UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

TECHE VERMILION SUGAR CANE GROWERS ASSOCIATION, INC.; CORA TEXAS GROWERS AND HARVESTERS AGRICULTURAL ASSOCIATION, INC.; AMERICAN SUGAR CANE LEAGUE; FOUR OAKS FARM, GP; GONSOULIN FARMS, LLC; TOWNSEND BROTHERS FARM, INC.; and JOHN EARLES, **Plaintiffs,**	**CIVIL ACTION NO.** **JUDGE**
VERSUS	
JULIE A. SU, Acting Secretary of Labor, in her official capacity; BRENT PARTON, Principal Deputy Assistant Secretary of Labor, in his official capacity; BRIAN PASTERNAK, Administrator of the Employment and Training Administration, Office of Foreign Labor Certification, in his official capacity; JESSICA LOOMAN, Action Administrator, Wage and Hour Division, in her official capacity, Defendants	**MAGISTRATE JUDGE**

COMPLAINT FOR DECLARATORY AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF (DECLARATORY RELIEF REQUESTED; PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF REQUESTED)

PRELIMINARY STATEMENT

1. Foreign agricultural workers are indispensable to the American food supply, particularly considering the harvesting and transportation work that must be completed in very short amounts of time to produce our nation's crops. On February 28, 2023, the United States Department of Labor ("DOL")[1] issued a Final Rule, 88 Fed. Reg. 12,760 (Feb. 28, 2023), codified at 20 C.F.R. § 655.120(b) (the "Final Rule") that unlawfully increases the wages for seasonal migrant guestworkers.

2. As detailed herein, the Final Rule disavows the appropriate classifications of agricultural laborers, as well as data germane to the appropriate classification of agricultural laborers collected by the United States Department of Agriculture ("USDA"), in favor of its own bureaucratic re-classification of the labor performed by agricultural workers. This re-classification seeks to impose upon the agricultural industry a unique category of agricultural work that, while it may accurately reflect certain economic sectors of the American economy, is inapposite to the realities of modern agricultural work. This is because modern agricultural labor requires laborers who are generalists, proficient in a wide range of skills, and able to complete a combination of duties in tandem and in a very short amount of time, due to the fact that agricultural work (unlike work in other economic sectors) is seasonal, not annual.

3. Congress has granted the DOL the authority to strike a balance between the labor requirements of U.S. agricultural employers and safeguarding the wages and working conditions of existing U.S. farm workers. Thus, the ostensible purpose of the Final Rule is to protect the wages of "similarly situated" American workers. However, the Final Rule does not accomplish this purpose, because it views the variegated skill set of a modern agricultural laborer (employed

[1] The term DOL as used herein includes, as appropriate, the individual defendants (in their official capacity).

seasonally) as "similarly situated" to the highest paid specialist in other economic sectors (employed annually).

4. By way of example, American law has long recognized the factual and legal distinction between driving a heavy truck[2] for agricultural purposes (to haul crops, equipment, and supplies) and driving a heavy truck for purposes of long-haul trucking generally. The former activity is seasonal and involves repeated trips hauling the same sorts of materials relatively short distances from the farm, while the latter is an annual activity that can involve the hauling of any kind of cargo anywhere in the United States. This factual distinction has been recognized by Congress, state legislatures, and the federal and state agencies who have primary jurisdiction over transportation over public roads, all of whom have decreed (or granted the authority to decree) that driving a heavy truck for agricultural purposes does not require a commercial driver's license or many of the other training and certification requirements of a long-haul trucker.

5. However, the Final Rule eschews these factual and legal distinctions and decrees that any agricultural laborer who drives a heavy truck on a public road during the several months out of the year he is employed, regardless of the circumstances, must be paid the same wages as a perennially employed long-haul trucker.

6. The Final Rule is illegal and invalid because it deviates from the statutory mandate of protection of domestic workers' wages. It does this by viewing as "similarly situated" both agricultural and non-agricultural laborers, despite the many factual and legal distinctions between such labor. The Final Rule also thwarts the central purpose of the H-2A program, namely, to provide American farmers with legal access to foreign labor that can make up for the shortfall in

[2] As used herein, the term "heavy truck" means a tractor-trailer combination or a truck with a capacity of at least 26,001 pounds Gross Vehicle Weight. This definition corresponds to the Department of Transportation regulations concerning long-haul trucking and a commercial driver's license, and the specialty occupation for "Heavy and Tractor-Trailer Truck Drivers," discussed in greater detail *infra*.

American workers who are not available, willing or able to work in the food supply chain. Indeed, by artificially inflating the wages of foreign workers (by mandating they be paid the highest wage rate of any annually-employed domestic specialist that corresponds to any of the tasks performed by the foreign laborer during his or her seasonal employment), the Final Rule imperils the H-2A program and American agriculture, which relies on foreign labor to produce food.

7. Simply put, the average American farmer cannot afford to employ a "Heavy and Tractor-Trailer Truck Driver" (at approximately $25 per hour) rather than an "Agricultural Equipment Operator" (at $13.67 per hour), particularly when the latter may spend most of his or her time performing other tasks on the farm, tasks that do not involve driving a heavy truck. Farms, and in particular small farms, are simply not able to classify laborers performing harvest and hauling duties like specialists. This is particularly true given that a "Heavy and Tractor-Trailer Truck Driver" on a modern farm would likely be unemployed for approximately seven months each year and would spend only a fraction of the remaining five months driving a truck. But this irrational result is what the Final Rule commands.

8. Moreover, small farms in particular tend to hire communities of workers, *i.e.*, workers related by blood or marriage, with whom they are familiar from year-to-year. This permits the farmer to plan for a work force he or she is familiar with and knows to be reliable and permits the foreign laborer the opportunity to acquire skill and proficiency by repeated tours on and familiarity with the same farm and farm operator. The natural incentive of this system is to encourage the farmer to provide the foreign laborers with training that they can put to use in the future, while permitting the foreign laborer to learn additional skills (including driving farm trucks). This system, which duplicates what would be expected from return domestic labor (if such were available), benefits both the farm operator and the foreign laborer. However, the Final

Rule completely eviscerates this system and its incentives, because under the Final Rule the farmer, by teaching new skills to a foreign laborer, runs the risk that DOL will seize upon the new skill to classify that worker at a higher wage rate (commensurate with a specialized, domestic worker that is employed year-round in another sector of the economy).

9. The effect of this artificial wage increase affects not only the wages, but the working conditions of domestic workers and foreign laborers. This is because certain foreign laborers who happen from time to time to perform tasks that correspond to a higher-wage domestic annual specialist occupation will have to be paid more, even if most of the time that foreign laborer is doing the same work as other laborers on the farm. This cannot help but create jealousy and dissention among the workforce, undermining the very sense of community that is so important to both farmers and laborers, and thus undermining the working conditions of domestic and foreign laborers alike.

