IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

International Fresh Produce Association, American Farm Bureau Federation, Mississippi Farm Bureau Federation, Stone County Farm Bureau, Chamber of Commerce of the United States of America, AmericanHort, Florida Fruit & Vegetable Association, North American Blueberry Council, Texas International Produce Association, and the State of Mississippi, Plaintiffs, v. United States Department of Labor; Julie Su, Acting U.S. Secretary of Labor, *in her official capacity*; Jose Javier Rodriguez, Assistant Secretary for Employment and Training, U.S. Department of Labor, *in his official capacity*; *and* Jessica Looman, Administrator of the Wage & Hour Division, U.S. Department of Labor, *in her official capacity*, Defendants.	Civ. No. 1:24cv309HSO-BWR

COMPLAINT FOR A STAY AND VACATUR

Plaintiffs International Fresh Produce Association, American Farm Bureau Federation, Mississippi Farm Bureau Federation, Stone County Farm Bureau, Chamber of Commerce of the United States of America, AmericanHort, Florida Fruit & Vegetable Association, North American Blueberry Council, Texas International Produce Association, and the State of Mississippi bring this complaint against Defendants the United States Department of Labor, Julie Sue in her official capacity, Jose Javier Rodriguez in his official capacity, and Jessica Looman in her official capacity, and allege as follows:

INTRODUCTION

1. The National Labor Relations Act of 1935 (NLRA) reflects a delicately balanced compromise between free enterprise and free association. On the one hand, Congress allowed the freedom to organize and created the National Labor Relations Board (NLRB), giving it exclusive jurisdiction relating to the federal prohibition against "unfair labor practices." 29 U.S.C. §§ 153, 156, 160; *Hobbs v. Hawkins*, 968 F.2d 471, 478-479 (5th Cir. 1992). On the other hand, Congress crafted certain "specific exemptions" to the employees covered by the Act, apparently recognizing that labor is not a one-size-fits-all undertaking and that some sectors of the economy call for different treatment than others. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). Relevant here, the NLRA "excludes from its coverage 'any individual employed as an agricultural laborer.'" *Sweetlake Land & Oil Co. v. NLRB*, 334 F.2d 220, 221 (5th Cir. 1964) (quoting 29 U.S.C. § 152(3)). This exception has not been without debate, but every legislative proposal over the past 90 years to remove or revise it has failed.

2. This case concerns a regulation recently promulgated by the U.S. Department of Labor (DOL) titled *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. 33898. Notwithstanding Congress's judgment that federal labor standards do not apply to agricultural workers, DOL extends NLRA-like protections to all agricultural workers whose employers happen to participate in the H-2A Temporary Agricultural Worker Program. As support for this newfound power, DOL invokes *not* the NLRA (it could not, as agricultural workers are exempt), but instead the Immigration Reform and Control Act of 1986 (IRCA), a nearly four-decade-old amendment to the Immigration and Nationality Act (INA).

3. The Rule nevertheless reads as though it is promulgated under the NLRA, rather than the INA. The preamble to the Rule claims to provide protections for "'concerted activity for mutual aid and protection' which encompasses numerous ways that workers can engage, individually or collectively, to enforce their rights." 89 Fed. Reg. 34005. The Rule accomplishes this task

by mirroring the substantive provisions of the NLRA. For example, the Rule specifies that farm employers may not "discharge, or in any manner discriminate against" *any* agricultural worker, temporary or otherwise, "who has engaged in activities related to self-organization" which includes "any effort to form, join, or assist a labor organization." 89 Fed. Reg. at 34062; 20 C.F.R. § 655.135(h)(2)(i). And it requires employers to permit *any* agricultural worker, temporary or otherwise, "to designate a representative to attend any" encounter with a supervisor that "the worker reasonably believes might result in disciplinary action." 89 Fed. Reg. at 34063; 20 C.F.R. § 655.135(m).

4. In seeking to extend labor-law protections to agricultural workers—the same workers expressly carved out from the NLRA—the Rule also significantly restrains employer speech. When employers hold mandatory employee meetings at which they "communicate the employer's opinion concerning" labor issues, they may not take adverse employment actions against any employee (whether H-2A or permanent) who "refused to attend" such meetings or "refused to listen" or view such speeches and communications. *Id.* § 655.135(h)(2)(ii). Beyond that, the Rule imposes a vaguely defined content-based speech ban, barring employers from any expression of an opinion that might be taken by any employee as "intimidation" or a "threat" for engaging in organizing activities. 89 Fed. Reg. 34062; 20 C.F.R. § 655.135(h)(1). Recognizing the First Amendment concerns they implicate, Congress excluded such prohibitions from the NLRA.

