UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 1:22-cv-03569-RC

PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1, Plaintiff National Council of Agricultural Employers ("NCAE") respectfully files this motion for entry of a preliminary injunction as to all Defendants. Plaintiff relies on the concurrently filed memorandum of points and authorities, its exhibits, the Complaint, and other documents filed in this action to support its requested relief.

Pursuant to Local Civil Rule 7(m), undersigned counsel states that they have attempted to resolve by agreement the issues raised in the motion and have not been successful.

NCAE respectfully requests that the Court schedule an expedited hearing on this motion after January 12, 2023 as that is the agreed date for Defendants to file their reply. Undersigned counsel certifies pursuant to Local Civil Rule 65.1 that all documents relied upon in this motion have been served or will be served prior to hearing on the Defendants.

Respectfully submitted,

Dated: December 23, 2022

s/ Shawn M. Packer
Shawn M. Packer (*pro hac vice*)
JPH LAW FIRM
525 9th Street, NW, Suite 800
Washington, DC 20004
Phone: (202) 629-9310
Email: spacker@jphlawfirm.com

David R. Dorey
D.C. Bar No. 1015586
902 11th Street, NE
Washington, DC 20002
Phone: (202) 848-3406
Email: david.r.dorey@gmail.com

Attorneys for Plaintiff

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MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Shawn M. Packer
JPH LAW FIRM
525 9th Street, NW, Suite 800
Washington, DC 20004
Phone: (202) 629-9310
Email: spacker@jphlawfirm.com

David R. Dorey
D.C. Bar No. 1015586
902 11th Street, NE
Washington, DC 20002
Phone: (202) 848-3406
Email: david.r.dorey@gmail.com

Attorneys for Plaintiff

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Department of Labor and its subordinate responsible agencies, Employment and Training Administration and Wage and Hour Division ("DOL Defendants"), unlawfully purported to repeal what they admit was a "final rule" [1] regulating H-2A employers, workers, and the relevant supporting industry ("Trump Final Rule")[2] and to replace it with a new final rule ("Biden Final Rule")—all without notice and comment. These agency actions accordingly violated the Administrative Procedure Act and must be set aside.

Beyond the procedural improprieties, the Biden Final Rule is arbitrary and capricious under its own weight in violation of the APA because DOL Defendants failed to: 1) provide a reasoned explanation for increasing the face value of surety bonds without evidence that the current surety bond requirements under the 2010 Rule[3] are insufficient or that DOL Defendants have ever even once had to "call" on a surety bond to pay damages[4]; 2) take into consideration how the bond market would respond to the changes in the face value and length of bond validity, substantially reducing the number of entities willing to write H-2A surety bonds and thereby effectively kicking a host of longstanding Farm Labor Contractors ("FLC") out of the H-2A Program altogether[5]; and 3) provide a reasoned explanation for rejecting decades of practice for conducting prevailing wage surveys by decreasing the number of employees required to be surveyed for a survey to be considered valid, all the while acknowledging that the reduction will sacrifice "precision, accuracy,

[1] Complaint ("Compl."), ECF No. 1, ¶ 7; Exhibit 1, Amended Declaration of Michael Marsh ("Marsh Decl.") at Ex. H.
[2] Compl. ¶ 1; Marsh Decl. at Ex. D.
[3] 75 Fed. Reg. 6884, 6941–42 (Feb. 12, 2010) (codified at 20 C.F.R. pt. 501 & 29 C.F.R. pt. 501).
[4] Compl. ¶¶ 68–70; Exhibit 2, Amended Declaration of Kathleen Brown ("Brown Decl.") ¶¶ 6–7.
[5] Compl. ¶¶ 71–73; Brown Decl. ¶¶ 11–16.

[and] granularity."[6] Plaintiff National Council of Agricultural Employers ("NCAE") is therefore likely to succeed on the merits of this lawsuit.

If the Biden Final Rule is not enjoined on a preliminary basis, NCAE and its membership will be irreparably harmed in three ways:

1) Having been deprived of an APA procedural protection to which they have a right to comment on the repeal of the Trump Final Rule and subsequent promulgation of the Biden Final Rule (and to have those comments considered and responded to by DOL Defendants), they will be forced to live under a defective and harmful H-2A regime that will increase the cost for all users of the program; will cause delays in application processing, which will result in loss of crops, profits, and jobs; and will preclude certain groups of H-2A Program users from being able to use the H-2A program pending the resolution of this lawsuit on the merits;
2) Relatedly, they will have to live under and understand at least four different, complex, and conflicting H-2A regimes during a small amount of time—the current 2010 Rule; the defective incoming Biden Final Rule; the Trump Final Rule to which reversion will be required after a merits judgment as the *status quo ante* (pending any implementation, the *status quo ante* should be the 2010 rule that the DOL Defendants and regulated community operated under for 12 years until November 30, 2022); and any future Biden Final Rule v.2.0 that is promulgated with appropriate process and substance;
3) FLCs, a significant user of the H-2A Program, will in many cases be run out of business by the increased face value and bond validity period as they struggle to obtain required surety bonds to participate in the H-2A program. Those FLCs that can obtain the

[6] Compl. ¶¶ 74–76; Exhibit 3, Declaration of Steve Bronars ("Bronars Decl.") ¶¶ 4–14.

required surety bonds will necessarily have to raise their costs, which will harm small farms and ranches that do not have the resources to participate in the H-2A Program and are lacking available labor to help run their farming operations (and who are also members of NCAE).

