UNITED STATES DISTRICT COURT
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. 6:23-cv-00831** **JUDGE ROBERT R. SUMMERHAYS** **MAGISTRATE JUDGE CAROL B. WHITEHURST**

V.

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.

PLAINTIFFS' APPLICATION
FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65.1, Plaintiffs Tech Vermilion Sugar Cane Growers Association, Inc. ("Teche Vermilion"), Cora Texas Growers and Harvesters Agricultural Association, Inc. ("Cora Texas"), American Sugar Cane League ("ASCL"), Four Oaks Farm, GP ("Four Oaks"), Gonsoulin Farms, LLC ("Gonsoulin"), Townsend Brothers Farm, Inc. ("Townsend Brothers"), and John Earles ("Earles") (collectively "Plaintiffs"), file this memorandum in support of their motion for a preliminary injunction (the "Motion").

Plaintiffs are asking the Court to act with all due haste[1] and enter a preliminary injunction enjoining the United States Department of Labor ("DOL")[2] from enforcing a final rule "revising the methodology by which it determines the hourly Adverse Effect Wage Rates for non-range[3] occupations," published at 88 Fed. Reg. 12,760 (Feb. 28, 2023)[4] and codified at 20 C.F.R. § 655.120(b) (the "Final Rule"). Filed contemporaneously herewith are a memorandum that lays out Plaintiffs' legal arguments in greater detail and supporting exhibits.

1.

For nearly forty years and through five different presidential administrations, DOL has interpreted and applied key provisions of immigration law applicable to temporary, foreign agricultural workers consistently and in a manner that does not lead to any absurd consequences. However, in the Final Rule issued on February 28, 2023 DOL seeks to apply a novel interpretation of applicable law with no sufficient reasons to justify such a major change. The new reading provided by the DOL ignores clear and unambiguous Congressional commands that recognize the distinctions between agriculture labor and non-agriculture labor. Even another agency in the Executive Branch has criticized DOL's new interpretation of immigration law as lacking transparency and an adequate factual basis. *See* Exhibit K. DOL's interpretation ignores clear and unambiguous law passed by Congress, disregards decades of administrative interpretation of the law, and leads to absurd results.

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[1] Plaintiffs have separately filed a request for expedited consideration of this motion.

[2] The named defendants are appointed officials of DOL and its Office of Foreign Labor Certification ("OFLC") sued in their official capacity. Official capacity lawsuits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361, 116 L.Ed.2d 301 (1991) (internal quotation marks and citations omitted). Thus, the primary defendant in this case is DOL/OFLC.

[3] 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."

[4] *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 (Feb. 28, 2023). For the Court's convenience, a copy of this Federal Register entry is attached hereto as Exhibit J.

2.

This dispute arises out of the H-2A program, which was established by Congress in 1986 for the express purpose of permitting American farmers to hire foreign workers on a temporary basis. This program is specifically limited to the provision of "agricultural wages and services;" it does not involve non-agricultural labor. *See* 8 U.S.C. §§ 1101(15)(H)(ii)(A) and 1188.

3.

Congress was concerned, however, that an influx of foreign agricultural laborers might deprive domestic agricultural workers of gainful employment. Thus, Congress specified that before an H-2A worker could be employed, DOL has to 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) & (B).

4.

DOL enforces Congress's mandate that the employment of H-2A workers "not adversely affect the wages and working conditions" of "similarly employed" American workers by what is known as the "Adverse Effect Wage Rate" ("AEWR"). The AEWR establishes a minimum wage for H-2A visa workers and domestic workers performing the same work for the same employer.[5]

5.

For decades, DOL has established the AEWR by relying on an annual survey of American farmworker wages conducted by the USDA known as the Farm Labor Survey ("FLS"). FLS wage

[5] 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. As a practical matter, the AEWR provides the effective wage rate for jobs governed by the H-2A program in Louisiana.

data is based on the average agricultural wages for agricultural workers per state. In the past, DOL has repeatedly affirmed that the FLS is the best source of information for wages paid for the "agricultural labor and services" addressed by the H-2A program.

6.

Under the Final Rule, however, DOL has determined that it will began paying agricultural laborers at the wage rates reflected by non-agricultural work performed in other sectors of the American economy. Thus, for example, under the Final Rule agricultural laborers employed by a farm that utilizes H-2A labor will have to pay its workers who may be called upon the drive a heavy truck from time to time the same wages as a commercial long-haul trucker is paid.

7.