10. The impact of the Final Rule on the working conditions of employees is, like wages, a consideration that is specifically required by statute. But the Final Rule fails to consider in any way the impact of the Final Rule on the working conditions of domestic and foreign laborers.

11. The economic impact of the Final Rule on agricultural employers is severe, as most American agriculture is dependent upon foreign labor, either obtained through the H-2A program or through the hiring of foreign workers who are not eligible for employment in the United States. Plaintiffs estimate that the impact on agricultural employers who currently utilize the H-2A program will be greater than $100 million. Amazingly, however, in issuing the Final Rule the DOL has admitted it does not have any data from which it can discern what the economic impact of the Final Rule will be.

12. The economic impact of the Final Rule will have three consequences that are all negative and contrary to the congressional purpose in enacting the H-2A program. First, the Final Rule will put some small farmers out of business because the margins and economies of scale involved in successfully operating an agricultural enterprise in the United States simply cannot accommodate the increase in wage costs mandated by the Final Rule. Second, because as a practical matter American farmers have limited influence over the retail prices of the commodities they produce (and thus cannot fully pass increases in production costs on to the consumer), the Final Rule will cause American farmers to change the quantity or quality of food production to absorb the additional artificial costs imposed by the Final Rule. This will inevitably lead to restricted employment, which will detrimentally impact both domestic and foreign workers. Finally, the wage inflation caused by the Final Rule will invariably cause more farmers to abandon the H-2A program and assume the risks of hiring illegal labor.

13. For the preceding reasons, and as set forth in greater detail below, the DOL exceeded its statutory authority in issuing the Final Rule. Moreover, the Final Rule is arbitrary and capricious, an abuse of discretion, and not in accordance with the law. Finally, it is unsupported by substantial evidence, and does not properly consider its economic impact.

14. Implementation and enforcement of this rule will irreparably harm Plaintiffs, as agricultural employers, by severely restricting their ability to produce food, by hampering their ability to hire new foreign and domestic labor, and by undermining the working conditions of such labor.

15. For these reasons, and those set forth *infra*, Plaintiffs bring this lawsuit seeking a declaration that the Final Rule is invalid and a preliminary and permanent injunction of that rule. The purpose of this lawsuit is to protect and preserve the livelihood of agricultural farmers and

workers in Louisiana, and in particular those farmers and workers who produce sugar cane and other agricultural commodities.

JURISDICTION AND VENUE

16. The Court has jurisdiction to adjudicate this matter pursuant to 5 U.S.C. §§ 702−04, 28 U.S.C. §§ 1331, 1346, and 1361. Each of the claims asserted herein arise under federal law, including the Administrative Procedure Act, the Congressional Review Act, the Regulatory Flexibility Act, and the Immigration and Nationality Act. The Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 706, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201−02.

17. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1) because one or more Plaintiffs are residents of this judicial district or have members residing in and/or conducting agricultural operations in parishes within this district. Venue in this district is also appropriate because a substantial part of the events, omissions, or harm occurred and will occur in those parishes within this district.

THE PARTIES

18. Plaintiff Teche Vermilion Sugar Cane Growers' Association, Inc. ("Teche Vermilion") is a non-profit corporation incorporated in the State of Louisiana with a principal place of business in Iberia Parish. Teche Vermilion is comprised of eighty-eight (88) farmers. Teche Vermilion's members grow and harvest sugarcane and other agricultural products throughout the Western District of Louisiana, including in the Lafayette Division of said district. Due to a lack of available labor in the domestic market, Teche Vermilion organized as an agricultural association to utilize the H-2A Temporary Nonimmigrant Worker Visa Program to employ agricultural workers who can work as farmhands, tractor drivers, equipment operators, production workers and truck drivers. Teche Vermilion appears herein both on its own behalf and

as the representative of its individual farmers, all or most of whom utilize H-2A laborers during the relevant agricultural seasons to perform the many tasks required of a modern agricultural worker.

19. Plaintiff Cora Texas Growers & Harvesters Agricultural Association, Inc. ("Cora Texas") is a non-profit corporation incorporated in the State of Louisiana, whose membership is comprised of approximately thirty-five (35) farmers that harvest and produce sugarcane and other agricultural commodities in the State of Louisiana. For many years Cora Texas has utilized the H-2A Temporary Nonimmigrant Worker Visa Program to employ agricultural workers who can work as farmhands, tractor drivers, equipment operators, production workers and truck drivers. Cora Texas appears herein both on its own behalf and as the representative of its individual farmers, all or most of whom utilize H-2A laborers during the relevant agricultural seasons to perform the many tasks required of a modern agricultural worker. Each year, Cora Texas's member farms typically engage approximately 270 H-2A laborers to harvest sugarcane and haul the sugarcane from the farms to a mill located in White Castle, Louisiana. Cora Texas has obtained Temporary Employment Certification for the 2023 cultivation/planting season, and it will seek Temporary Employment Certification for the 2023 harvesting season as well.

20. Plaintiff American Sugar Cane League ("ASCL") is a non-profit organization incorporated in the State of Louisiana. Founded in 1922, ASCL is an agricultural association that represents the interests of Louisiana sugarcane growers and processors in the State of Louisiana through research, legislation, product promotion, education, and public relations. ASCL is also active in legislative matters on the state and national levels and is constantly monitoring the public policy decision-making process that affects the sugar industry. ASCL's legislative efforts help to ensure that American families have a safe, dependable and domestically produced supply of this

essential food ingredient. In January 2022, ASCL submitted a comment to the DOL regarding the November 2022 Notice of Proposed Rulemaking ("NPRM") that preceded the Final Rule.

21. Plaintiff Four Oaks Farm ("Four Oaks") is a Louisiana general partnership that operates a family-owned farm in the State of Louisiana. A farm operator that has supported Louisiana's agricultural industry for more than fifty-five (55) years, Four Oaks produces various agricultural products, including sugarcane, crawfish, rice, and soybeans in the State of Louisiana, including in the Western District of Louisiana. Because American workers have not been available for agricultural employment, Four Oaks has utilized the H-2A Temporary Nonimmigrant Worker Visa Program for many years. Each year, Four Oaks employs between sixteen (16) to eighteen (18) H-2A laborers to plant sugarcane, of which two (2) to four (4) are often asked to drive trucks on public roads to deliver equipment or supplies to plots being farmed, and to deliver sugarcane from the farm to a milling site located in Port Allen, Louisiana. Four Oaks also employs approximately fifteen (15) H-2A farm laborers to harvest its crawfish each year. These workers are responsible for, *inter alia*, cleaning and setting bait traps, fishing, and driving boats to deliver live crawfish to loading stations. Four Oaks has obtained Temporary Employment Certification for the 2023 cultivation/planting season, and it will seek Temporary Employment Certification for the 2023 harvesting season as well.

