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

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| INTERNATIONAL FRESH PRODUCE ASSOCIATION, *et al.*,<br><br>*Plaintiffs*,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF LABOR, *et al.*,<br><br>*Defendants*. | No. 1:24-cv-00309-HSO-BWR |

**MEMORANDUM OF LAW IN SUPPORT OF THE PRIVATE PLAINTIFFS' URGENT AND NECESSITOUS MOTION FOR A SECTION 705 STAY OR PRELIMINARY INJUNCTION**

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## INTRODUCTION

It is a fundamental precept of administrative law that a federal agency may not adopt rules or regulations that exceed the authority conferred by Congress. This case involves a plain violation of that precept. Equally plain are the irreparable harms that will be suffered if a stay is not entered under 5 U.S.C. § 705.

At issue here is the U.S. Department of Labor's (DOL) regulation titled *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 89 Fed. Reg. 33,898 (April 29, 2024) (the "Rule"). In a stunning regulatory overreach, DOL used its rulemaking power over ministerial aspects of the Nation's temporary agricultural worker program, known as the H-2A program, to adopt broad and wide-ranging labor rules applicable to all agricultural workers whose employers participate in the program. Not only is it impossible to read the Immigration and Nationality Act (INA) as conferring power on DOL to adopt general labor regulations like this, but the Rule largely mimics the substantive provisions of the National Labor Relations Act (NLRA)—which expressly exempts agricultural workers from its scope.

The Rule also trammels farmers' First Amendment rights. In the NLRA, Congress carefully balanced employer speech rights with the need to prohibit improper threats and coercion. *See Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (rejecting state efforts to silence employer views on unionization). But the Rule here drives a bulldozer over those carefully drawn lines, adopting content- and speaker-based speech restrictions that bar employers from engaging in a wide range of protected expression. The Rule is thus an especially troubling case where an agency has flouted both a statute *and* the Constitution.

Under these circumstances, a Section 705 stay of the Rule is plainly warranted. Under 5 U.S.C. § 705, the Court is authorized to "issue all necessary and appropriate process to postpone the effective date of an agency action . . . pending conclusion of the review proceedings." The irreparable harms here are manifest: Farms have already begun, or soon will begin, taking on the

irremediable costs of compliance, including disruptions to farm operations and chilling of speech. And the balance of hardships and public interest tilt decisively in favor of a stay—there is no public interest in enforcing an unlawful, unconstitutional regulation.

Although Plaintiffs welcome whatever relief the Court may enter, Fifth Circuit precedents suggest that a Section 705 stay of the Rule would be more appropriate than a preliminary injunction issued with only party-specific scope. "Nothing in the text of Section 705, nor of Section 706, suggests that either preliminary or ultimate relief under the APA [should] be [party] limited." *Career Colleges & Schools of Texas v. DOE*, 98 F.4th 220, 255 (5th Cir. 2024). On the contrary, "the scope of preliminary relief under Section 705 aligns with the scope of ultimate relief under Section 706, which is not party-restricted and allows a court to 'set aside' an unlawful agency action." *Id*. Consistent with the plain language of 5 U.S.C. §§ 705 and 706, the Court therefore should enter a judicial stay of the Rule, restoring national uniformity and preserving the status quo ante while judicial review proceeds.

## BACKGROUND

### A. The National Labor Relations Act

The National Labor Relations Act (NLRA) grants qualifying employees the right to "engage in collective bargaining free from employer interference." *NLRB v. Health Care & Retirement Corporation of America*, 511 U.S. 571, 572 (1994). To that end, the National Labor Relations Board (NLRB) is authorized to "prevent any person from engaging in any unfair labor practice." 29 U.S.C. § 160(a). An employer engages in an unfair labor practice when, among other things, he or she "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of" their rights to organization and collective bargaining. *Id.* § 158(a)(1). Employers also may not discriminate against their employees "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). The NLRB "has exclusive jurisdiction to prevent and remedy unfair labor practices by employers

and unions." *Hobbs v. Hawkins*, 968 F.2d 471, 478-479 (5th Cir. 1992).