Moreover, not only will DOL and its agencies ***not*** be harmed by a preliminary injunction because they have an institutional interest in not subjecting the regulated community to uncertainty and a quickly four-time flip-flopped regulatory environment (and having to manage the same), but the *status quo ante* under a preliminary injunction pending final resolution of this litigation is the very familiar 2010 Rule that had been in place for over a decade. Further, an injunction is in the public interest because the Biden Final Rule (and the attendant uncertainty of a regulatory environment involving compliance with four different rules) will continue to drive up the cost of food through the lack of available labor to cultivate and harvest food for American tables and grocery stores.[7] The public interest is also served when administrative agencies are required to comply with their obligations under the APA; and there is an as-yet-unsettled in this Circuit significant legal question presented here that should be given due consideration on the merits without worry about the time it will take (when is the earliest a rule is truly final such that it cannot be rescinded without notice and comment?). All told, the balance of equities favors NCAE and preliminary relief—and it's not even a close call.

[7] David J. Bier, *DOL's New H-2A Final Rule Will Increase Food Inflation*, CATO INSTITUTE (Oct. 14, 2022) https://www.cato.org/blog/dols-new-h-2a-final-rule-will-increase-food-inflation (last visited Dec. 23, 2022). *See also* Sean Maddan, Claudia San Miguel, & Marcus A. Ynalvez, *The Link Between Consumer Prices, Labor Costs, and Immigration in the U.S.: Bivariate Association*, TEXAS A&M INTERNATIONAL UNIVERSITY (2022), https://www.tamiu.edu/coas/documents/tamiu-abic.pdf (last visited Dec. 23, 2022).

STATEMENT OF FACTS

On May 24, 2018, then Secretaries of Labor, Homeland Security, Agriculture, and State (Secretaries Acosta, Nielsen, Perdue, and Pompeo respectively) announced a coordinated effort of "streamlining, simplifying, and improving the H-2A temporary agricultural visa program – reducing cumbersome bureaucracy and ensuring adequate protections for U.S. workers."[8] This kicked off over a year of interagency work developing the Trump Notice of Proposed Rulemaking ("NPRM") that was published in the Federal Register on July 26, 2019. Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 84 Fed. Reg. 36168 (July 26, 2019) (to be codified at 20 CFR pts. 653 & 655, & 29 CFR pt. 501). The NPRM had a 60-day public comment period during which DOL received 83,541 comments.[9]

Over the next year and several months, DOL Defendants analyzed the 83,541 comments and in due consideration developed a final rule that streamlined and modernized the H-2A Program by allowing farmers and ranchers to navigate the complex program more easily and reducing cost burdens for participating in the H-2A program.[10] On January 14, 2021, DOL noticed a stakeholder call for January 15, 2021, "regarding significant rulemaking on the H-2A Visa Program."[11] On the same day, DOL Defendants caused to be signed and sent to the Office of the Federal Register ("OFR") the final agency action that was the Trump Final Rule.[12] Also that same day DOL published a copy of the Trump Final Rule on its website along with a press release announcing the "issuing [of] this final rule in response to the extensive public comments received from farmers,

[8] Marsh Decl. ¶ 8 & Ex. A.
[9] Compl. ¶ 44*; see also* 84 Fed. Reg. 36168.
[10] Compl. ¶ 45.
[11] *See id*. ¶ 46. *See also* Marsh Decl. ¶ 12 & Ex. B.
[12] Compl. ¶ 47.

farmworkers, as well as advocates and associations for both groups from across the country."[13] The press release contained a hyperlink to the Trump Final Rule indicating the "regulation has been submitted to the [OFR] for publication, and is currently pending placement on public inspection at the OFR and publication in the Federal Register. This version of the regulation may vary slightly from the published document if minor technical or formatting changes are made . . . ."[14] After DOL Defendants made Plaintiff aware of the finalization of the Trump Final Rule through means discussed above, and Plaintiff otherwise was notified by other industry advocate organizations,[15] Plaintiff notified its membership that the Trump Final Rule was final.[16]

The regulated public, including Plaintiff, had actual knowledge of the Trump Final Rule being a final agency action through the publication on a DOL website,[17] a stakeholder call explaining the regulation held by DOL,[18] and through the press releases issued by both DOL and the Secretary of Agriculture.[19]

Because of intervening Federal holidays, OFR did not place on public inspection the Trump Final Rule before the incoming Biden Administration took office on January 20, 2021.[20] On January 20, 2021, the Biden Administration posted an announcement to a DOL website that it was withdrawing the Trump Final Rule to review issues of law, fact, and policy—***not*** to make corrections of any errors that might be in the Trump Final Rule as allowed by the OFR regulations.[21] Subsequent to their purported withdrawal of the Trump Final Rule, DOL Defendants