22. Plaintiff Gonsoulin Farms, LLC ("Gonsoulin Farms") is a limited liability company incorporated in the state of Louisiana with a principal place of business in Iberia Parish. Gonsoulin Farms is an approximately 3500-acre farm operation that primarily produces sugarcane in Iberia and St. Mary Parishes. Because American workers have not been available for employment, Gonsoulin Farms has utilized the H-2A Temporary Nonimmigrant Worker Visa Program for many years. Gonsoulin Farms normally engages approximately twenty-two (22) H-2A laborers to hand-

plant sugarcane in August of each year. Some of these workers also serve, as needed, as tractor drivers, equipment operators and production workers. Some of these workers may from time to time drive heavy trucks on public roads to deliver farm equipment or supplies to plots that are being farmed, or to deliver harvested crops to the mill, market or storage. Gonsoulin Farms has obtained Temporary Employment Certification for the 2023 cultivation/planting season, and it will seek Temporary Employment Certification for the 2023 harvesting season as well.

23. Plaintiff Townsend Brothers Farms, Inc. ("Townsend Brothers") is a business corporation incorporated in the state of Louisiana with a principal place of business in Avoyelles Parish. Townsend Brothers produces sugarcane and other agricultural commodities in Avoyelles Parish. Because American workers have not been available for employment, Townsend Brothers has utilized the H-2A Temporary Nonimmigrant Worker Visa Program for many years, employing H-2A laborers to hand-plant sugarcane and perform related tasks. Some of these workers also serve, as needed, as tractor drivers, equipment operators and production workers. Some of these workers may from time to time drive heavy trucks on public roads to deliver farm equipment or supplies to plots that are being farmed, or to deliver harvested crops to the mill, market or storage. Townsend Brothers Farms has obtained Temporary Employment Certification for the 2023 cultivation/planting season, and it will seek Temporary Employment Certification for the 2023 harvesting season as well.

24. Plaintiff John Earles is a natural person who resides in Avoyelles Parish, Louisiana and owns and operates farm enterprises that farm plots of land located in Avoyelles, Evangeline, Rapides, and St. Landry Parishes. These farm enterprises include Plaintiff Townsend Brothers and Triple E Farms, located in Bunkie, Louisiana. Because American workers have not been available for employment, Mr. Earles' farm enterprises have utilized the H-2A Temporary

Nonimmigrant Worker Visa Program for many years, employing H-2A laborers to hand-plant sugarcane and perform related tasks. Some of these workers also serve, as needed, as tractor drivers, equipment operators and production workers. Some of these workers may from time to time drive heavy trucks on public roads to deliver farm equipment or supplies to plots that are being farmed, or to deliver harvested crops to the mill, market or storage. Mr. Earles' farm enterprises have obtained Temporary Employment Certification for the 2023 cultivation/planting season and will seek Temporary Employment Certification for the 2023 harvesting season as well.

25. Defendants are appointed officials within the United States Department of Labor, who are all responsible for the issuance and implementation of the Final Rule. The DOL is responsible for drafting, promulgating, and implementing the Rule.

26. Defendant Julie Su is the Acting United States Secretary of Labor. Secretary Su oversees all operations of the Department, including the Employment and Training Administration and the Office of Foreign Labor Certification, which is responsible for issuing H-2A labor certifications. Secretary Su is sued in her official capacity.

27. Defendant Brent Parton is the Principal Deputy Assistant Secretary of Labor. Assistant Secretary Parton is the Acting Employment and Training Administrator of the Department of Labor. The Employment and Training Administration, through the Office of Foreign Labor Certification, issues labor certifications under the H-2A program. Assistant Secretary Parton is sued in his official capacity.

28. Defendant Brian Pasternak is the Administrator of the Department of Labor's Office of Foreign Labor Certification ("OFLC"). OFLC is the office within the Employment and Training Administration responsible for assigning AEWRs and issuing labor certifications. Administrator Pasternak is sued in his official capacity.

29. Defendant Jessica Looman is the acting Administrator of the Department's Wage and Hour Division. The Wage and Hour Division enforces the AEWR. Administrator Looman is sued in her official capacity to seek injunctive relief regarding potential future enforcement of the wage rates established under the Final Rule.

STATEMENT OF CLAIM AND ISSUES FOR REVIEW

The H-2A Program

30. In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"). IRCA made it illegal to hire foreign workers who were not granted legal authority to work within the United States. At the same time, Congress, recognizing the importance of foreign workers to the agricultural sector, divided the existing H-2 migrant guestworker program into separate programs for agricultural (H-2A) and non-agricultural (H-2B) workers.

31. The H-2A program enables U.S. employers to hire workers "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services." 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (the "H-2A" program). The H-2A guestworker labor program is administered and regulated by the DOL. The program certifies agricultural employers to hire foreign workers on a temporary basis.

32. For an employer to participate in the H-2A program, the Secretary of Labor must certify that (1) "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 (2) "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)(A) and (B) (emphasis added).

33. The sole purpose and effect of this statutory authorization is to empower the DOL to prevent wage disparities between American workers and foreign workers who perform similar work in the same geographic regions. "Even if desirable, the Secretary has no authority to set a wage rate on the basis of attractiveness to workers. [Her] authority is limited to making an economic determination of what rate must be paid all workers to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers." *Williams v. Usery*, 531 F.2d 304, 306 (5th Cir. 1976) (italics supplied).

34. Congress directed the Secretary of Labor to promulgate regulations implementing the H-2A program. 8 U.S.C. § 1101(a)(15)(H). Under these regulations, an employer seeking to hire H-2A workers must first recruit U.S. workers by submitting a job order to the state workforce agency, which sets out the material terms and qualifications for employment. 20 C.F.R. §§ 655.103(b), 650.121(a)(1); *see also* 8 U.S.C. § 1188(b)(4). The state workforce agency attempts to recruit domestic workers using the terms and conditions contained in the job order and refers interested applicants to the employer. 20 C.F.R. §§ 655.121(a)–(d). After posting the job order with the appropriate state workforce agency, a prospective H-2A employer must then file an Application for Temporary Employment Certification with the Department and must include a copy of its job order with its H-2A Application. 20 C.F.R. § 655.130(a).