5. American farms feed the Nation and the world. Because there is chronic shortage of willing farm workers all across the country, American farms depend on the H-2A visa program as an essential source of temporary labor. In 2019, about 258,000 immigrant workers were granted temporary H-2A visas. Yet the Rule is irreparably harming farms that utilize the H-2A program. It is requiring them to expend money immediately and irrecoverably on implementation and compliance measures. And it is disrupting farm operations by making employee interaction more complicated, contentious, and inefficient.

6. The Rule also immediately burdens farmers' constitutional right to "communicate" an "opinion" at employee meetings. And its ban on threats and intimidation is hopelessly ambiguous. Vague standards like this are always problematic, but they are doubly so when it comes to speech expressed on matters of political and public concern, where they work to chill speakers from communicating their views if there is even a slight risk that their words might be taken as offensive. None of these harms can be remediated with a civil lawsuit for damages.

7. The Final Rule also irreparably harms the State of Mississippi. The H-2A program requires prospective Mississippi H-2A employers to begin the program's application and certification processes by submitting job orders to the State's designated "State Workforce Agency," the Mississippi Department of Employment Security, for compliance review. *See* 20 C.F.R. § 655.121; Miss. Code Ann. § 71-5-201 (MDES designation). Among other things, the Final Rule imposes additional duties and requirements on the Department's compliance reviews. These duties and requirements will force the Department to incur costs in the form of expenditures of additional time and resources in conducting compliance reviews, modifications of its policies and procedures, employee training, and adaptation of its practices to the Final Rule. Such costs and expenditures are unrecoverable and uncompensated by additional funding from DOL associated with the Final Rule's implementation.

8. The Final Rule is unlawful in at least three ways and must be set aside. First, it is not authorized by the INA, as amended by IRCA. The INA assigns DOL the limited, ministerial task of certifying, upon an employer's petition, the need for temporary foreign labor. 8 U.S.C. § 1188. As part of that process, the statute permits DOL to obtain certain, limited "assurances" from the employer (*id.* § 1188(b)), but it does not come close to authorizing the agency to issue affirmative labor protection requirements for all agriculture employees.

9. Even if there were ambiguity on that point (and there is not), the INA cannot be interpreted in a vacuum and must be harmonized with the broader statutory scheme for federal

labor law. The NLRA and the NLRB's implementing regulations are the more specific provisions in this context, and they forbid federal superintendence of labor relations in the agricultural sector. Having enacted a comprehensive regulatory scheme through the NLRA, including detailed requirements and explicit carveouts, Congress did not silently intend for a narrow grant of authority to DOL to certify employers under the INA to override discrete policy judgments reflected in the NLRA. To put it another way, the Rule conflicts with and is precluded by the NLRA and its agricultural carveout. *See POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014).

10. In addition, the Rule violates the First Amendment. "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed" by a government agency in an immigration regulation. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The prohibition on any kind of employee discipline for refusing to attend paid, employer-mandated meetings does just that. And the ban on employer speech concerning labor issues when it might be taken as "intimidation" or a "threat" is a vague and subjective content-based speech restriction that fails strict scrutiny. *See generally Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 165 (2015); *Villarreal v. City of Laredo, Texas*, 94 F.4th 374, 417 (5th Cir. 2024). The challenged provisions of the Rule must be vacated.

11. The Court's intervention is urgently needed by or before end of November 2024. Already, the Rule is beginning to inflict irreparable harms on the private association Plaintiffs' members, and on the State of Mississippi. It is no overstatement to say that the Rule fundamentally reorders an entire labor market, which will have spillover effects across the Nation's food supply. Very soon, the compounding, cumulative harms of the Rule will be impossible to unwind, and the pervasive impact that the Rule already is having on labor relations on farms throughout the Nation will be irreversible. Courts in other jurisdictions have stayed the Rule in Kansas, Georgia, South Carolina, Arkansas, Florida, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Tennessee, Texas, and Virginia. But DOL has indicated that employers in all

other states "must comply" with the Rule. *See* DOL, *Training and Employment Notice* (Oct. 2, 2024), https://perma.cc/4VXQ-ZCSV.

12. Accordingly, Plaintiffs intend to move imminently for a Section 705 stay of the Rule and other appropriate preliminary injunctive relief, so as to restore the status quo and prevent irreparable harm pending the conclusion of judicial review.

PARTIES

13. Plaintiff International Fresh Produce Association (IFPA) is an international trade association serving the entire fresh produce and floral supply chain. IFPA represents members, including growers, shippers, wholesalers, distributors, fresh-cut businesses, retailers, food service companies, and related subsidiaries with operations in all 50 states, Washington D.C., Puerto Rico, and more than 40 countries around the world. This representation includes litigation on behalf of members where appropriate to better enable them to carry out their businesses. IFPA's members in the United States use the H-2A program as a source of agricultural employees and are being harmed by the Rule's changes to that program. IFPA is a nonprofit organization headquartered in Washington, DC.