[13] *See* Compl. ¶ 47; *see also* Marsh Decl. ¶ 13 & Ex. C.
[14] *See* Marsh Decl. ¶ 14 & Ex. D. *See also* Compl. at Ex. A.
[15] *See* Marsh Decl. ¶ 15 & Ex. E.
[16] *See id*. ¶ 16 & Ex. F.
[17] *See id*. at Ex. C.
[18] *See id*. at Ex. B.
[19] *See id*. ¶ 17 & Ex. G.
[20] Compl. ¶ 57.
[21] *See* Marsh Decl. ¶ 19 & Ex. H.

did not undertake any notice and comment of any kind or indicate how they planned to officially rescind the Trump Final Rule.[22]

Months later, and while keeping the regulated community under the 2010 Rule, on or about July 15, 2022, the Biden Administration sent the Biden Final Rule to the Office of Information and Regulatory Affairs at Office of Management and Budget for interagency final review.[23] Months after that, on October 6, 2022, DOL Defendants published an announcement on DOL's website stating that the Biden Final Rule was impending publication in the Federal Register on October 12, 2022 and was on public inspection.[24] On October 12, 2022, OFR published the Biden Final Rule in the Federal Register with an effective date of November 14, 2022.[25] The Biden Final Rule includes a transition period of 90 days from its effective date in which applications under the H-2A Program with start dates prior to the 90th day after the effective date are still processed under the 2010 Rule and applications with start dates on or after the 90th day will be processed under the Biden Final Rule.[26] Because of the requirements to file prior to an employer's date of need, and DOL making required modifications to the electronic filing system, December 15, 2022 is the earliest date that an employer's application was processed under the Biden Final Rule.[27]

[22] Compl. ¶ 59. *See* Marsh Decl. ¶ 18.
[23] Compl. ¶ 62. *See* Marsh Decl. ¶ 21.
[24] Compl. ¶ 63.
[25] Compl. ¶ 64. *See* Temporary Agricultural Employment of H-2A Nonimmigrants in the United States, 87 Fed. Reg. 61660 (Oct. 12, 2022) (to be codified at 20 C.F.R. pts. 653 & 655, & 29 C.F.R. pt. 501).
[26] Compl. ¶ 65. *See* 87 Fed. Reg. at 61667–68.
[27] Compl. ¶ 66.

LEGAL STANDARD

To prevail on a motion for preliminary injunction, the moving party must show "that four factors, taken together, warrant relief: likely success on the merits, likely irreparable harm in the absence of preliminary relief, a balance of the equities in its favor, and accord with the public interest." *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 6 (D.C. Cir. 2016). "[B]ecause the government is the non-movant, the balance of the equities and the public interest merge into one factor[.]" *Open Tech. Fund v. Pack*, 470 F. Supp. 3d 8, 31 (D.D.C. 2020) (Howell, C.J.) (cleaned up). "Further . . . the balance of the equities and the public interest here are essentially derivative of the parties['] arguments on the merits of the case." *Id.* (cleaned up). "Thus, it follows that the public interest factor of the preliminary injunction test should weigh in favor of whoever has the stronger arguments on the merits." *Id.* (cleaned up).

ARGUMENT

I. FACTOR ONE: PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The Trump Final Rule was the consummation of DOL Defendants' decision-making process. It was signed by designated agency officials after the review of an extensive comment record; sent by them to OFR for publication as a final rule; published by them to a DOL website where the regulated community and general public at large had actual knowledge of its contents; they held a stakeholder call to discuss the significant changes they had made to the H-2A Program; they posted a press notice on the DOL website articulating this was a final rule; and rights and/or obligations would be determined and/or legal consequences would flow from their action. DOL Defendants failed to properly repeal the Trump Final Rule under mandatory APA procedures. DOL Defendants also did not produce the Biden Final Rule through notice and comment rulemaking or articulate in the Biden Final Rule a good cause analysis for dispensing with the

notice and comment requirements of the APA. This double fault means the Biden Final Rule is invalid and must be vacated. Because of this deprivation of a legal protection to which Plaintiff is entitled, this Court must stay, vacate, and set aside this unlawful rulemaking and action by the DOL Defendants.

A. The Trump Final Rule was a Duly Issued, Prescribed, or Promulgated Final Agency Action Under Law

DOL Defendants issued, prescribed, or duly promulgated the Trump Final Rule by having designated agency officials sign and send that final agency action to OFR. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 597 (2016) (citing *Bennett v. Spear*, 520 U.S. 154 (1997)) (articulating what makes an agency action final: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow."). That was the culmination of the DOL Defendants' decisionmaking process and was not tentative or interlocutory in nature. *Id.; see* Marsh Decl. Ex. C. DOL Defendants held a stakeholder call with the regulated community in which they articulated that significant rulemaking had taken place.[28] Finally, the Trump Final Rule is an action by which "rights or obligations [were] determined," as it imposes on the regulated community the obligations associated with their participation in the H-2A Program, and the "legal consequences [that] will flow" for their failure to adhere to the obligations under it. *Hawkes Co.*, 578 U.S. at 597. The Trump Final Rule was and is a final agency action of DOL. The released document itself clearly articulates that it is a "regulation" that was submitted to OFR for publication and said that "this version of the regulation may vary slightly from the published document if **minor**

[28] Marsh Decl. ¶ 12.

technical or formatting changes are made during the OFR review process." *See* Marsh Decl. Ex. D. (emphasis added).