The NLRA's protections ordinarily apply to "any employee." *Sure-Tan v. NLRB*, 467 U.S. 883, 891 (1984) (quoting 29 U.S.C. § 152(3)). But Congress carved out "specific exemptions" (*id.*) for a range of different workers, including as relevant here "agricultural laborers." 29 U.S.C. § 152(3). The agricultural laborer exemption reaches "farming in all its branches," including "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . performed by a farmer or on a farm." *Sweetlake Land & Oil Co. v. NLRB*, 334 F.2d 220, 221 (5th Cir. 1964) (quoting 29 U.S.C. § 203(f)).

**B. The H-2A visa program**

The INA, as amended, establishes a visa program to ensure that farmers have sufficient employees to help operate their farms during periods of temporary or seasonal need. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The H-2A program creates a visa classification for workers who reside in foreign countries but "com[e] temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature." *Id*. American farmers today struggle to find workers to harvest and process their crops. With the dwindling rural population and growing opportunities in urban centers away from the farm, they have come to depend on the H-2A program.

The U.S. Secretary of State, the U.S. Attorney General, the U.S. Department of Homeland Security, and DOL all have responsibilities for administering the H-2A program. For its part, DOL is assigned a narrow role: It must, as to each petitioning employer, certify that (A) there are not sufficient American workers able and qualified to do the work; and (B) employment of a foreign temporary worker will not adversely affect the wages and working conditions of workers in the United States similarly employed. 8 U.S.C. § 1188(a)(1). DOL also "may not issue a certification" if "[t]here is a strike or lockout in the course of a labor dispute" domestically, the employer has previously "violated a material term or condition of the labor certification," or the employer has not adequately recruited domestic workers. *Id*. § 1188(b).

Employers must "offer to provide benefits, wages and working conditions required pursuant to this section and regulations." 8 U.S.C. § 1188(c)(3)(B)(i). On that front, § 1188(b) requires that, in the absence of a state workers' compensation law, an employer must furnish H-2A workers with "insurance covering injury and disease arising out of and in the course of the worker's employment." *Id*. And Section 1188(c)(4) specifies that employers "shall furnish housing in accordance with regulations" and authorizes DOL to "issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." But Section 1188 is otherwise silent on the benefits and conditions that an employer must provide to H-2A migrant workers, and it says nothing about working conditions or benefits for non-H-2A agricultural workers. Neither § 1188 nor any other provision of the INA creates or contemplates the creation of rights to collective bargaining or other NLRA-like rights.

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

**C. The final Rule**

DOL published the Rule on April 29, 2024. It took effect on June 28, 2024, and applies to all H-2A applicants whose applications were filed after August 28, 2024. In substantial part, the Rule is an effective carbon copy of the NLRA's substantive requirements—except that it applies to many of the agricultural laborers exempted from the NLRA.

Under the Rule, employers participating in the H-2A program must allow agricultural workers to "engage[] in activities related to self-organization, including any effort to form, join, or assist a labor organization." 89 Fed. Reg. at 34062; *see also* 20 C.F.R. § 655.135(h)(2)(i). That is, the Rule providers agricultural workers—H-2A workers and *all others* employed by a farmer utilizing H-2A labor—a protected right to organize, notwithstanding the fact that the NLRA expressly carves out agricultural workers.

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

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

The Rule also prohibits H-2A employers from engaging in certain "unfair treatment" of any agricultural workers they employ. *See* 89 Fed. Reg. at 34062. Thus, H-2A employers must provide (and "abide by") assurances that they "will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against" any person who has exercised rights under the Rule. 89 Fed. Reg. 34062; 20 C.F.R. § 655.135(h)(1). And they must "not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against" any agricultural employee "because such person . . . has engaged in activities related to self-organization" or "other concerted activities for the purpose of mutual aid or protection relating to wages or working conditions." 89 Fed. Reg. at 34062, 34068; 20 C.F.R. § 655.135(h)(2)(i). This again sweeps in permanent resident and U.S.-citizen agricultural workers. 20 C.F.R. §§ 655.135(h)(2), 655.135(m).