14. Plaintiff American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919, representing nearly six million member families through Farm Bureau organizations in all 50 states and Puerto Rico. Its primary function is to advance and promote the interests of farmers and ranchers and their rural communities. This involves advancing, promoting, and protecting the economic, business, social, and education interests of farmers and ranchers across the United States. AFBF has a dedicated staff and expends substantial resources to advocate on many issues before Congress, the Executive Branch, and federal courts to serve the interests of farmers and ranchers. Many of its farmer members rely on the H-2A program as a source essential to agricultural employees.

15. Plaintiff the Mississippi Farm Bureau Federation (MSFB) is a 501(c)(5) organization that advocates for the interests of Mississippi farmers before Congress, the Mississippi Legislature, and state and federal regulatory agencies. MSFB serves as the largest and strongest general farm organization in Mississippi, with more than 177,000 member families in 82 county Farm Bureaus. It is a voluntary, non-governmental, non-partisan organization seeking solutions to problems affecting the lives of farm families, both socially and economically. MSFB's farmer members employ thousands of agricultural employees each year. Its members experience difficulty finding, hiring, and retaining qualified and dedicated employees to work on their farms. MSFB thus brings this suit on behalf of its farmer members who produce myriad of crops throughout Mississippi and depend on the H-2A migrant worker program.

16. Plaintiff Stone County Farm Bureau (SCFB) is a branch of MSFB located in Stone County, Mississippi. SCFB shares MSFB's goals of advocating for the interests of Mississippi farmers, specifically those in Stone County. SCFB's farmer members employ hundreds of agricultural employees each year. Like MSFB, its members experience difficulty finding, hiring, and retaining qualified and dedicated employees to work on their farms. SCFB thus brings this suit on behalf of its farmer members who produce myriad of crops throughout Stone County, Mississippi and depend on the H-2A migrant worker program.

17. Plaintiff the Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is a non-profit organization headquartered in Washington, D.C. Its members include agricultural businesses that use the H-2A migrant worker program. Among other things, the Chamber works with and on behalf of the entire agricultural industry to advance a secure, efficient, and reliable consumer food supply chain to nourish people and support healthy communities. The Final Rule is at odds with

the Chamber's policy objectives and is harming the ability of its members that use the H-2A migrant worker program to carry out their business effectively, and such harms will likewise be felt downstream by other members of the Chamber who rely upon the products of those farms. Challenging the Final Rule is directly relevant to the Chamber's mission.

18. Plaintiff AmericanHort is a national trade association serving the ornamental horticulture industry. AmericanHort's members include greenhouse and nursery growers, garden retailers, plant breeders, suppliers, wholesalers and distributors, landscapers, interior plantscapers, educators, researchers, and manufacturers from throughout the industry supply chain. Members come from all 50 states and 27 countries. AmericanHort's primary function is to unite, promote, protect and advance the horticulture industry through advocacy and, when necessary, litigation. AmericanHort members rely on the H-2A program to meet workforce needs and to have an adequate number of employees to operate their business. The Final Rule places a potentially stifling regulatory burden on AmericanHort's small and mid-sized agricultural businesses.

19. Plaintiff Florida Fruit & Vegetable Association (FFVA) is an agricultural trade organization whose grower-shipper membership represents the majority of fruit, vegetable, and other specialty crop production in Florida. Fruit and vegetable production in Florida is labor intensive due to the perishable nature of the crops produced, and FFVA members rely on large, seasonal workforces to grow and harvest their produce. FFVA members have come to rely on the H-2A program as the only available means of securing the workforce they need. Florida is the largest user of the H-2A program and was certified for 51,987 H-2A job opportunities in fiscal year 2023. FFVA serves as a resource to its members on labor, employment, and immigration matters, including the H-2A visa program. FFVA also serves its members as an H-2A visa filing agent, and prepares and submits H-2A job clearance orders, labor certification applications, and H-2A nonimmigrant visa petitions on its members' behalf. The Final Rule would place a heavy regulatory burden on FFVA members using the program.

20. Plaintiff North American Blueberry Council (NABC) represents the interests of growers, fruit brokers, processors, food manufacturers, and others connected to the blueberry industry before the public, agencies, legislatures, and courts. NABC's mission is to be an advocate and resource serving the interests of the highbush blueberry industry, and to address issues, opportunities and industry practices that drive success and profitability in the production and distribution of blueberries in North America and around the world. NABC provides its members with vital resources, including market research, advocacy, and educational programs. The implementation of the Final Rule poses significant challenges for NABC's members, who heavily rely on the H-2A program to secure a reliable and skilled workforce essential for their operations.