B. The Trump Final Rule was Required to be Repealed Using Notice and Comment Procedures Required by the APA

The APA defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4). It further defines "rule making" as an "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The Trump Final Rule is a "rule" because it was an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law and policy—the H-2A Program as authorized under the Immigration and Nationality Act (the "INA" or the "Act," codified at 8 U.S.C. § 1101 *et seq*.). The Trump Final Rule is a final agency action for the reasons described above. *Hawkes Co.,* 578 U.S. at 597. "[O]nce an agency makes a rule—that is, once it makes a statement prescribing law with future effect—the APA requires the agency to provide notice and an opportunity for comment before repealing it." *Humane Society of the U.S. v. USDA*, 41 F.4th 564, 569 (D.C. Cir. 2022); *see also Arlington Oil Mills, Inc. v. Knebel*, 543 F.2d 1092, 1099 (5th Cir. 1976) (despite that the rule at issue was not published in the Federal Register, the agency "had made a determination which was 'final and conclusive' . . . . Any further consideration by the Department of whether to alter this final decision fell within the APA's definition of rulemaking: an 'agency process for formulating, amending, or repealing a rule,' and the rulemaking procedures of the APA fully applied to the Department's determination of its . . . announcement.").

A final agency action, such as the Trump Final Rule, is promulgated before publication in the Federal Register and in some cases even before public inspection by the Federal Register. Federal Register publication is no more than a "rebuttable presumption" that the document was

"duly issued, prescribed, or promulgated," meaning a rule becomes final ***before*** that publication. 44 U.S.C. § 1507. Further, documents to be filed in the Federal Register are "not valid as against a person who has *not had actual knowledge* of" them until they are "filed with [OFR] and a copy made available for public inspection." *Id.* Accordingly, if a person has actual knowledge of the contents of a document to be filed in the Federal Register the "legal consequences [that] will flow" from that document can be enforced against that person—and that means that document was promulgated prior to OFR public inspection. What counts is notice, nothing else. *Hawkes Co.*, 578 U.S. at 597; *see also United States v. Aarons*, 310 F.2d 341, 348 (2d Cir. 1962) ("The only purpose of . . . publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice.").

Additionally, the Federal Register Act ("FRA") defines a "document" as a regulation or rule that has been "issued, prescribed, or promulgated by a Federal agency." 44 U.S.C. § 1501. This means that a document required to be filed with the Federal Register has already been issued, prescribed, or promulgated by a Federal agency prior to anything the FRA requires. That makes sense: why would agencies send to OFR for public inspection and publication actions that aren't final? They absolutely would never.

Further, the FRA itself contemplates that a rule can be issued or promulgated before filing with the Federal Register for public inspection. *See* 44 U.S.C. § 1503 ("When the original is *issued, prescribed, or promulgated* outside the District of Columbia and certified copies are filed before the filing of the original, the notation shall be of the day and hour of filing or the certified copies.) (emphasis added). "On the whole, the Federal Register Act appears simply to use the word 'promulgated' as a synonym for official adoption . . . ." *Sea Watch Int'l v. Mosbacher*, 762

F. Supp. 370, 374 (D.D.C. 1991) (Boudin, J.) (distinguishing "promulgate" in the FRA from "promulgate" in the Magnuson Act for setting the time limitation for judicial review under the latter). So, if a rule can be issued, prescribed, or promulgated even before it is sent to the Federal Register, the APA requirement for notice and comment to repeal a rule can attach before it is sent to the Federal Register as well. Nor does it make any difference if the rule has a future effective date post-publication: "Like an enacted statute, which becomes valid law once enacted even if not yet effective, a duly prescribed rule is law even if it sets a future effective date." *Humane Society*, 41 F.4th at 571 (cleaned up). "[L]ongstanding precedent holds that once an agency prescribes a rule, it must provide notice and comment before repealing it, even if the rule's effective date has yet to pass." *Id*. at 572.

In *Humane Society*, the dissent argued that another case was controlling on the issue of when a rule becomes law and therefore must be repealed through notice and comment rulemaking. *Id*. at 576–77 (Rao, J., dissenting) (citing *Kennecott Utah Copper Corp. v. DOI*, 88 F.3d 1191 (D.C. Cir. 1996)). In *Kennecott*, the outgoing Bush I Administration on its final day sent a rule to OFR for publication; however, two days later, before the rule was to be put on public inspection, the incoming Clinton Administration withdrew it. 88 F.3d at 1200–01. The Court there did not say if the rule had been made available to the general public in another manner other than public inspection or if it was announced as a final agency action in a press release; it simply said that it was sent to the Federal Register for "confidential processing." *Id*. However, the actions in *Kennecott* occurred in 1993 prior to the modern internet, so it is highly unlikely that the type of publication and announcement the Trump Final Rule went through were possible there. The prevalence of the internet and news media in 2021 (and some years leading up to it) has been a sea change in the government's ability to communicate with the regulated community and to make

statements prescribing law with future effect without reference to the Federal Register publication. *Humane Society*, 41 F.4th at 569.