35. Once an employer's H-2A application is approved and the employer hires foreign laborers, the employer must continue to provide its domestic and foreign workers the minimum wages and working conditions laid out in the regulations to ensure the employment of foreign workers does not adversely affect similarly employed American workers. 8 U.S.C. § 1188(a)(1)(B). Thus, as a practical matter the minimum wage rate set for foreign workers by the

DOL's H-2A regulations is the legal minimum wage for all similarly employed workers (foreign and domestic) on the same farm.

36. Congress has further clarified what foreign and domestic workers may be considered "similarly employed," for purposes of this regulatory scheme, by the enactment of provisions governing the Secretary of DOL's determination that there is a lack of comparable domestic applicants for the positions sought to be filled. Specifically, 8 U.S.C. § 1188(c)(3)(A)(ii) provides that "[i]n considering the question of whether a specific qualification is appropriate in a job offer, the Secretary shall apply the normal and accepted qualifications required by non-H–2A-employers in ***the same or comparable occupations and crops***." Thus, Congress has directed that domestic and foreign labor be compared, for purpose of the H-2A program, not merely within the agricultural sector, but at the level of individual crop(s) being farmed.

37. Congress has granted the DOL a range of sanctions with which to punish perceived noncompliance with the H-2A program. The Secretary of Labor "is authorized to take such actions, including imposing appropriate penalties and seeking appropriate injunctive relief and specific performance of contractual obligations, as may be necessary to assure employer compliance with terms and conditions of employment" of the H-2A program. 8 U.S.C. § 1188(g)(2).

The Recruitment of Foreign Labor to Work in Louisiana Agriculture

38. From a labor market perspective, domestic workers do not want to perform agricultural labor in the State of Louisiana. This is because the work often takes place in remote communities and locations and is of very limited duration, confined by natural circumstances to certain months of the year. The work is also difficult and intense in the limited time period when harvesting or production operations are being conducted. This is particularly true when the work at issue concerns the harvesting of sugar cane.

39. Furthermore, unlike jobs in other sectors of the economy, which have evolved to favor some degree of specialization, agricultural labor still requires workers with a variety of skill sets that can perform many different tasks in the course of a single day. Consequently, farmers favor workers they know they can rely upon and call upon to perform multiple tasks competently.

40. For this reason, many farm operators tend to hire the same H-2A workers year-after-year, and then in later years to hire the children or other relatives of those same workers. This practice allows the farmers to obtain a community of workers they know they can rely upon to perform a variety of tasks as needed and allows the temporary workers the ability to build and refine their skill sets over time and to further advance the interests of their families and local communities with the increased skills and money they bring home to those communities.

The Minimum Wage Rate Established by DOL for the H-2A Program in Louisiana

41. The DOL relies on what is known as the "Adverse Effect Wage Rate" ("AEWR") to establish a minimum wage for H-2A visa workers and U.S. workers performing similar work. H-2A employers are required to pay the highest of the AEWR, any collectively bargained wage rate, the state or federal minimum wage, or the state prevailing wage for that crop or occupation. 20 C.F.R. § 655.120.

42. As a practical matter, the AEWR provides the effective wage rate for most, if not all, jobs governed by the H-2A program in the agricultural sector of Louisiana.

43. For decades, the DOL has established the AEWR by relying on an annual survey of U.S. farmworker wages conducted by the USDA known as the Farm Labor Survey ("FLS").[3]

[3] In 2008, the DOL issued a rule that would have relied on the Bureau of Labor Statistics' Occupational Employment Wage Statistics survey data ("BLS" and "OEWS") instead of the FLS to establish AEWRs. DOL suspended that rule after roughly six months, and then in 2010 finally overturned this rule (at 75 Fed. Reg. 6896), stating in pertinent part:

> The selection of the Bureau of Labor Statistics (BLS) Occupational Employment Wage Survey (OES) in the 2008 Final Rule was based on an underestimation of its inadequacies. The OES agricultural wage

In the Final Rule, the DOL concedes that "[t]he FLS is the most comprehensive survey of wages paid by farmers and ranchers. The data collected in the FLS allows the Department to establish AEWRs using the most current agricultural wage rates." *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States*, Final Rule, 88 Fed. Reg. 12,760, 12,768 (Feb. 28, 2023).

44. FLS wage data is based on the average agricultural wages for field and livestock workers per state (and per region when states within the region do not report FLS data). As the DOL acknowledges in the Final Rule, the FLS is "the only comprehensive survey of wages paid by farmers and ranchers." *Adverse Effect Wage Rate Methodology for the Temporary Employment of H-2A Nonimmigrants in Non-Range Occupations in the United States*, 85 Fed. Reg. 70,445, 70,467 (Nov. 5, 2020) (emphasis added); *see also id.* at 70,468 ("[T]he FLS has been the only comprehensive survey of wages paid by farmers and ranchers that has enabled the Department to establish hourly rates of pay for H-2A opportunities.").

45. Thus, the FLS reflects wage rates in the agricultural sector, rather than wages paid to more specialized workers in other sectors of the American economy.

46. The DOL's Bureau of Labor Statistics also conducts its own survey, the semi-annual Occupational Employee Wage Statistics ("OEWS"). However, this survey, unlike the FLS, surveys occupations across the economy as a whole, and does not distinguish or focus upon job occupations in the agricultural sector.

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data has a number of significant shortcomings with respect to its accuracy as a measure of the wages of hired farm labor suitable to be used as the AEWR. Perhaps its most substantial shortcoming in this context is that the OES data does not include wages paid by farm employers. Data is not gathered directly from farmers but from non-farm establishments whose operations support farm production, rather than engage in farm production.

47. The FLS and OEWS both collect wage data using Standard Occupational Classification (SOC) codes. The SOC system is a nationwide framework for classifying and categorizing occupations in the United States. It is a tool used by federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. The SOC system is administered by the Office of Management and Budget with input from an SOC Policy Committee composed of representatives of several federal agencies (including DOL).

48. The six SOC Codes as to which data is reported in the FLS cover the range of conventional agricultural employment, and include:

45-2041 – Graders and Sorters, Agricultural Products
45-2091 – Agricultural Equipment Operators
45-2092 – Farmworkers and Laborers, Crop, Nursery, and Greenhouse
45-2093 – Farmworkers, Farm, Ranch, and Aquacultural Animals
53-7064 – Packer and Packagers, Hand
45-2099 – Agricultural Workers, All other.