21. Plaintiff Texas International Produce Association (TIPA) represents the business, economic and political interests of Texas-grown fruits and vegetables before state and federal policy makers and the courts. It addresses the issues and opportunities surrounding the importation and marketing of foreign grown produce that is shipped through Texas ports. TIPA's grower members rely on the H-2A program to meet workforce needs and to have an adequate number of employees to operate their business. The Final Rule poses significant challenges to TIPA's members' operations.

22. Plaintiff the State of Mississippi is a sovereign State of the United States of America. Lynn Fitch is the duly-elected Attorney General of Mississippi. She has constitutional, statutory, and common-law authority to bring suit on behalf of the State of Mississippi and its citizens. Miss. Const. art. VI, §173; Miss. Code Ann. §7-5-1; *see also Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 649 (Miss. 1973).

23. Defendant United States Department of Labor (DOL) is an executive agency of the federal government. DOL is responsible for administering and enforcing various federal statutes, including but not limited to the Fair Labor Standards Act, the Family Medical Leave Act, and the Occupational Health and Safety Act. The DOL is not responsible for processing immigration or

naturalization applications or establishing policies regarding immigration services. The DOL has limited statutory authority to administer the H-2A program. The Employment and Training Administration (ETA), and the Wage and Hour Division (WHO), are sub-agencies of the DOL. They jointly issued the Final Rule.

24. Defendant Julie Su is the Deputy Secretary of Labor and the Acting Secretary of Labor. The Secretary of Labor is charged with carrying out certain limited responsibilities under the INA. Defendant Su is sued in her official capacity only.

25. Defendant Jose Javier Rodriguez is the Assistant Secretary of Labor in charge of the ETA. Defendant Rodriguez manages and directs the ETA's activities, including issuing temporary labor certifications for the H-2A program. He is sued in his official capacity only.

26. Defendant Jessica Looman is the Administrator of the WHO, which enforces the terms and conditions of employment that agricultural employers must follow under the H-2A program. She is sued in her official capacity only.

JURISDICTION AND VENUE

27. This case is proceeding under the Administrative Procedure Act (APA), 5 U.S.C. § 702, and Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs' claims arise under the Constitution and laws of the United States. The Court's jurisdiction is invoked under 28 U.S.C. § 1331.

28. Venue is proper in this district under 28 U.S.C. § 1391(e) because at least one Plaintiff resides in this district, and no real property is involved in this action.

BACKGROUND

A. Statutory and regulatory background

1. The National Labor Relations Act

29. The National Labor Relations Act (NLRA) was enacted in 1935 to "protect and facilitate employees' opportunity to organize unions to represent them in collective-bargaining negotiations." *American Hospital Association v. NLRB*, 499 U.S. 606, 609 (1991); 29 U.S.C.

§ 157. It grants qualifying employees the right to "engage in collective bargaining free from employer interference." *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571, 572 (1994).

30. To effectuate that purpose, the NLRA empowers the NLRB to "prevent any person from engaging in any unfair labor practice." 29 U.S.C. § 160(a). An employer engages in an unfair labor practice when, among other things, he or she "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of" their rights to organization and collective bargaining. *Id.* § 158(a)(1). Employers also may not discriminate against their employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). Nor may they discharge or otherwise discriminate against employees who file charges or testify in proceedings under the NLRA. *Id.* § 158(a)(4).

31. The NLRB "has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions." *Hobbs v. Hawkins*, 968 F.2d 471, 478-479 (5th Cir. 1992).

32. The NLRA's protections have a "striking" breadth in that they ordinarily apply to "any employee." *Sure-Tan*, 467 U.S. at 891 (quoting 29 U.S.C. § 152(3)). But Congress carved out "specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA." *Sure-Tan*, 467 U.S. at 891; *see also Sweetlake Land & Oil*, 334 F.2d at 221 (citing 29 U.S.C. § 152(3))).

33. Agricultural laborers are therefore excluded from the provisions under the NLRA regarding organization and collective bargaining. 29 U.S.C. § 152(3). This exemption reaches "farming in all its branches," including "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities … the raising of livestock, bees, furbearing animals, or poultry, and any practices … 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.." *Sweetlake Land & Oil*, 334 F.2d at 221 (quoting 29 U.S.C. § 203(f)).