Further, there is longstanding Circuit precedent that "[a] person with actual notice is bound by an agency action, even if the act which imparts constructive notice to others filing with the Federal Register for publication has not yet occurred." *Indus. Union Dep't v. Bingham*, 570 F.2d 965, 971 (D.C. Cir. 1977). In *Bingham*, the court was determining if it had jurisdiction of a challenge to an Occupational Safety and Health Act ("OSH Act") standard promulgated by OSHA. *Id.* The plaintiff attended a meeting with the OSHA Assistant Secretary and approximately twelve organizations, during which the OSHA Assistant Secretary signed an emergency temporary standard and described the standard to those present as well as answered questions regarding the standard. *Id*. at 967. The following day plaintiff there filed a petition for review of the standard, prior to the OSHA Assistant Secretary holding a press conference and providing a copy of the text with a statement describing the standard to those in attendance at the press conference. *Id.* After the press conference the standard was sent to the Federal Register for publication. *Id*. Following publication two other plaintiffs filed a petition for review of the standard in a different district. Under the OSH Act, the district of the first petition for review is the district that has jurisdiction to hear the challenge. The court held that "[a] valid petition for review could not have been filed before the press conference if Dr. Bingham had signed the standard alone in her office, or only in the presence of an aide, and not held the invitational briefing." *Id*. at 969*; see also Saturn Airways, Inc. v. Civil Aeronautics Bd.*, 476 F.2d 907, 909 (D.C. Cir. 1973) (holding that a challenge to an agency action yet to be published in the Federal Register but widely publicized to the public was ripe for judicial review: "For at the time of filing it was clear both that the Board had taken what

it deemed official action and that the substance of that action had been communicated to the public in some detail.").

Plaintiff and the regulated community had ample actual notice of the Trump Final Rule even though it was never put on the table at OFR or published in the Federal Register. That's all that was required—the rule was final and could not be repealed without notice and comment.

C. The DOL Defendants Failed to Repeal the Trump Final Rule Through Notice and Comment Procedures Required by the APA

The purported withdrawal of the Trump Final Rule from the Federal Register by the incoming Biden Administration deprived Plaintiff of a procedural protection to which it is entitled. *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 17 (D.D.C. 2009) (Friedman, J.) ("A party experiences actionable harm when deprived of a procedural protection to which he is entitled under the APA.") (cleaned up). Had the DOL Defendants proposed to repeal the Trump Final Rule in compliance with the APA, Plaintiff would have been able to make arguments for why that shouldn't happen. Plaintiff would have explained the Rule's benefits of allowing employers to file one application for multiple dates of need throughout the year, cutting down on the administrative burden of utilizing the H-2A program, as well as the cost associated with filing applications at both DOL and the United States Citizenship and Immigration Service; allowing State Workforce Agencies, the entities charged with inspecting H-2A housing, to certify housing every 24 months instead of for each application, significantly reducing the administrative burden on employers who file annually multiple H-2A applications; easing the burden on employers from being required to continue to hire United States workers that show up through 50% of a work contract after H-2A workers have already arrived and been working on that contract; allowing employers to add additional worksites after certification instead of having to file a whole new H-2A application; clarifying that transportation and subsistence costs that are to be reimbursed to H-

2A workers are calculated from the United States Consulate at which the H-2A worker was processed and not from a more difficult standard of the place of recruitment, which is often difficult to determine; providing flexibility by creating a reduced surety bond for small FLCs seeking to hire fewer than ten H-2A workers; and streamlining the program by allowing employers to optionally begin recruitment of United States workers prior to DOL issuing a first action, reducing the time it takes for an employer to be certified under the H-2A Program.[29] "The value of notice and comment prior to repeal of a final rule is that it ensures that an agency will not undo all that it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal." *Consumer Energy Council v. Fed. Energy Regul. Comm'n.*, 673 F.2d 425, 446 (D.C. Cir. 1982).

A "plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result." *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 94–95 (D.C. Cir. 2002). "If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Id*. DOL Defendants' failure to follow the APA procedures in repealing the Trump Final Rule robbed Plaintiff of a procedural right that cannot be cured without setting the Biden Final Rule aside.

[29] Compl. ¶¶ 49–54; *see also* Marsh Decl. ¶ 18.

D. The DOL Defendants Failed to Promulgate the Biden Final Rule Through Notice and Comment Procedures Required by the APA

DOL Defendants will probably contend that because they withdrew the Trump Final Rule, they did not need new notice and comment procedures to promulgate the Biden Final Rule. They would be wrong. The Trump Final Rule was a final agency action and the culmination of the rulemaking process. "If one rulemaking proceeding has culminated and another has begun, then new notice and comment procedures are required." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 800 (D.C. Cir. 1983). New notice and comment procedures were required to promulgate a rule that was not the Trump Final Rule. DOL Defendants did not do that, so they acted in a manner that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and was "without observance of procedure required by law," *id.* § 706(2)(D).

II. FACTOR TWO: PLAINTIFF WILL SUFFER IRREPARABLE INJURY IF THE COURT DOES NOT GRANT INJUNCTIVE RELIEF

To demonstrate irreparable harm because of lack of APA notice and comment, the plaintiff seeking injunctive relief must show that it is likely to experience injury that cannot be cured by ultimate success on the merits. *Wisc. Gas Co. v. Fed. Energy Regul. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985). The unrecoverable financial loss of current users and related service providers of the H-2A Program (who are members of NCAE) resulting from the unlawful repeal and promulgation of the Biden Final Rule make preliminary relief appropriate and necessary. *Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1, 58–59 (D.D.C. 2020) (Boasberg, J.) ("If a plaintiff has shown that financial losses are certain, imminent, and unrecoverable, then the imposition of a preliminary injunction is appropriate and necessary.") (cleaned up). Since this is an action brought under the APA, Plaintiff and its membership cannot recover financial loss that

occurs during the pendency of this action. *See* 5 U.S.C. § 702 (providing for relief "other than monetary damages"); *see also, e.g., ITServe All., Inc. v. Cuccinelli,* 502 F. Supp. 3d 278, 287 (D.D.C. 2020) (Mehta, J.) ("[B]ecause Plaintiffs' demand . . . is a demand for money damages, the court lacks jurisdiction as to that claim under the APA.").