49. Before the Final Rule, the AEWR for sugarcane haulers, including those who drive heavy trucks on public roads to deliver crops, equipment and supplies during the seasons when such deliveries are required as part of the operation of the farm, was set under the SOC Code 45-2091 (Agricultural Equipment Operators). The tasks associated with this SOC Code (as determined and compiled by the OMB and SOC Policy Committee) expressly include "drive trucks to haul crops, supplies, tools, or farm workers." However, consistent with the nature of agricultural labor, this SOC includes a wide variety of other farm-based tasks unrelated to driving a truck.

50. SOC Code 45-2091 (Agricultural Equipment Operator) can be contrasted with SOC Code 53-3032 (Heavy and Tractor-Trailer Truck Drivers). SOC Code 53-3032 (as determined and compiled by the OMB and SOC Policy Committee) includes tasks exclusively related to the operation of a heavy vehicle over long distances and the management of a wide variety of cargo.

These tasks are unrelated to, and have no application in, the agricultural sector. Moreover, SOC 53-3032 requires a commercial driver's license which (as discussed *infra*) is not required for the driving of trucks hauling farm commodities, equipment, or supplies. In fact, the only SOC Code that expressly addresses the driving of trucks for farm-related purposes is SOC Code 45-2091 (Agricultural Equipment Operator).

51. The distinctive nature of the driving of heavy trucks on public roads to haul agricultural products, equipment, and supplies is further recognized by the Federal Motor Carrier Safety Administration of the Department of Transportation ("FMCSA"), the agency with primary jurisdiction over the use of commercial vehicles on public roads. The FMCSA has recognized the need to provide agricultural operations and drivers with flexibility in the transportation of agricultural commodities, livestock, farm supplies, and farm machinery due to the wide variety of time and weather sensitive planting, harvest, and livestock feeding activities in the United States. These flexibilities include 150 air-mile and farm truck exemptions, waivers, and other limited exemptions from the Commercial Drives License (CDL), interstate commerce, drivers' hours of service, and electronic logging device regulations applicable to other heavy commercial vehicles regulated by the FMCSA. *See, e.g.*, 49 C.F.R. §§ 383.3(f), 390.5, 390.39, 391.2, 391.67, 395.1(k).

52. The State of Louisiana has implemented this federal scheme by exempting drivers who use heavy trucks to deliver farm crops, equipment or supplies from the commercial driver's license requirement, as long as such driving occurs within 150 miles of the farm. La. R.S. 32:408(8)(b). This is the type of driving that the H-2A laborers hired by Plaintiffs or Plaintiffs' constituents may be called upon to perform, from time to time as needed.

The Final Rule is Illegal and Unlawfully Alters the AEWR Methodology

53. The Final Rule unlawfully changes the methodology for calculating the AEWR for H-2A workers, including those that may drive a truck. Specifically, the Final Rule requires the DOL to determine the AEWR for "non-range"[4] agricultural occupations (farm jobs, which includes trucking and hauling jobs) using the OEWS survey when FLS data is unavailable.

54. Under the Final Rule, the DOL calculates the AEWR for agricultural occupations falling within six traditional SOCs by relying on reports from the Farm Labor Survey. 20 C.F.R. § 655.120(b)(1)(i). For any occupation that falls outside of the six traditional SOCs, the DOL relies on data reported by the "OEWS" survey conducted by the Bureau of Labor Statistics. Importantly, the OEWS survey is not reflective of agricultural wages. 20 C.F.R. § 655.120(b)(1)(ii).

55. Moreover, the Final Rule provides, in a situation where an occupation has a combination of duties encompassed by two or more distinct occupational classifications subject to different AEWRs (e.g., a field and livestock worker and an SOC occupation not encompassed in the field and livestock worker occupational group), the DOL will assign the highest AEWR among all applicable occupational classifications. 20 C.F.R. § 655.120(b)(5). Therefore, even where agricultural work predominates, the higher wage rate applicable to non-agricultural workers will apply to agricultural workers with combined duties.

56. The most salient example of the harsh and unreasonable effect of the Final Rule can be gleaned from a consideration of the Final Rule's impact on the use of H-2A workers to drive trucks to haul crops, equipment, or supplies. As set forth *supra*, the SOC classification

[4] Certain "range" positions, like shepherding, are addressed by a separate set of rule and regulations because such jobs have unique time and housing requirements. The Final Rule and this complain address only "non-range" jobs, *i.e.*, those associated with the harvesting of crops and animal husbandry practiced on a farm and not on a "range."

system (administered by the OMB and SOC Policy Committee), the United States Department of Transportation, and the Louisiana Legislature all recognize that such truck driving is a component of the (seasonal) agricultural sector that is distinct from, and not analogous to, the (perennial) commercial long-haul truck driving sector. These federal and state authorities explicitly and/or implicitly recognize that truck driving is only one of many tasks, most of which are unrelated to operation of the truck, that an Agricultural Equipment Operator (SOC Code 45-2091) is expected to perform, and that burdening an agricultural heavy truck drive with the requirements imposed upon other commercial heavy truck drivers is both unwarranted and unnecessary.

57. However, the DOL, through the Final Rule, has unilaterally determined that any H-2A worker who at any time drives a heavy truck on a public road should be re-classified as a Heavy and Tractor-Trailer Truck Driver (SOC 53-3032), and paid wages commensurate with that position. Under the law and rules applicable to the H-2A Program, this wage inflation extends to all domestic workers employed by the same farmer who get behind the wheel of a heavy truck.

58. In reaching this conclusion, DOL has disregarded entirely the basic fact that the agricultural worker is a generalist, not a specialist, and thus is called upon to perform many different tasks in the course of a given day. Moreover, even when a particular laborer's primary occupation may be to drive a farm truck, DOL has ignored the manifold legal and factual differences between an agricultural and non-agricultural truck driver, *i.e.*, the differences between SOC Code 45-2091 (Agricultural Equipment Operator) and SOC Code 53-3032 (Heavy and Tractor-Trailer Truck Drivers).

59. DOL's approach distorts the developed meanings of the SOC Classifications, neglects the rules and practices of other federal agencies and state legislatures, and neglects entirely the customs and practices of the very industry the H-2A program is designed to service.

The Final Rule does not reflect any reasoned attempt to protect the wages of domestic workers from foreign competitors for similar employment (the purpose of the AEWR); indeed, the Final Rule eschews the only survey that provides reliable information about ***agricultural*** labor. In short, the Final Rule reflects a bureaucratic effort by statisticians unfamiliar with farming to obtain an impermissible policy objective, *i.e.*, the artificial inflation of the wages of all farm workers.