The Rule does not define what speech or expression constitutes "intimidat[ion]" or "threat[s]," or whether an employer's or manager's expression of his or her opinion (including, for

example, that unionization can harm employees) would qualify. This stands in contrast with the NLRA, which more narrowly bans "threat[s] of reprisal or force." 29 U.S.C. § 158(c).

### D. The Georgia injunction

Kansas and 16 other states challenged the Rule in the Southern District of Georgia, which issued a preliminary injunction against the Rule's enforcement. *See Kansas v. DOL*, 2024 WL 3938839 (S.D. Ga. Aug. 26, 2024). The court there held, among other things, that "the Final Rule conflicts with the NLRA, and the Final Rule is unconstitutional." *Id*. at *7. The court held further that the plaintiff states would suffer irreparable harm without immediate relief and that the public interest favored an injunction. *Id*. at *9-10. The court limited its injunction, however, to the geographic boundaries of the 17 plaintiff states and a single private-party co-plaintiff. *Id*.

DOL, meanwhile, has issued guidance explaining that it will continue to enforce the Rule in the 33 states not covered by the Georgia federal court's injunction. *See* DOL, Announcements (Sept. 10, 2024), https://perma.cc/M3LX-BVQA.

## REASONS FOR GRANTING PRELIMINARY RELIEF

A Section 705 stay is warranted and necessary: Plaintiffs are likely to succeed on the merits; there is a substantial threat of irreparable harm absent a stay; and the balance of harms and public interest favor an injunction. *See Wages & White Lion Investments v. FDA*, 16 F.4th 1130, 1135 (5th Cir. 2021) (standard for Section 705 stay same as for a PI). If the Court does not issue an immediate stay, meaningful judicial relief may not be possible as a practical matter until next fall harvest season, resulting in tremendous irreparable harms this fall and coming spring.

## I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

### A. The Rule exceeds the regulatory authority conferred by Congress

An agency action is invalid and must be vacated if it conflicts with relevant statutory language or exceeds the power conferred upon the agency by Congress. That is the case here.

### 1. The INA does not authorize DOL to regulate labor relations in connection with the H-2A visa program

**a.** Courts must set aside agency action "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). "Congress enacts laws that define and, equally important, circumscribe the power of the Executive to control the lives of the citizens." *Chamber of Commerce v. DOL*, 885 F.3d 360, 387 (5th Cir. 2018). An agency "'literally has no power to act'—including under its regulations—unless and until Congress authorizes it to do so by statute." *Franciscan Alliance v. Becerra*, 47 F.4th 368, 378 (5th Cir. 2022) (quoting *FEC v. Cruz*, 596 U.S. 289, 301 (2022)). "Sometimes, however, agencies 'defy Congressional limits' and aggrandize powers to themselves that Congress never granted." *Kovac v. Wray*, 660 F. Supp. 3d 555, 563-564 (N.D. Tex. 2023). When they do so, they act beyond their authority and in violation of the APA. *Id.*

Just so here. DOL purported to issue the Rule "pursuant to the INA." 89 Fed. Reg. at 33899-33900. But the INA does not authorize DOL to establish NLRA-style protections for agricultural workers or limit the speech of their employers. The INA is implemented principally by the Department of Homeland Security, which is "charged with the administration and enforcement" of all "laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1)). In contrast, Congress gave DOL limited duties under the statute. Chiefly, it is directed to "issue a certification" on H-2A petitions (*id.* § 1188(b)) upon finding that there are insufficient workers currently and that the alien's employment "will not adversely" affect wages and working conditions of "workers in the United States similarly employed" (*id.* § 1188(a)(1)(A)-(B)).