2. The H-2A Visa Program

34. The INA, as amended by IRCA, establishes a visa program to ensure that farmers have sufficient employees to help operate their farms during periods of high seasonal need. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). This H-2A program creates a visa classification for a worker who resides in a foreign country but "is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature." *Id.*

35. American farmers today struggle to find people willing to harvest and process the food that feeds the world every year. With the dwindling rural population and growing opportunities in urban centers away from the farm, many farmers throughout America have turned to labor from other countries through the H-2A temporary agricultural worker program.

36. The U.S. Secretary of State, the U.S. Attorney General, the U.S. Department of Homeland Security, and DOL all have responsibilities for administering the H-2A program.

37. The task assigned to DOL is narrow and ministerial and does not invite substantive labor regulations like the Rule. Pursuant to Section 1188, DOL must, as to each petitioning employer, certify that "(A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1188(a)(1). DOL also "may not issue a certification" to employers of H-2A workers if "[t]here is a strike or lockout in the course of a labor dispute" domestically, the employer has previously "violated a material term or condition of the labor certification," or the employer has not adequately recruited domestic workers. 8 U.S.C. § 1188(b).

38. Employers must "offer to provide benefits, wages and working conditions required pursuant to this section and regulations." 8 U.S.C. § 1188(c)(3)(B)(i). On that front, Section 1188(b) requires that, in the absence of a state workers' compensation law, an employer must furnish H-2A workers with "insurance covering injury and disease arising out of and in the course of the worker's employment." *Id.* And Section 1188(c)(4) specifies that employers "shall furnish housing in accordance with regulations" and authorizes DOL to "issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." But Section 1188 is otherwise silent on the benefits and conditions that an employer must provide to H-2A migrant workers, and it says nothing about working conditions or benefits for non H-2A agricultural workers.

39. Neither Section 1188 nor any other provision of the INA creates or contemplates the creation of rights to collective bargaining or concerted action for H-2A workers specifically, let alone "any person engaged in agriculture." 20 C.F.R. § 655.135(h)(2), (m).

40. Employers who violate the H-2A program's regulations are subject to significant civil penalties and the possibility of debarment from the program. *See* 29 C.F.R. §§ 501.16 (sanctions and remedies), 501.19 (civil money penalty assessment), 501.20 (debarment and revocation).

B. The Final Rule

41. DOL published the Rule on April 29, 2024. It took effect on June 28, 2024, and applies to all H-2A applications filed by agricultural employers after August 28, 2024.

42. The challenged elements of the Rule prohibit H-2A employers from engaging in "unfair treatment" of all agricultural workers they employ. 89 Fed. Reg. at 34062; 20 C.F.R. § 655.135(h). Thus, the H-2A certification process is used to impose requirements not only with respect to H-2A workers, but also "[w]ith respect to *any* person engaged in agriculture as defined and applied in 29 U.S.C. 203(f)," including permanent resident and U.S.-citizen agricultural workers with permanent positions. 20 C.F.R. § 655.135(h)(2); *see also id.* § 655.135(m).

43. Under the Rule, employers may not require their agricultural employees "to attend an employer-sponsored meeting with the employer or its agent, representative or designee, if the primary purpose of the meeting is to communicate the employer's opinion concerning any activity protected" by the Rule; nor may employers take any adverse action against an employee who "has refused to listen to employer-sponsored speech or view employer-sponsored communications, the primary purpose of which is to communicate the employer's opinion concerning any activity protected by" the Rule. 89 Fed. Reg. at 34063; *see also* 20 C.F.R. § 655.135(h)(2)(ii).

44. The Rule further mandates that H-2A employers permit any agricultural employee, whether temporary or permanent, "to designate a representative to attend any investigatory interview that the worker reasonably believes might result in disciplinary action and must permit the worker to receive advice and active assistance from the designated representative during any such investigatory interview." 89 Fed. Reg. at 34063; 20 C.F.R. § 655.135(m).

45. Under the Rule, H-2A employers must provide (and "abide by") assurances that they "will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against" any person who has exercised rights under the Rule. 89 Fed. Reg. 34062; 20 C.F.R. § 655.135(h)(1). It further specifies that employers "will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against" any agricultural employee "because such person . . . has engaged in activities related to self-organization, including any effort to form, join, or assist a labor organization; or has engaged in other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions." 89 Fed. Reg. at 34062, 34068; 20 C.F.R. § 655.135(h)(2)(i).

46. Yet the Rule does not further define what could be understood as "intimidat[ion]" or "coerc[ion]" and whether an employer's or manager's expression of his or her opinion (including, for example, that unionization can harm employees) would qualify.

THE RULE EXCEEDS DOL'S STATUTORY AUTHORITY AND IS PRECLUDED BY THE NLRA

47. DOL's attempt to create a NLRA-like rights to collective bargaining and concerted action for agricultural laborers under the INA and H-2A program conflicts with Congress's exemption for agricultural laborers under the NLRA.