60. The impact of the Final Rule is particularly harsh when the circumstances of Louisiana agriculture are considered. Many Louisiana agricultural employers seek DOL certification to bring in foreign workers to harvest produce sugarcane, rice, crawfish, nursery products and other agricultural commodities. Before and during the harvesting of sugarcane (typically from late September to early January), farm employees must drive heavy trucks on public roads to haul equipment and supplies to the various plots they farm. After the sugarcane is harvested, it must be quickly hauled a short distance (less than 150 air miles from the farm, as specified by the FMCSA and State of Louisiana) to a mill for processing. This means that many H-2A laborers will, at some point during their seasonal employment, get behind the wheel of a heavy truck, and by that action become entitled to the same wages paid a long-haul trucker under the Final Rule.

61. Under the Final Rule, these types of H-2A workers will be re-classified as Heavy and Tractor-Trailer Truck Drivers. Because there is no wage data for this occupation under the FLS (because it is not an agricultural job), the DOL will use the wage data compiled under the OEWS survey to determine the AEWR for such workers. Under the AEWR required by the Final Rule, Plaintiffs and other agricultural employers will be required to pay these workers the Louisiana wage (as determined by the OEWR) for Heavy and Tractor-Trailer Truck Drivers, or approximately $25 per hour. This wage is nearly double that paid to a worker classified under the

conventional agricultural labor classifications. These new Heavy and Tractor-Trailer Truck Driver wages are not representative of wages, now or at any time before, in the agricultural sector in Louisiana.

62. This is an unreasonable and unjust result, because sugarcane hauling is vastly different in nature than the work performed by commercial truck drivers who drive long distances to transport goods throughout the State of Louisiana and across state lines. The agricultural hauler and the long-haul trucker are not "similarly employed" within the meaning of the statute.

63. The DOL has failed to justify its departure from reliance on FLS wage data and its new practice of re-classifying occupations to reflect the highest paid SOC that corresponds to any task performed by the H-2A laborer. The Final Rule will cause a very limited number of H-2A occupations to be paid wages akin to those that H-2B workers earn while performing non-agricultural duties broadly similar to their domestic counterparts. But using OEWS wage data is inappropriate in the agricultural context because the work is not identical to H-2B labor. In its preamble to the 2010 Final Rule, the DOL acknowledged this concern, explaining:

> The 2008 Final Rule's definition was problematic because it allowed a farmer to employ both H-2A workers and H-2B workers to perform identical work, so long as the H-2A workers and the H-2B workers were employed in different locations. Congress clearly intended to create two separate programs: H-2A for agricultural work and H-2B for other, nonagricultural work. Compare 8 U.S.C. 1101(a)(15)(H)(ii)(a) and 8 U.S.C. 1101(a)(15)(H)(ii)(b). A regulation that allows H-2A workers and H-2B workers to perform the same activity is inconsistent with this Congressional intent.

75 F.R. 6888 (Feb. 12, 2010).

64. The DOL has completely disregarded its previous concerns regarding the use of OEWS data, including its correct observation that such a use is inconsistent with Congress's intent, and now resorts to using non-agricultural wages to establish AEWRs under the H-2A program.

65. This portion of the nation's food supply chain depends on workers who are willing and able to accept seasonal employment for very short durations of time. Sugarcane producers use 18-wheelers to transport sugarcane to mill and supplies and heavy equipment around the farm, and, like every other aspect of the production of sugarcane, this work is usually performed by H-2A laborers.

66. It is appropriate that the DOL defer to the FLS when assigning wage rates for agricultural truck drivers because wage data from that data source has been reliable and is a measure that could establish wages that comply with the Immigration and Nationality Act. By contrast, relying on OEWS data to assign AEWRs for sugarcane haulers will result in wages set at levels above those necessary to guard against adverse effect. Thus, the Final Rule irreparably harms sugarcane producers by increasing the wage rate for H-2A sugarcane haulers who engage in harvesting work.

67. The Final Rule uses unreliable surveys to impose wages on seasonal agricultural workers based on the earnings rate of non-agricultural, year-round workers who are not "similarly employed." The DOL has violated its statutory mandate by issuing an arbitrary and capricious Final Rule that fails to protect "similarly employed" U.S. workers from wage depression.

68. In issuing the Final Rule, the Secretary of Labor exceeded her limited statutory mandate to protect the wages of "similarly employed" American agricultural workers. 8 U.S.C. § 1188(a)(1)(A) and (B); *see* 5 U.S.C. § 706(2)(C) (authorizing review of an agency action taken "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[…]"). No "similarly employed" American agricultural workers were negatively impacted by the wage rates that existed prior to promulgation of the Final Rule.

69. Further, the Final Rule violates the Administrative Procedure Act as an "arbitrary and capricious" agency action, unsupported by substantial evidence, because the DOL has failed to offer a reasoned explanation for the need to change the methodology for calculating AEWRs in a manner that exceeds congressional authority. 5 U.S.C. § 706(2)(A), (E); *see also United Farm Workers, et al. v. U.S. Dep't of Labor, et al.*, 598 F. Supp. 3d 878 (E.D. Cal. 2022) (enjoining the DOL from implementing its proposed rule to rely on OEWS data to establish the AEWR for field and livestock workers, in part, because the DOL failed to offer a reasoned explanation for its departure from its use of the FLS).

70. The Final Rule violates the Regulatory Flexibility Act because the DOL made no attempt to obtain data that might permit it to consider the economic impact of the Final Rule, and furthermore failed to consider "significant alternatives" to the methodology established under the Final Rule, despite receiving numerous comments to the NPRM preceding the Final Rule (including a comment from Plaintiff ASCL) suggesting more workable alternatives. *See* 5 U.S.C. § 601, *et seq.*

71. The Final Rule also violates the Congressional Review Act because the DOL failed to seek congressional review at least sixty (60) days prior to the effective date of the agency action, even though the Final Rule is estimated to have an economic impact of greater than $100 million. 5 U.S.C. § 801.

72. The DOL fell short of its statutory mandate to administer this government program in a manner that properly balances the varied interests of U.S. agricultural workers, agricultural employers, and the American workforce at-large.

73. The Department's justification for the need for additional regulation does not include fair consideration of the adverse impact upon farm employers generally, nor does the

Department's explanation of the alleged need for rulemaking consider the interests of Louisiana sugarcane growers and/or agricultural employers specifically. Additionally, the Department has not considered the impact that potential food costs and inflation may have on American citizens.

74. Plaintiffs respectfully request that the Court enjoin the Final Rule and the current AEWR methodology established thereunder to avoid the irreparable harm that Plaintiffs will suffer as a direct result of the Final Rule's violation of the Immigration and Nationality Act and the Administrative Procedures Act.

PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE HARM UNDER THE FINAL RULE

75. The Final Rule constitutes an unlawful agency action that will result in immediate and irreparable harm to a critical sector of the national economy. Food costs are highly sensitive to wage modifications. When the federal government modifies minimum wage rates by increasing mandatory pay due to agricultural employees (as well as employees who work in occupations ancillary to agriculture), those cost increases must either be absorbed by producers or passed onto consumers.

76. Sugar production is a significant economic contributor in Louisiana. A Louisiana sugarcane harvest traditionally generates an economic impact in excess of approximately $3 billion, annually. Food costs are highly sensitive to wage modifications. When the federal government modifies minimum wage rates by increasing mandatory pay due to agricultural employees (as well as employees who work in occupations ancillary to agriculture), those cost increases must either be absorbed by producers or passed onto consumers.

77. Sugar cane harvesting is extremely time-sensitive and labor-intensive. The agricultural work is completed in an approximately four (4)-month period of time and operates on

a 24-hour daily cycle. This agricultural work is best completed by laborers with the skill, know-how and dexterity required to harvest and haul sugarcane before it spoils in the field.

78. The Final Rule fails to consider that harvesting and hauling workers can only be employed for four (4) months in any given year. This is why harvesting and hauling workers are different than truck drivers who are employed year-round and provide services to various vendors, none of which are private associations organized to support the American food supply chain.

79. The Final Rule fails to consider that sugarcane harvesting must always be accompanied by real-time hauling because sugarcane can never remain grounded after it is cut from the stalk. Sugarcane must remain in continuous motion until it is fully processed at a milling site. Because agricultural harvesting and hauling work operate in tandem, this work cannot be appropriately classified as non-agricultural due to the highly perishable nature of sugarcane.

80. The Final Rule materially and irreparably harms Louisiana sugarcane farms because it requires them to pay wages that are artificially inflated and not representative of the agricultural wages that actually do and should apply in the metropolitan statistical area.

81. The harmful effects of the Final Rule are not speculative by any means. Annually in Louisiana, approximately 15,500,000 tons of sugarcane are harvested for sugar on roughly 481,435 acres. An additional 30,730 acres are harvested for seed cane, with an additional 128,000 acres remaining fallow for future crops. If the wage rate for sugarcane laborers who occasionally drive a heavy truck increases from $13.67 per hour to approximately $25 per hour under the DOL's proposed methodology, then the increased cost burden to Louisiana's sugarcane growers would be approximately $46,938,022.29 in straight-pay time alone.

82. Louisiana sugarcane farmers only have a limited number of jobs that the Employment and Training Administration (ETA) will likely argue fall outside the six farm and

livestock workers (combined) SOCs. Intra-farm competition for such jobs will result in labor shortages in the agricultural industry and will likely incite unrest and tensions among agricultural labor communities to the disadvantage of American consumers.

83. While Congress intended to create two distinct programs (H-2A agricultural and H-2B non-agricultural), Congress's intent was not that workers in the H-2A agricultural program could never perform any other work. The Final Rule is likely to have the unintended effect of eliminating or reducing many occupations or duties entirely from the H-2A program.

84. As a direct result of the Final Rule, growers will be unable to afford the increased cost of labor to service their farming needs, and they will be forced to alter their hiring practices by eliminating certain duties, bifurcating the duties among workers, or reducing the number of workers they hire in certain occupations that do not fall squarely within the field and livestock worker SOC.

85. Further, agricultural employers will have considerably less flexibility to hire workers to perform with combined job duties due to the increased wage rates for such workers as established under the Final Rule. For example, instead of hiring twenty (20) workers to perform both harvesting and hauling duties, Plaintiffs may find it will be more cost efficient to hire ten (10) workers to perform only harvesting duties and ten (10) workers to perform the hauling duties. But this hiring practice would be infeasible and much less efficient than hiring one set of workers that can accomplish both tasks in tandem. Moreover, this altered hiring practice may be impossible to accomplish in scenarios where the Final Rule forces the de-coupling of harvesting and hauling duties, resulting in a loss of revenue to the employer, the cost of which can neither be absorbed by farmers nor passed onto consumers.

86. Under the Final Rule, Plaintiffs collectively will incur a substantial increase in labor costs for this year, as opposed to 2022.

CLAIMS

COUNT I

The Final Rule Violates the Administrative Procedure Act; The DOL Has Exceeded Its Statutory Mandate

87. Plaintiffs incorporate by reference the preceding allegations.

88. The Immigration and Nationality Act does not prescribe a rigid methodology for the DOL to prevent "adverse effect." However, the INA offers unequivocal clarity on the scope of the labor and workers that the Secretary of Labor is required to protect. To be sure, labor certifications must be based on a specific demand for "the labor or services in the petition", 8 U.S.C. § 1188(a)(1)(A), and the Secretary of Labor must certify that "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)(B) (emphasis added). Moreover, 8 U.S.C. § 1188(c)(3)(A)(ii) mandates that, in implementing the H-2A program, "[i]n considering the question of whether a specific qualification is appropriate in a job offer, the Secretary [of the DOL] ***shall*** apply the normal and accepted qualifications required by non-H–2A-employers in ***the same or comparable occupations and crops***."

89. The Final Rule improperly conflates seasonal agricultural wages with wages applicable to permanent non-agricultural workers and establishes a wage methodology that exceeds the adverse effect limitation imposed by statute. In promulgating this rule, the DOL, through the actions of Defendants, has violated its statutory mandate by adjusting H-2A wages based on the wages of workers in the United States who are not "similarly employed" and who perform "labor or services" that are vastly different than the duties listed in any H-2A "petition."

90. Because each state workforce agency makes the initial assignment of the applicable SOC (and the corresponding AEWR), the process of assigning wage rates to H-2A employees under the Final Rule will likely result in inconsistent wage rate assignments that subject Plaintiffs and other farm operations to the risk of sanction by the DOL.

91. Therefore, the DOL has acted in excess of its statutory authority under the INA, which violates the Administrative Procedure Act. 5 U.S.C. § 706(2)(c). As the Fifth Circuit has stated, that "authority is limited to making an economic determination of what rate must be paid all workers to neutralize any 'adverse effect' resultant from the influx of temporary foreign workers." *Williams*, 531 F.2d at 306.

92. Because the DOL exceeded its statutory authority in implementing the Final Rule, the Final Rule should be vacated accordingly pursuant to Section 706(2)(C) of the APA. Defendants must be enjoined, preliminarily and permanently, from implementing or otherwise enforcing any part of the Final Rule.