The INA's explicit grants of rulemaking authority to DOL are few and far between, and none justifies the new rights and obligations created by the Rule. There are at most six such provisions; a short review demonstrates that the Rule "bears little kinship to the rulemaking authority expressed by statute." *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1272 (5th Cir. 1983).

*First*, the INA authorizes DOL to "define[]" "agricultural labor or services" for purposes of the H-2A program. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). DOL accordingly has issued regulations

addressing, for example, whether "workers employed on Christmas tree farms . . . would be classified as 'agricultural' employees for purposes of the H–2A program." *North Carolina Growers' Association v. United Farm Workers*, 702 F.3d 755, 761-762 (4th Cir. 2012).

*Second*, the Secretary of Labor may "require by regulation, as a condition issuing the certification, the payment of a fee to recover the reasonable costs of processing applications for certification." 8 U.S.C. § 1188(a)(2). DOL has done so. *See* 20 C.F.R. § 655.163.

*Third*, DOL may "prescribe[]" "criteria for the recruitment of eligible individuals." 8 U.S.C. § 1188(c)(3)(A)(i). This provision allows DOL to implement employers' statutory "obligation to engage in positive recruitment" of domestic workers before seeking foreign labor under the H-2A program. *Id.* § 1188(b)(4). It refers to those domestic "eligible individuals who have indicated their availability to perform such labor or services." *Id.* § 1188(c)(3)(A)(ii). DOL has prescribed such criteria. *See* 20 C.F.R. §§ 655.153-156.

*Fourth*, the Secretary of Labor "shall promulgate, on an interim or final basis, regulations based on his findings in furtherance of the Congressional policy that aliens not be admitted under this section unless there are not sufficient workers in the United States" that are willing, able, and qualified. *Id.* § 1188(c)(3)(B)(iii). This requirement addresses the statutory "50 percent rule" outlined in paragraph (c)(3)(B)(i), which requires employers to hire qualified domestic applicants until 50 percent of the H-2A worker's contract period has elapsed. Again, DOL has promulgated such regulations. *See* 20 C.F.R. § 655.135(d).

*Fifth*, "[t]he Secretary of Labor shall issue regulations which address the specific requirements of housing for employees principally engaged in the range production of livestock." 8 U.S.C. § 1188(c)(4). This provision relates to the statutory obligation of H-2A employers to "furnish housing in accordance with regulations," and more specifically the obligation to meet certain local, state, or federal housing standards "at the employer's option." *Id.* Again, DOL has promulgated such regulations specific to "range housing." 20 C.F.R. §§ 655.230, 655.235.

*Sixth*, "[r]egulations shall provide for an expedited procedure for the review of a denial of certification under subsection (a)(1) or a revocation of such a certification or, at the applicant's request, for a de novo administrative hearing respecting the denial or revocation." 8 U.S.C. § 1188(e)(1). Once again, DOL has promulgated such a regulation. *See* 20 C.F.R. § 655.164(b).

Nowhere does the Rule reference any of these provisions, and rightly so—none of them have anything to do with workers' rights to "engage[] in activities related to self-organization" or to "refuse[] to attend" mandatory meetings. 20 C.F.R. § 655.135(h)(2)(i)-(ii). And none of them grant DOL authority to limit "employer-sponsored speech" and "employer-sponsored communications" when shared with "the primary purpose . . . to communicate the employer's opinion" concerning collective action or the H-2A program. *Id.* § 655.135(h)(2)(ii).

Even broad grants of rulemaking authority—such as the provision allowing the Secretary of *Homeland Security* to "establish such regulations . . . as he deems necessary for carrying out his authority" (8 U.S.C. § 1103(a)(3))—are insufficient to create new rights and obligations. *See Gulf Fishermens Association v. National Marine Fisheries Service*, 968 F.3d 454, 465 (5th Cir. 2020). For example, Congress's "grant of authority over 'any fishery' and 'any stock of fish'" to the National Marine Fisheries Service did not empower it to regulate "aquaculture," that is, "fish farming," even when combined with the broad authority to "promulgate 'necessary' regulations." *Id.* at 458, 465. There was simply "nothing in the [statute that] plausibly suggests the agency has been given authority to regulate aquaculture." *Id.* at 465. Here, DOL's unlawful aggrandizement of authority is even more obvious because Congress assigned it very narrow tasks, with limited rulemaking authority, under the INA.