48. As a starting point, DOL may not infer in the INA's silence an implied grant of power to promulgate regulations that are at odds with the express terms of the NLRA. An agency may not "regulate areas not committed to it by Congress," especially where to do so "conflicts with another statute's enforcement scheme." *Central Florida Sheet Metal Contractors Association v. NLRB*, 664 F.2d 489, 497 n.11 (5th Cir. 1981).

49. That is the case here. The INA does not grant DOL broad rulemaking powers to condition participation in the H-2A program on employers' agreement to comply with detailed labor regulations having nothing whatever to do with the INA. Again, the INA assigns DOL a limited, ministerial task of certifying the need for temporary foreign labor. 8 U.S.C. § 1188. As part of that process, the statute permits DOL to obtain a very narrow range of "assurances" from the employer (*id*. § 1188(b)), but it does not authorize the agency promulgate affirmative labor protection requirements for H-2A workers. And it *certainly* does not authorize DOL to backdoor in a NLRA-like labor regime for "any person engaged in agriculture as defined and applied in 29 U.S.C. 203(f)." 20 C.F.R. § 655.135(h)(2), (m).

50. The major questions doctrine lends further support to this conclusion. When an agency "assert[s] highly consequential power beyond what" the legislative text clearly authorizes, "both separation of powers principles and a practical understanding of legislative intent" counsel against "read[ing] into ambiguous statutory text the delegation claimed to be lurking there." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). Here, given the political significance of imposing collective bargaining rights for the agricultural workers that are critical to American farms'

production of food, in contravention of the NLRA's plain text, , the agency "must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner." *Id.* at 732. DOL has not, and cannot, do so here.

51. That Congress never meant to confer these newfound regulatory powers on DOL is confirmed by the NLRA. Through that separate enactment, Congress provided employees engaged in interstate commerce with rights to collective bargaining and concerted action—rights against "unfair labor practices." 29 U.S.C. § 158. At the same time, the NLRA expressly excludes agricultural laborers from its scope. 29 U.S.C. § 152(3).

52. With the Rule, DOL purports to override that exemption, using participation in the H-2A program as leverage to require farms across the Nation to provide NLRA-like protections to all agricultural employees. These are the very same legal provisions that Congress specified in the NLRA should *not* apply in the agricultural context.

53. The Rule gives agricultural workers the right to engage in "concerted activity for mutual aid and protection which encompasses numerous ways that workers can engage, individually or collectively, to enforce their rights." 89 Fed. Reg. 34005. The NLRA's language is nearly identical, protecting employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157.

54. The Rule provides that H-2A employers may not "discharge, or in any manner discriminate against . . . any person who has engaged in activities related to self-organization," including "any effort to form, join, or assist a labor organization." 89 Fed. Reg. 34062. Similarly, the NLRA states that employers may not "interfere with, restrain, or coerce employees in the exercise of the[ir] rights" (29 U.S.C. § 158(a)(1)), including rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (*id.* § 157).

55. Similar to preemption of state laws that conflict with federal laws, the doctrine of preclusion operates to prevent the expansion of "one federal statute" in a way that would impliedly repeal the express "provisions of another federal statute." *POM Wonderful*, 573 U.S. at 111.

56. The analysis focuses on Congressional intent. A "comprehensive remedial scheme for the enforcement of a statutory right creates a presumption that Congress intended to foreclose resort to more general remedial schemes to vindicate that right." *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999); *West Virginia*, 597 U.S. at 723 ("Agencies have only those powers given to them by Congress."). Moreover, "it is a commonplace of statutory construction that the specific governs the general" especially when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

57. This "reconciliation of distinct statutory regimes is a matter for courts, not agencies" to resolve. *Epic Systems v. Lewis*, 584 U.S. 497, 520 (2018) (cleaned up). "An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively bootstrapping itself into an area in which it has no jurisdiction." *Id.* (cleaned up).

58. That is precisely what has occurred here. For just that reason, the Southern District of Georgia has observed that "the Final Rule mirrors the NLRA." *Kansas v. United States Dep't of Lab.*, No. 2:24-CV-76, 2024 WL 3938839, at *8 (S.D. Ga. Aug. 26, 2024) (granting preliminary injunction enjoining Defendants from enforcing the Rule within the geographic limits of the certain states). Defendants have effectively attempted to bypass the NLRB's exclusive jurisdiction. *Cf. San Diego Building Trades Council, Millmen's Unio v. Garmon*, 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to [the NLRA], the States as well as the federal courts must

defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.").