COUNT II

The Final Rule Violates the APA
The Final Rule is Arbitrary and Capricious, an Abuse of Discretion, and/or Otherwise Not in Accordance with the Law

93. Plaintiffs incorporate by reference the preceding allegations.

94. The APA authorizes courts to set aside any agency rule that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

95. The DOL disregarded numerous comments to its NPRM from industry stakeholders regarding the use of OEWS data to set wages. The DOL declined to consider several commenters sound proposal to adopt a "primary duty" test to assign H-2A wages to workers with combined duties based on which of the workers' duties predominates.

96. While the Final Rule applies, on its face, to labor certifications applied for on or after March 30, 2023, the Final Rule establishes that H-2A applications filed or certified before the effective date of the Final Rule will be subject to OEWS-based wages if they were assigned a SOC code outside the six traditional agricultural SOC codes. This change will take effect when the Bureau of Labor Statistics publishes new OEWS data on July 1, 2023.

97. As with the Final Rule's methodological changes to AEWR calculations, retroactive application of the Final Rule constitutes yet another arbitrary and capricious agency action.

98. The Final Rule does not reasonably explain why the DOL has decided to abandon its reliance on what the DOL has long recognized as the best available source of agricultural wages (the FLS) to rely on the OEWS, which contains wage data for non-agricultural occupations.

99. Under the APA, agency rulemaking should be based solely on well-reasoned, legitimate policy needs that fall within the guidelines specified by Congress. The DOL has failed to articulate a reasoned explanation for its conclusion that the FLS is incapable of reporting appropriate wage data.

100. The Final Rule lends considerable discussion to the DOL's duties to prevent adverse effects to the wages of U.S. workers. However, the Final Rule does not describe any "adverse effects" to domestic workers that might justify the methodological changes established under the Final Rule.

101. The Final Rule is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, and should be vacated pursuant to 5 U.S.C. § 706(2)(A). The Court should preliminarily and permanently enjoin Defendants from enforcing any part of the Final Rule.

COUNT III

The Final Rule Violates the Congressional Review Act, 5 U.S.C. § 801 *et seq*.

102. Plaintiffs incorporate by reference the preceding allegations.

103. The Congressional Review Act requires that any agency action with an economic impact of greater than $100 million to undergo congressional review at least sixty (60) days prior to the effective date of the agency action. The Final Rule violates the Congressional Review Act because the DOL did not seek congressional approval within sixty (60) effectuating the Final Rule. 5 U.S.C. § 801, *et seq.*

COUNT IV

The Final Rule Violates the Regulatory Flexibility Act (5 U.S.C. § 601, et seq.) ("RFA")

104. Plaintiffs incorporate by reference the preceding allegations.

105. The RFA was enacted in an effort to ameliorate the harsh impact of some federal rules and regulations on small businesses (referred to as "small entities" under the RFA). Thus, final agency rules must contain a "final regulatory flexibility analysis," which includes:

> a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

5 U.S.C. § 604(a)(5).

106. While the RFA does not require the agency to implement any specific substantive measures, it does impose upon the agency the requirement that it take a reasonable, good-faith effort to carry out the Act's mandate.

107. DOL has conceded it made no attempt to procure any data from which it could make the considerations required by the Act.

108. The Final Rule also fails to provide a meaningful comparative analysis of the new methodology established thereunder and the "significant alternatives" proposed by industry stakeholders in their official comments to the DOL's 2022 NPRM.

109. The DOL received several comments from industry stakeholders cautioning that reliance on OEWS data will disproportionately skew the AEWR by accounting for wage data that is neither industry-specific nor region-specific. Those commenters proposed that the DOL rely on OEWS wage data solely when the "primary duty" of a given position falls outside the parameters of the USDA's FLS.

110. Other commenters proposed that the DOL assign wage rates based on the actual amount of time spent performing a specific job duty. The Final Rule does not offer any empirical, or otherwise reasonable, explanation to support its rejection of this proposal.

111. The commenters critical of the Final Rule included the Small Business Administration, a separate federal agency within the same administration as DOL. On January 31, 2022, the Small Business Administration submitted a comment in which it stated it was "concerned that DOL has underestimated the economic impacts of this rule and lacks sufficient transparency about the likely compliance costs for small businesses." The Small Business Administration added that the "DOL's certification that the rule will not have a significant economic impact on a substantial number of small entities is improper and lacks an adequate factual basis." The Small Business Administration further called upon the DOL to comply with the RFA and consider alternative ways of accomplishing the objectives of the H-2A program that might minimize the economic impacts to small entities. The DOL ignored this comment, as it ignored the others.

112. The Small Business Administration's assessment was correct. The DOL did not conduct a reasonable, good-faith effort to carry out the RFA's mandate. The DOL made no good-

faith reasonable effort to procure or locate data that might permit it to assess the economic impact of the Final Rule, and furthermore failed to consider more reasonable alternatives that would minimize the Final Rule's impact on small entities while still achieving the statutory objectives. The DOL also ignored commenters' submissions regarding such reasonable alternatives.[5]

113. By failing to consider significant alternatives to the Final Rule, the DOL has violated the RFA. The Final Rule should be vacated and remanded to the DOL with instructions to perform the required analysis. Until such analysis is conducted, the DOL should be enjoined, preliminarily and permanently, from enforcing any part of the Final Rule.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Court issue Plaintiffs the following relief:

(a) A preliminary injunction, pending a merits decision, enjoining Defendants from:

(i) implementing or enforcing the Final Rule, 88 Fed. Reg. 12,760 (Feb. 28, 2023), codified at 20 C.F.R. § 655.120(b);

(ii) requiring any employer to pay any H-2A wage rate higher than the applicable AEWR published by the DOL at 87 Fed. Reg. 77,142 (Dec. 16, 2022); and

(iii) enforcing the payment of any wage rates arising the Final Rule against any employer;

(b) A preliminary injunction, pending a merits decision, directing Defendants to process H-2A applications using the AEWRs published on December 16, 2022 under the prior methodology set forth in the DOL's 2010 Rule;

(c) A declaratory judgment that the Final Rule and its methodology for calculating the AEWR are invalid;

(d) An order vacating the Final Rule, 88 Fed. Reg. 12,760 (Feb. 28, 2023), codified at 20 C.F.R. § 655.120(b), and permanently enjoining Defendants from implementation or enforcement of said Final Rule;

[5] A copy of this letter can be found at https://advocacy.sba.gov/wp-content/uploads/2022/01/Advocacy-Comment-Letter-H2A-Wage-Rule.pdf.

(e) An order awarding Plaintiffs their costs and expenses, including reasonable attorney's fees, under the Equal Access to Justice Act and all other applicable authorities authorizing such relief; and

(f) Any such further and additional relief as the Court deems just and proper.

Dated: June 20, 2023.

Respectfully submitted,

/s/ J. Walter Green

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