If the Court would allow the Biden Final Rule to continue to be implemented, Plaintiff and its association membership will be further irreparably harmed by the DOL Defendants' violation of the APA by having to comply with a complex, far-reaching, costly regulatory regime that is both wholly defective and fleeting (because it will have to be set aside). *N. Mariana Islands*, 686 F. Supp. 2d at 17 ("Such concerns about fairness to affected parties and the exposure of proposed regulations to diverse public comment are especially warranted where the rule in question creates a complex and far-reaching regulatory regime.") (cleaned up). Plaintiff's ultimate success on the merits will not cure this injury and it will only be further harmed by the regulatory flipflop. Plaintiff's success on the merits will make the Trump Final Rule the new *status quo ante* with the 2010 rule remaining in effect while the Defendants either choose to implement or properly repeal the Trump Final Rule. DOL Defendant have already determined they do not wish for that Rule to be the law; after success on the merits the DOL Defendants are not likely to be receptive to comments from Plaintiff regarding why the Trump Final Rule should not be repealed—they've already pre-determined the result. *Id.* at 18 ("Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas.") (citing *New Jersey v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980)).

"[Plaintiff's] injury is actual and great, and it is sufficient to weigh in favor of the issuance of an injunction." *Id. at* 19. (citing *Wisc. Gas Co.*, 758 F.2d at 674) (internal quotations omitted).

"After all, irreparable injury is but one of four factors courts consider in deciding whether to issue a preliminary injunction. In the context of [Plaintiff's] particular case, where the likelihood of success on the merits is so high and the public interest served by an injunction is so great, [Plaintiff] has shown injury serious enough to warrant immediate injunctive relief." *Id.* "[W]hen a plaintiff's alleged damages are unrecoverable, such as here, due to the sovereign immunity enjoyed by Defendants, courts have recognized that unrecoverable economic loss can indeed constitute irreparable harm." *Luokung Tech. Corp. v. DoD*, 538 F. Supp. 3d 174, 192 (D.D.C. 2021) (Contreras, J.) (quoting *Xiaomi Corp. v. DoD*, No. 21-280-RC, 2021 WL 950144 (D.D.C. Mar. 12, 2021)). "[T]he economic harm in question must be sufficiently 'significant.'" *Id.* (determining that a $10 million dollar loss in revenue was sufficiently significant).

Further, the damaging impact that this unlawfully promulgated regulation will have on the Farm Labor Contractor ("FLC") industry, many of which are members of Plaintiff, is incalculable and threatens the very existence of their businesses.[30] *See Wis. Gas Co*, 758 F.2d at 674. This is not speculation—it's already happening. Plaintiff's member FLCs are already losing access to the bond market; this harm cannot be undone without the Biden Final Rule being enjoined because FLCs that have dates of need as early as February 13, 2023 must have a surety bond in place before filing their application with the Department.[31]

Since FLCs now make up nearly fifty percent of the users of the H-2A program, foreclosure of nearly half of the users of the program from an effective bond market—a required aspect prior to filing an application with the Department—will irreparably harm Plaintiff's association members who rely on FLCs to plant and harvest their crops, as well as the FLCs underlying ability

[30] Compl. ¶¶ 70–72. *See* Marsh Decl. ¶¶ 27–29*; see also* Brown Decl. ¶ 35.
[31] Brown Decl. ¶¶ 14–15.

to use the H-2A program.[32] If the Biden Final Rule remains in effect many FLCs will be unable to service contracts that they have already signed related to the upcoming season, causing them severe reputational and financial harm that is unrecoverable against DOL Defendants.[33] And the growers those FLCs provide labor for will suffer severe and permanent financial loss as crops rot in the fields unable to be harvested without the required labor that they contracted for many months in advance of publication of the Biden Final Rule.[34]

One of the largest H-2A surety bond underwriters in the Southeast, and a member of Plaintiff's association, Insurance Office of America ("IOA"), has indicated that one of its larger bond markets has already provided narrower underwriting standards that disqualify nearly half of its current FLC clients.[35] Further, two of IOA's other bond markets have decided to stop writing H-2A FLC bonds ***altogether*** because of the changes in the Biden Final Rule.[36] *Luokung*, 538 F. Supp. 3d at 192 ("The Court begins with a review of the economic loss that has already come to pass."). The fact that these bond markets stopped providing H-2A FLC bonds because of the increase in surety bond face values and length of validity period, coupled with the fact that DOL Defendants have not followed APA procedure and produced adequate evidence that changes in surety bond face values or length of bond validity period are needed, is already creating irreparable harm for a large portion of the H-2A industry and all farmers and ranchers that use FLCs. This includes small family farming operations that cannot handle the complexity and cost of using an agent to file petitions and job orders for themselves, and to rent or construct housing