**b.** The Rule also cites the Wagner-Peyser Act as a source of rulemaking authority. 89 Fed. Reg. at 33899; 29 U.S.C. 49 *et seq.* That statute established the United States Employment Service within DOL, and it obliges the Secretary to "assist in coordinating" State public employment offices throughout the country and in "increasing their usefulness" by setting minimum efficiency

standards. 29 U.S.C. § 49b(a). The Rule nods at DOL's responsibilities under that act, then highlights the statute's general grant of authority to "make such rules and regulations as may be necessary to carry out [its] provisions." 89 Fed. Reg. at 33899 (quoting 29 U.S.C. § 49k).

The Wagner-Peyser Act cannot rescue the Rule. The Fifth Circuit surveyed precedents interpreting similar general provisions and observed: "None of these cases suggests that general rulemaking authority empowers an agency—established to enforce and carry out a congressional act—to promulgate regulations which run far afield from the specific substantive provisions of the act." *Central Forwarding*, 698 F.2d at 1277. So too here: DOL's authority under the Wagner-Peyser Act and the INA is "tied to and limited by . . . specific substantive provisions," and the broadly worded grant of rulemaking authority may not be used to "open whole new horizons on the regulatory landscape." *Id.* In sum, DOL lacks statutory authority to issue regulations providing agricultural workers organized labor protections.[1]

**c.** In the Georgia federal litigation, the government asserted that "Congress delegated broad authority to DOL to ensure that an employer's use of H-2A workers would not harm similarly employed workers in the United States." *Kansas* DOL PI Opp. 15. Its theory appears to be that the INA empowers it to establish "baseline" working conditions for H-2A workers, and then allows it to extend those "baseline" rules to *all* workers, so there is "parity between the terms and conditions of employment provided to H-2A workers and other workers employed by an H-2A employer." *Id*. (quoting 89 Fed. Reg. at 33987). That is not plausible.

The INA specifies clearly the Secretary of Homeland Security and Attorney General have broad authority to implement the statute by general regulations. *See* 8 U.S.C. § 1103. No such

[1] The Rule also cites a 1974 court order requiring DOL to implement a monitoring and advocacy system to ensure that state Employment Service programs are consistent with migrant-farmworker benefits and protections that are "authorized by law," and DOL regulations promulgated in response to that order. 89 Fed. Reg. 33,899; 20 C.F.R. parts 651, 653, 658. That order does not purport to require DOL to create new collective-bargaining rights, and regardless, neither court orders nor regulations can expand an agency's rulemaking power.

broad delegation is authorized for DOL. When an agency asserts significant rulemaking power beyond what the legislative text clearly authorizes—and especially when that power is in conflict with an express exemption that Congress elsewhere has provided—"both separation of powers principles and a practical understanding of legislative intent" counsel against "read[ing] into ambiguous statutory text the delegation claimed to be lurking there." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (citation omitted). A rule that fundamentally realigns the balance of regulatory power over immigration, labor, and collective-bargaining issues across an entire sector of the American economy is a matter of extraordinary political significance requiring "a 'clear congressional authorization' to regulate in that manner." *Id.* at 732 (citation omitted). The Rule here was promulgated without any such clear authorization.

**2. The NLRA precludes the Rule**

Separately, the carefully tailored provisions of the NLRA preclude the Rule.

**a.** Where Congress creates a comprehensive statutory scheme addressing a particular subject matter, that scheme precludes agencies implementing other federal statutes from promulgating regulations that conflict with it. *See POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 111 (2014) (distinguishing between preclusion and preemption); *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999) (a "comprehensive remedial scheme for the enforcement of a statutory right creates a presumption that Congress intended to foreclose resort to more general remedial schemes to vindicate that right").