Under prior iterations of the AEWR, such workers would have been paid the rate applicable to such workers as determined by the FLS survey. In 2022 and 2023, this rate was $13.67 per hour. Under the Final Rule, employers are required to increase the wages of such workers to the wage rates earned by long-haul truckers as determined by the DOL's Bureau of Labor Statistics own survey, the Occupational Employee Wage Statistics ("OEWS"). In 2022, this rate was $22.60 per hour, and has been raised to $23.16 as of July 1, 2023.

8.

There has been no change in the work performed by agricultural laborers. Nonetheless, by bureaucratic fiat the wages of these workers have increased by roughly 40%. These wages are not representative of wages, now or at any time before, in the agricultural sector in Louisiana.

9.

This increase comes solely at the expense of the agricultural employers, including Plaintiffs, who must pay these inflated wages. If the Final Rule is not enjoined by this Court,

Plaintiffs will have no option put to comply with the Final Rule, as they are reliant upon H-2A labor due to a lack of domestic workers willing and able to perform agricultural labor. And, once paid, these inflated wages will not be recoverable, as DOL enjoys sovereign immunity from any claim for monetary damages.

10.

By issuing the Final Rule, DOL has exceeded its statutory authority. Congress has provided DOL authority only to prevent adverse effects upon "similarly employed" American workers. Workers in the agricultural sector are not "similarly employed" to workers in other sectors of the American economy. Agricultural work is seasonal and exclusively rural in nature, while jobs in other economic sectors tend to be annual or perennial and clustered in urban centers. Moreover, because agricultural work is driven by nature (the seasons and plant and animal biology) rather than the demands of a human marketplace, the limited period of work is more intensive than in other economic sectors.

11.

This is particularly true in the area of sugarcane farming in the State of Louisiana. Sugarcane is the primary crop produced by all farmer Plaintiffs. Sugarcane farming is an ongoing series of events. Because of this, it is important for farm labor to be able to multi-task and underscores the need for workers to perform various tasks essential to a successful harvest, including switching from operating harvesting equipment to hauling crops to the mill before returning to other tasks at the farm. Moreover, because harvested sugarcane quickly spoils, it is essential that harvested sugarcane be immediately gathered, loaded, and transported to market. This means that during harvest season, farm laborers typically work nine (9) hour days, seven days a week, and may be called upon to perform any task at any time, depending upon the need.

12.

Thus, a farm laborer may be asked to drive a heavy truck to drive harvested sugarcane to the mill or may be asked to drive a heavy truck at other times to deliver supplies or equipment to other plots being farmed by the farmer. The sight of a heavy truck hauling harvested sugar cane, or fertilizer, water, or other supplies, is not an unusual one in Louisiana during harvest season.

13.

Driving a truck for agricultural purposes, which involves repeat trips in a geographically limited rural environment, is nothing like long-haul commercial trucking. This has been recognized by the laws and regulations issued by the federal and state agencies with primary jurisdiction over commercial truck driving on public roads, which treat agricultural driving much differently from other forms of truck driving. Agricultural truck drivers, for example, are not required to have a commercial driver's license, and benefit from numerous other exemptions from the requirements imposed upon long-haul commercial truckers under federal and state law.

14.

The distinction between agricultural truck driving and long-haul commercial trucking has also been recognized by the Standard Occupation Classification ("SOC") system, which is an integral part of the gathering and analysis of employment data by federal agencies. This system, which is overseen by the Office of Management and Budget with input from representatives from various federal agencies (including DOL) assigns the uniquely agricultural task "drive trucks to haul crops, supplies, tools, or farm workers" to SOC Code 45-2091 (Agricultural Equipment Operators), rather than the code associated with long-haul commercial trucking, SOC Code 53-3032 (Heavy and Tractor-Trailer Truck Drivers).

15.

An agricultural laborer who drives a heavy truck from time to time is not "similarly employed" to a long-haul commercial trucker. Thus, DOL has exceeded its statutory authority by decreeing that the former should be paid the same wages as the latter.

16.

The Final Rule is thus invalid, as an agency action beyond the agency's statutory authority, and thus in violation of 5 U.S.C. § 706(2)(C).

17.

DOL has also failed to adequately explain its decision to change from its long-standing reliance upon FLS surveys (and the agricultural SOC codes for which data is collected by that survey) to a reliance upon OEWS surveys (which address non-agricultural work) in determining the AEWR. While DOL pays lip service to a continuing reliance on the FLS, this is refuted by the new DOL policy of reclassifying workers to a non-agricultural SOC code for purposes of wage determination. Because wage rates for non-agricultural jobs are not surveyed by the FLS, this means as a practical matter that many agricultural laborers (such as truck drivers) will now be paid non-agricultural wage rates dictated by OEWS survey data.