[32] Of the 370,907 H-2A positions certified in fiscal year 2022, 163,888 were for FLCs or 44% of the entire H-2A program. U.S. DEPARTMENT OF LABOR, H-2A Disclosure Data FY2022 Q4, https://www.dol.gov/agencies/eta/foreign-labor/performance (last visited Dec. 23, 2022).
[33] Marsh Decl. ¶ 25.
[34] *Id*. ¶ 26.
[35] Brown Decl. ¶¶ 3, 4, 15.
[36] *Id*. ¶ 14.

for the workers.[37] IOA is already losing the ability to underwrite bonds for 30 of its FLC clients, with direct losses of $400,000 a year due to the inability to underwrite bonds that were previously approved.[38] Due to the lost ability to underwrite the H-2A surety bond, IOA will also lose the ability to write other insurance products for its FLC clients, costing it approximately $10,000,000 a year in fees on other products that FLC clients will no longer need, since they cannot obtain the H-2A labor they typically hire.[39] This harm that IOA faces is similar to the economic harm faced in *Luokung*, 538 F. Supp. 3d at 193; however, the scope of the harm is orders of magnitude more severe because it's not just IOA that's being irreparably harmed—it's entire groups of customers cannot be approved for the higher face value bonds , are completely excluded from the H-2A market, and are thus not able to use IOA's services that they otherwise want and need. *See id.* ("Luokung is facing the complete loss of *any* public market for its securities. If anything, this imminent harm Luokung faces is even more severe than that the Court found sufficient in *Xiaomi*.") (emphasis in original).

In addition, Plaintiff's members are already having to obtain surety bonds with the massively increased face values. One example, Fresh Harvest, is going to need to obtain $8,835,752 in face value of surety bonds for the remainder of 2023, an increase of over $6,000,000 from the previous year.[40] The compliance cost of $8,835,752 in bonds for Fresh Harvest is roughly 10%, which is $883,575—an increase of $602,575 year over year. These additional compliance costs increase Fresh Harvest's spending by 214% from the previous year and will continue to exact additional harm to it throughout the remainder of the year each time it has to file a new contract.[41]

[37] Marsh Decl. ¶ 11.
[38] Brown Decl. ¶¶ 1617.
[39] *Id.* ¶ 17.
[40] Marsh Decl. ¶¶ 27–29.
[41] *Id.*

In fact, Fresh Harvest must file its next round of contracts by January 1, 2023; these contracts carry face value bond amounts totaling $200,535.14—an $80,535.14 increase year over year. This face value will carry a compliance cost of $20,053.51—an increase of $8,053.51 year over year for one start date of need alone.[42] The Amended Marsh Declaration contains a chart showing the increased costs and thus irreparable harm that the Biden Final Rule will exact on Fresh Harvest each month during 2023 beginning in February.[43] Those increases will only compound in future fiscal years as the National Average Adverse Effect Wage Rate changes annually and Fresh Harvest will be required to carry the surety bonds for additional time.[44]

Another member, Everglades Harvesting, recently saw a 350% increase in compliance costs for a face value bond of $267,717.[45] A typical pre-Biden Final Rule bond of $75,000 would have cost this member $1,125 and post-Biden Final Rule this member is paying $4,016 for the new face value amount.[46] *Luokung*, 538 F. Supp. 3d at 194 ("[T]hese injuries have either already occurred or are directly imminent due to the prohibitions that will begin later this week, and are thus far from the prohibited type of speculative or theoretical harms as Defendants try to imply.").

Finally, the unlawfully promulgated Biden Final Rule will harm H-2A agricultural employers in all states, but especially those in Washington State that already conduct a significant number of prevailing wage surveys. The Biden Final Rule is throwing away twenty years of procedural history with little more than a page worth of justification. 87 Fed. Reg. at 61694–95. It will cause prevailing wage surveys to be four to five times less accurate.[47] This will cause less

[42] *Id*.
[43] *Id*. ¶ 28.
[44] *Id*. ¶ 27.
[45] Marsh Decl. ¶ 29.
[46] *Id*.
[47] Bronars Decl. ¶ 8.

accurate prevailing wages and higher wage inflation in states that conduct prevailing wage surveys.[48] Increasing an employer's wage obligations by four or five times for one employee might not be significant harm on its own; however Washington State had 33,049 certified H-2A workers in Fiscal Year 2022, accounting for 8.9% of the H-2A Program.[49]

If this Court does not enjoin the Biden Final Rule at once, Plaintiff will lose the chance to meaningfully participate in a lawful process to propose the repeal of the Trump Final Rule. *N. Mariana Islands*, 686 F. Supp. 2d at 18. FLCs will be pushed out of the H-2A program because they cannot obtain a surety bond, the price of which has been so drastically increased that bond issuers are leaving the market or changing their underwriting procedures making it impossible for an indispensable party to the H-2A Program to continue to function.[50] *See Wis. Gas Co*, 758 F.2d at 674. H-2A Employers in all states will be subject to the uncertainty of artificial wage inflation brought on by wage surveys that lack any statistical validity that can be hoisted upon an employer at any point within a work contract, dramatically increasing already contracted for costs, which threatens employers' ability to continue their farming operations. *Id.* at 674.