THE FINAL RULE VIOLATES THE FIRST AMENDMENT

A. The Final Rule Burdens Protected Speech

59. "[A]n employer's free speech right to communicate his view to his employees is firmly established and cannot be infringed" unless the state has narrowly tailored its law to serve a compelling governmental interest. *Brown & Root, Inc. v. NLRB*, 333 F.3d 628, 634 (5th Cir. 2003) (quoting *Gissel Packing*, 395 U.S. at 617).

60. An employer's communication to an employee is commonplace in a work setting. An employer may obligate employees to attend certain workplace meetings—such as trainings on farm operations, workplace safety trainings, and discussions of productivity expectations. In short, employers frequently organize paid-time meetings with employees, and—at those meetings—convey a variety of speech. If workers refuse to attend such mandatory meetings, the employer can take disciplinary action, including termination, for a worker's refusal to attend a mandatory meeting. Employers may from time to time wish to hold mandatory meetings where a primary purpose of the meeting is to communicate the employer's opinion concerning activities related to labor organizing—and how such activities, in an employer's view, may be detrimental to the business and the employees.

61. Congress recognized that restraint of employer speech on matters as important as labor rights risks grave constitutional concerns. It thus drafted the NLRA narrowly to avoid encroaching on speech rights and expressly provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). This provision "implements the First Amendment." *Gissel Packing*, 395 U.S. at 617.

62. Beyond that, the NLRA forbids only *conduct* in response to unionization: Employers must not "interfere with, restrain, or coerce employees in the exercise of" their rights to organization and collective bargaining. 29 U.S.C. § 158(a)(1).

63. While the NLRA's protection for the "expressing of any views, argument, or opinion" seeks to safeguard employers' First Amendment rights (29 U.S.C. § 158(c)), the Rule here fails to do so. Indeed, it does the opposite: It harshly penalizes employers who "communicate" an "opinion" "concerning any activity protected by this subpart"—that is, concerning controversial political topics like unionization, collective bargaining, and concerted action rights. 20 C.F.R. § 655.135(h)(2)(ii). In particular, the Rule forbids employers from disciplining a worker who "refuse[s] to attend" a meeting with the employer "if the primary purpose of the meeting is to communicate the employer's opinion concerning any activity protected by this subpart." *Id.*

64. That is, under the Rule, if an employer holds a mandatory meeting to discuss any number of issues—be it farm safety, workplace operations, or the employer's views about politics—an employer can discipline employees who refuse to attend. However, if the primary purpose of the meeting is to communicate the employer's views as to labor organizing, the Rule forbids an employer from making the meeting mandatory.

65. The Rule thus contains a "[c]ontent-based regulation[]" because it "target[s] speech based on its communicative content." *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018). "[S]uch laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Id.* "This stringent standard reflects the fundamental principle that governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.*

66. The Rule is not narrowly tailored to achieve a compelling governmental interest. Indeed, federal policy explicitly exempts agricultural laborers from the legal provisions of the Rule, expressly negating an assertion of a compelling interest.

67. Moreover, mere "[a]nti-union bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act [i]s not itself an unfair labor practice," and "[i]n a free democracy, it is the citizen, not the Government, who fixes his own beliefs" and must be allowed to speak upon them. *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 753 (5th Cir. 1979) (quoting *NLRB v. McGahey*, 233 F.2d 406, 409 (5th Cir. 1956))).

68. The fact that farmers voluntarily participate in and benefit from the H-2A visa program does not justify DOL's limits on their speech. "Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 513 (1996).

B. The Rule is Vague and Chills Protected Speech

69. The Rule also lists a series of undefined terms that implicate expression. Employers participating in the H-2A program may not "intimidate" or "threaten" in any manner any person because of their "activities related to self-organization" or their refusal to attend mandatory employee meetings. 20 C.F.R. § 655.135(h)(2)(i)-(ii); *see also id.* § 655.135(h)(1). These limitations are in addition to the NLRA-like prohibitions on the conduct of "restrain[ing], coerc[ing], blacklist[ing], [or] discharg[ing]" employees in response to protected activities. *Id.* § 655.135(h).

70. A regulation is void for vagueness if its prohibitions are not "clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Such laws are unlawful when they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.*

71. "It is well established that when laws may infringe upon sheltered First Amendment freedoms, the Constitution demands they be held to stricter standards of definiteness." *Angelico v. State of La.*, 593 F.2d 585, 588 (5th Cir. 1979); *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review

of laws dealing with speech."). A rule unconstitutionally limits speech where people "must necessarily guess at its meaning." *Hynes*, 425 U.S. at 620.

72. An indefinite regulation "chill[s] protected speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the [regulation]." *Id*.