18.

Moreover, regardless of explanation, the substance of the Final Rule is simply unreasonable, arbitrary and capricious, and an abuse of discretion. There is no data, for example, that supports paying agricultural truck drivers (whose work is seasonal, rural, involves tasks unrelated to driving a truck, and not subject to commercial driver's license and similar requirements) the same wages as long-haul commercial truckers (whose work is perennial, largely urban, specialized, and highly regulated). The competent federal and state regulatory agencies,

and the SOC classification system, expressly recognize that these two modes of truck driving are distinct and have different requirements. DOL not only has not but cannot explain its failure to take any of these clear legal and factual distinctions into account before conflating the wage rates of two very different occupations.

19.

The Final Rule is thus invalid also because it is unreasonable, arbitrary, capricious, and constitutes an abuse of discretion, in violation of 5 U.S.C. § 706(2)(A).

20.

Moreover, DOL, in issuing the Final Rule, has also violated the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. The Final Rule is not certified by the "head of the agency," as required by the Act, and moreover lacks a sufficient factual basis for its conclusion that a substantial number of "small entities" will not suffer a significant economic impact from the Final Rule. In presenting this challenge, Plaintiffs are echoing the conclusions of the Small Business Administration, which reached the same conclusions as Plaintiffs (and hopefully this Court) regarding the inadequacy of DOL's effort to comply with the Act. Exhibit K.

21.

Plaintiffs observe that, despite concluding that there would be no "significant" impact on a "substantial number" of small entities, DOL also concluded that "[o]f small entities with wage impacts, their average wage impact is $149,541." 88 Fed. Reg. at 12,800. As per the declarations attached hereto, Plaintiffs will all suffer wage impacts of this amount or greater. Exhibits A-F; *see also* Exhibits H, I. Consequently, Plaintiffs here are suing to avert the very harm adverted to by DOL's own limited analysis.

22.

For the reasons set forth herein and in the accompanying memorandum in support, Plaintiffs are entitled to the issuance of a preliminary injunction.

23.

While the Final Rule has nationwide effect, Plaintiffs are suing in this case to prevent harm to farm operations in the State of Louisiana, and in particular to avert the hugely negative impact of the Final Rule on sugarcane farming, which due to the necessity of quick transport from field to mill requires that a large number of laborers drive trucks during harvest season. Accordingly, for this purpose, and given the premises of this motion, Plaintiffs seek an injunction limited in scope to H-2A employers within the State of Louisiana.

24.

Federal Rule of Civil Procedure 65(c) provides that a preliminary injunction can issue "only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any part found to have been wrongfully enjoined or restrained." Because the Defendants will suffer no financial loss or other economic harm from the prayed-for injunction, no bond or other security is required in this case.

SCOPE OF RELIEF REQUESTED

25.

Plaintiffs' goal in bringing this application is, pending final adjudication of its claims, to arrest implementation of the Final Rule, which Plaintiffs assert is invalid and illegal, and restore the AEWR formula methodology that has operated on a nearly uninterrupted basis for decades. Accordingly, Plaintiffs seek the following specific relief via this motion:

(a) an order enjoining DOL from enforcing, within the State of Louisiana, the Final Rule codified in 20 C.F.R. § 655.120(b);

(b) an order enjoining DOL, including without limitation the Office of Foreign Labor Certification, from requiring employers to post or otherwise advertise H-2A job orders with wages other than the FLS-based AEWRs published by Defendants at 87 Fed. Reg. 77,142 (Dec. 16, 2022);

(c) an order enjoining DOL, including without limitation its Wage and Hour Division, from enforcing any requirement of H-2A employers to pay wage rates resulting from the Final Rule's methodology;

(d) an order requiring that DOL amend and reissue any H-2A certifications issued prior to the injunction order, so that such certification reflect and incorporate the other requirements of the Court's preliminary injunction; and

(e) granting Plaintiffs any further relief they may be due on the premises of this application for a preliminary injunction.

Dated: July 7, 2023

Respectfully submitted,

/s/ J. Walter Green

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CERTIFICATE OF SERVICE

I do hereby certify that on July 7, 2023, a copy of the foregoing Plaintiffs' Application for Preliminary Injunction was filed electronically with the Clerk of Court using the CM/ECF system, which will transmit a copy to all counsel of record. Moreover, due to the urgency of the relief sought, counsel for plaintiff also certifies that a copy was served via certified mail upon defendants' counsel, the United States Attorney for the Western District of Louisiana, and upon all defendants individually.

/s/ J. Walter Green
COUNSEL FOR PLAINTIFFS