III. FACTORS THREE AND FOUR: THE BALANCE OF HARMS WEIGHS IN FAVOR OF GRANTING INJUNCTIVE RELIEF AND INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST

Plaintiff and its members are already experiencing and will continue to suffer irreparable harm absent an injunction of the Biden Final Rule until this matter can be resolved on its merits. DOL Defendants will not suffer any harm whatsoever. DOL Defendants, the regulated community, and United States and foreign farmworkers will continue to operate under the 2010

[48] *Id.* ¶¶ 9–14.
[49] U.S. DEPARTMENT OF LABOR, H-2A Selected Statistics FY2022, Office of Foreign Labor Certification (2022) https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Selected_Statistics_FY2022_Q4.pdf (last visited Dec. 23, 2022).
[50] Brown Decl. ¶ 18.

Rule, which has effectively been the *status quo* for twelve years and is working just fine. "An order maintaining the status quo is appropriate when a serious legal question is presented [and] when little if any harm will befall other interested persons or the public . . . ." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). Here, Plaintiff presents a serious legal question to the Court: when is a regulation promulgated requiring notice and comment procedures to repeal it under the APA?

Additionally, "[t]he public interest is served when administrative agencies comply with their obligations under the APA." *N. Mariana Islands*, 686 F. Supp. 2d at 21*; see also Nat'l Treasury Emps. Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993) (Greene, J.) ("The preservation of the rights in the Constitution and the legality of the process by which government agencies function certainly weighs heavily in the public interest."). Because implementation of the Biden Final Rule is unlawful, the public has a real interest in an injunction that would prohibit such a result. An "extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest." *League of Women Voters*, 838 F.3d at 12. Additionally, "there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *Id*. (internal citations omitted).

Finally, as indicated by the Cato Institute and Texas A&M International University in two recent studies of inflation and food costs, the lack of available labor for farmers and ranchers, and the FLCs that service their operations, is a substantial cause of inflation.[51] The Biden Final Rule

[51] David J. Bier, *DOL's New H-2A Final Rule Will Increase Food Inflation*, CATO INSTITUTE (Oct. 14, 2022) https://www.cato.org/blog/dols-new-h-2a-final-rule-will-increase-food-inflation (last visited Dec. 23, 2022). *See also* Sean Maddan, Claudia San Miguel, & Marcus A. Ynalvez, *The Link Between Consumer Prices, Labor Costs, and Immigration in the U.S.: Bivariate Association,*

will continue to drive up the cost of food production in the United States further harming the public interest. Therefore, an injunction of the Biden Final Rule will be substantially in the public interest.

CONCLUSION

For the foregoing reasons, the Preliminary Injunction should be issued forthwith. Plaintiff seeks an expedited hearing schedule on this motion at the Court's earliest possible convenience because of the imminent and concrete harm to Plaintiff and its members.

Respectfully submitted,

Dated: December 23, 2022

s/ Shawn M. Packer
Shawn M. Packer (*pro hac vice*)
JPH LAW FIRM
525 9th Street, NW, Suite 800
Washington, DC 20004
Phone: (202) 629-9310
Email: spacker@jphlawfirm.com

David R. Dorey
D.C. Bar No. 1015586
902 11th Street, NE
Washington, DC 20002
Phone: (202) 848-3406
Email: david.r.dorey@gmail.com

Attorneys for Plaintiff

TEXAS A&M INTERNATIONAL UNIVERSITY (2022), https://www.tamiu.edu/coas/documents/tamiu-abic.pdf (last visited Dec. 23, 2022).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF LABOR, *et al.*,

Defendants.

Civil Action No. 1:22-cv-03569-RC

ORDER

AND NOW, this ___ day of _____, 2023, upon consideration of Plaintiff's Motion for Preliminary Injunction, and supporting memorandum and documents and any responses and replies thereto, and finding good cause exists, IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction is GRANTED. It is FURTHER ORDERED as follows:

1. Defendants shall publish a notice in the Federal Register that the regulations under 87 Fed. Reg. 61660 are enjoined and shall not be implemented or enforced and that the *status quo* will continue to be the regulations as of November 13, 2022.
2. Defendants shall instruct State Workforce Agencies that enforce parts of the H-2A Visa Program to continue to operate under the regulations as of November 13, 2022.
3. Defendants and State Workforce Agencies shall re-adjudicate any H-2A Program Visa applications that were adjudicated under the regulations effective after November 14, 2022 under the regulations as they existed on November 13, 2022 within seven days of this order.
4. Defendants shall allow Farm Labor Contractors who were required under the now enjoined rule to terminate any bond that is in excess of the bond amounts on

November 13, 2022 and provide within 7 days of termination an updated bond reflecting the amounts required on November 13, 2022.

BY THE COURT:

_____
Rudolph Contreras
U.S. District Court Judge

cc: Shawn M. Packer, Esq.
JPH LAW FIRM
525 9th Street, NW, Suite 800
Washington, DC 20004

David R. Dorey, Esq.
902 11th Street, NE
Washington, DC 20002

Michael J. Gaffney, Esq.
Liam C. Holland, Esq.
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L. Street, NW
Washington, D.C. 20005