlords may not prohibit legal and other social service providers from visiting migrant workers; and (2) such service providers may not be prosecuted under any state trespass statute. Addressing the former, the Attorney

General endorsed the approach of *State v. Shack*, 277 A.2d 369 (N.J. 1971), in which the New Jersey Supreme Court overturned the convictions of an attorney and a non-profit employee for trespassing on farmland in an attempt to contact migrant workers. Noting the disadvantaged condition of migrant farmworkers and the essential unfairness of the proposition that their employer should be entitled to cut this vulnerable population from services, the AG opined that

> Property rights are not absolute. It is beyond question that the ownership of real property does not grant the owner of the property dominion over the lives and rights of those living within its borders. . . . We concur with the conclusion in *Shack* that, as a matter of property law, mere ownership of a labor camp does not carry with it the right to cut off the fundamental rights of those who live in the camp.

67 Md. Op. Att'y Gen. 4, 1982 WL 187845, at *3 (July 19, 1982)[4]

As to whether aid workers could be prosecuted for trespass, the Attorney General carefully analyzed several Maryland statutes. *Id.* at 3-4. The AG noted that Maryland's statute regarding trespass on cultivated land (now Md. Code, Crim. Law § 6-406) provided that "this section shall not be construed . . . [t]o prevent persons who reside on cultivated land from receiving any person who seeks to provide a lawful service." *Id.* at 3. This clause reflects a "legislative policy to facilitate communications between migrants and those who seek to serve them," and, to the extent that Maryland's other criminal trespass statutes are in conflict, "would appear to supersede those sections" inasmuch as the cultivated land statute is "both the more specific and later enacted statute." *Id.* at 4. The AG concluded that "the General Assembly did not intend our criminal trespass statutes to be used to deny migrant workers access to governmental and charitable organizations serving their social, health, and legal needs." *Id.*

[4] Other state and federal courts and state authorities have arrived at similar conclusions. *See, e.g.*, *Velez v. Amenta*, 370 F. Supp. 1250 (D. Conn. 1974); *State v. DeCoster*, 653 A.2d 891 (Me. 1995); *United Farm Workers of Am. v. Superior Ct.*, 537 P.2d 1237 (Cal. 1975); 1991 N.Y. Op. Att'y Gen. 23, 1991 WL 537273 (Nov. 25, 1991); Letter from Andrew A. Vanore, Jr., General Counsel, N.C. Dept. of Justice, to Keith Werner (Aug. 21, 1998), http://nfwm.org/wp-content/uploads/2014/07/NC-Attorney-General-Opinion-1998.pdf.

It should be clear, then, that not only does the First Amendment guarantee Plaintiffs' right to speak with migrant workers in their homes, but also Maryland law protects migrant workers' right to receive visitors—even against the will of their employers. There is no legal basis on which the Lewis Defendants could justify their attempt to isolate their migrant workers from contact with the outside world, nor any law even plausibly allowing Plaintiffs to be barred from the premises under threat of prosecution for criminal trespass.

Because the County Defendants have restrained Plaintiffs from exercising their clearly established First Amendment rights to meet with, speak with, and distribute literature to migrant workers, and because neither the Lewis Defendants nor the County Defendants have any basis in state law that would sanction such restraint or justify charges of criminal trespass, Plaintiffs will almost certainly prevail on the merits of their suit.

B. Plaintiffs' First Amendment Rights Are Irreparably Harmed by the No-Trespass Order

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *accord Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 191 (4th Cir. 2013). Plaintiffs continue to wish to speak with migrant workers on Lewis Orchards property. They have a right to do so, and every moment Defendants impede them works an irreparable harm.

In particular, Lewis Orchards's 2016 contracts suggest that a new set of seasonal workers are either working and living on the Farm now or soon will be. Plaintiffs urgently desire to visit this year's workers to educate them about their rights—particularly in light of the Lewis Defendants' unlawful attempt to stifle Plaintiffs' communications. Delay in granting a preliminary injunction would not only extend the ongoing violation of Plaintiffs' First Amendment rights, but risk allowing the entire work

season to pass before Plaintiffs can again speak with Lewis workers. If the season ends before Plaintiffs are allowed to visit Lewis workers, the harm caused will be truly irreparable—Plaintiffs may *never* get to speak with those particular workers.

C. Defendants Will Not Be Harmed by a Preliminary Injunction

In contrast, Defendants will suffer no harm from a preliminary injunction. Plaintiffs seek to enter Lewis Orchards property and speak with workers there. They do not visit at unreasonable hours, they do not visit areas other than those required for ingress and egress to the migrant farmworkers' residences, and they do not otherwise interfere with the Lewis Defendants' property or business. The County Defendants will suffer no harm from a preliminary injunction prohibiting them from enforcing an illegal no-trespass order.[5]

D. The Public Interest Strongly Favors Legal Aid's Unfettered Access to Migrant Farmworker Labor Camps

The most compelling factor in the Court's decision on this motion should be the public interest. Absent timely intervention by the Court, Plaintiffs will not be able to meet with Lewis workers to talk with them about their rights. The workers' status quo of isolation and powerlessness will persist. Without practical access to free legal services, the migrant farmworkers' rights—so robust on paper—become a technicality, an unkept promise. If we are to make good on a national commitment to fair treatment of migrant farmworkers—a commitment on which the H-2A program is founded and which,

[5] The Court should refuse to weigh, or weigh only slightly, any alleged harm to the Lewis Defendants' right to exclude Plaintiffs from their property. As discussed above, the Lewis Defendants simply do not have such a right, and therefore can suffer no injury to it. To the extent that the Court considers such a harm at all, it is heavily outweighed by the harm to Plaintiffs and the public interest because (a) injuries to First Amendment rights of Plaintiffs and the Lewis Orchards workers are far more serious than any minor infringements on property rights; and (b) the alleged harm to the Lewis Defendants must be discounted because Defendants are unlikely to successfully prove a legal harm on the merits.

more to the point, is made to *all* persons within the jurisdiction of the United States—then the Defendants may not prevent Plaintiffs from visiting Lewis Orchards workers.

CONCLUSION

For the reasons stated above, the Court should GRANT Plaintiffs' motion for a preliminary injunction.

April 20, 2016

Respectfully submitted,

/s/ Deborah A. Jeon
Deborah A. Jeon (Bar # 06905)
David Rocah (Bar # 27315)
Sonia Kumar (Bar # 07196)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MARYLAND
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Telephone: (410) 889-8555
jeon@aclu-md.org
rocah@aclu-md.org
kumar@aclu-md.org

Kit A. Pierson (Bar # 11253)
Robert W. Cobbs (*Pro hac vice* application pending)
COHEN MILSTEIN SELLERS & TOLL PLLC
1100 New York Ave., NW
Suite 500, East Tower
Washington, DC 20005
Telephone: (202) 408-4600
Facsimile: (202) 408-4699
kpierson@cohenmilstein.com
rcobbs@cohenmilstein.com

Attorneys for Plaintiffs

PROOF OF SERVICE

I certify that on the 20th day of April, 2016, a true and correct copy of the foregoing: "Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction" was served by operation of the electronic filing system of the U.S. District Court for the District of Maryland upon all counsel who have consented to receive notice of filings in the matter styled *Rivero, et al. v. Montgomery County, Maryland, et al.*, Case No. [CASE NUMBER], and by personal service in accordance with Federal Rule of Civil Procedure 5(b)(2) upon all other persons required to be served under Federal Rule of Civil Procedure 5.

/s/ Deborah A. Jeon
Deborah A. Jeon