73. "Th[e] doctrine of overbreadth is closely related to the vagueness doctrine, because indefinite laws tend to be overly broad as well, in that they not only provide insufficient notice of illegality but sometimes include within their prohibitions expression that is protected speech." *Hiett v. United States*, 415 F.2d 664, 671 (5th Cir. 1969). A regulation "is overbroad if in banning unprotected speech, a substantial amount of protected speech is prohibited or chilled in the process." *United States v. Scruggs*, 714 F.3d 258, 267 (5th Cir. 2013). "The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*

74. It is unclear, and Plaintiffs' members cannot know, when mere expression of an opinion will be perceived as a threat or intimidation. Without clear definitions, employers are left to guess what constitutes a violation, leading to a heightened risk of inadvertent non-compliance and chilling their speech.

75. The Rule thus also violates the First Amendment because it is vague, overbroad, and chills protected speech.

CLAIMS FOR RELIEF

COUNT I (ALL PLAINTIFFS AGAINST ALL DEFENDANTS): AGENCY ACTION IN EXCESS OF STATUTORY AUTHORITY AND NOT IN ACCORDANCE WITH LAW

76. Plaintiffs incorporate the allegations contained in all preceding paragraphs.

77. The Administrative Procedure Act (APA) requires courts to "hold unlawful and set aside agency action" that is "in excess of statutory authority" or "not in accordance with law." 5 U.S.C. § 706(2)(A).

78. The Rule exceeds DOL's rulemaking authority. The INA does not authorize DOL to issue regulations that provide NLRA-like protections to agricultural workers who work for H-2A employers. The Rule thus exceeds the limited rulemaking authority conferred by Congress.

79. The Rule conflicts with and thus is precluded by the NLRA. Congress enacted the NLRA to provide collective bargaining and concerted action rights to "employees," but it specifically excluded agricultural laborers. The Rule purports to override that express provision of the NLRA by granting collective bargaining and concerted action rights to agricultural laborers throughout the country. The Rule therefore must be held unlawful, set aside and vacated.

COUNT II (PRIVATE PLAINTIFFS AGAINST ALL DEFENDANTS): AGENCY ACTION IN VIOLATION OF THE FIRST AMENDMENT

80. Plaintiffs incorporate the allegations contained in all preceding paragraphs.

81. The APA requires courts to "hold unlawful and set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

82. The Rule burdens employers' right to communicate their opinions concerning collective bargaining, concerted action, and other rights conferred under the Rule. 20 C.F.R. § 655.135(h)(2)(ii). This content-based speech restriction is not narrowly tailored to serve a compelling interest and thus violates the First Amendment.

83. The Rule also prohibits and chills speech by providing that an employer may not "intimidate" or "threaten," without limitation or qualification, anyone who engages in activities protected by the Rule. 20 C.F.R. § 655.135(h)(1)-(2). Because those terms are not defined, employers cannot know what speech may be held unlawful under the Rule. Because the Rule gives no notice of what is proscribed, employers will refrain from engaging in protected speech out of fear of enforcement. The Rule's broad restrictions on expression that intimidates or threatens thus effectively limits protected speech and is unconstitutionally overbroad.

84. The Rule infringes Plaintiffs' speech rights under the First Amendment and must be held unlawful, set aside, and vacated.

COUNT III (ALL PLAINTIFFS AGAINST ALL DEFENDANTS): DECLARATORY JUDGMENT

85. Plaintiffs incorporate the allegations contained in all preceding paragraphs.

86. The Declaratory Judgment Act provides that, "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a).

87. As described above, there is an actual controversy between the Plaintiffs and the Defendants that is within this Court's jurisdiction.

88. Plaintiffs therefore request that the Court issue a judgment declaring that the Rule is unlawful in its entirety.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in its favor and that the Court:

1. Set aside and vacate the Rule's amendments of the Code of Federal Regulations because they exceed DOL's rulemaking authority under the INA, are precluded by the NLRA, and are contrary to the First Amendment;

2. Declare that the Rule is unlawful in its entirety because it exceeds DOL's rulemaking authority under the INA, is precluded by the NLRA, and is contrary to the First Amendment;

3. Set aside and vacate 20 C.F.R. § 655.135(h)(2)(ii) and sever the words "intimidate" and "threaten" from 20 C.F.R. § 655.135(h) as violations of the First Amendment;

4. Declare 20 C.F.R. § 655.135(h)(2)(ii) and the words "intimidate" and "threaten" in 20 C.F.R. § 655.135(h) to violate the First Amendment;

5. Award Plaintiffs their costs and reasonable attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, or other applicable law; and

6. Award Plaintiffs such other and further relief as the Court may deem just and proper.

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Respectfully submitted,

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