Statutory preclusion is a matter of congressional intent, embodying in part "the principle that courts apply a 'specifically tailored' and 'better fitted' statute over a 'more general' one." *Fath v. Texas Department of Transportation*, 924 F.3d 132, 137 (5th Cir. 2018) (quoting *EC Term of Years Tr. v. United States*, 550 U.S. 429, 433-434 (2007)). For instance, this doctrine "precluded the FDA's jurisdiction to regulate tobacco products" even though the agency had authority to regulate "drugs" and "drug delivery devices." *FDA v. Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 127, 133 (2000). That is because other "tobacco-specific legislation" manifested "Congress' clear intent." *Id.* at 143.

The NLRA is just the kind of "comprehensive statute" that manifests a clear congressional intent to regulate a particular subject matter in a particular way, preclusive of attempts to regulate the same subject matter in different ways under different statutes. The Supreme Court has been express about this: The NLRA prevents "all regulations, whether state or federal" within "a protected zone, whether it be a zone protected and reserved for market freedom or for NLRB jurisdiction." *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 226-227 (1993); *see also International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 155 (1976) (holding that the NLRA's "comprehensive federal law of labor relations is not to be frustrated").[2]

With the NLRA, "Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes." *Brown*, 554 U.S. at 65. Preclusion thus operates in two directions. First, where the act protects or prohibits certain activities, states and other bodies may not regulate such activities, and only the NLRB may adjudicate violations. *See Building & Construction*, 507 U.S. at 225. Second, where the NLRA left areas "to be controlled by the free play of economic forces," neither "state [n]or federal" entities may introduce new protections or prohibitions in those areas. *Id.* at 225-226.

This case falls within the second category, "conduct that Congress intended to be unregulated." *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614 (1986). Despite

[2] Accordingly, courts routinely apply both preclusion and preemption to cases where governmental authorities regulate in ways that conflict with or augment the NLRA's substantive standards. *See, e.g.*, *Hobbs v. Hawkins*, 968 F.2d 471, 478 (5th Cir. 1992) (NLRA precluded claims under 42 U.S.C. § 1983); *NLRB v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 130 (1987) (NLRA precluded the APA's judicial review provision); *Machinists*, 427 U.S. 132 (NLRA preempted state regulation of employers' and employees' "peaceful methods of putting economic pressure upon one another" left available by the NLRA); *San Diego Building Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 246-247 (1959) (similar).

the NLRA's "striking" breadth of application to "any employee" (*Sure-Tan*, 467 U.S. at 891), Congress expressly chose to "exclude from its coverage 'any individual employed as an agricultural laborer'" (*Sweetlake*, 334 F.2d at 221) (quoting 29 U.S.C. § 152(3))). This "specifically enumerated exception[]" was plainly intentional. *Sure-Tan*, 467 U.S. at 891. There is therefore no doubt that regulating labor relations between agricultural workers and farm employers is contrary to Congress's intent. Yet that is exactly what the Rule does. *See* 20 C.F.R. § 655.135(h)(2), (m). With the Rule, DOL purports to override the NLRA's exemption by providing NLRA-like protections to all agricultural employees working for farms that participate in the H-2A visa program.

These are the same legal protections that Congress concluded should *not* apply to agricultural workers in the NLRA. The Rule gives agricultural workers the right to engage in "'concerted activity for mutual aid and protection,' which encompasses numerous ways that workers can engage, individually or collectively, to enforce their rights." 89 Fed. Reg. 34005. The NLRA's language is nearly identical, protecting employees' right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And the Rule states that H-2A employers may not "discharge, or in any manner discriminate against . . . any person who has engaged in activities related to self-organization," including "any effort to form, join, or assist a labor organization." 89 Fed. Reg. at 34062. The NLRA similarly provides that employers may not "interfere with, restrain, or coerce employees in the exercise of the[ir] rights" (29 U.S.C. § 158(a)(1)), including rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (*id.* § 157).

Recognizing these similarities, the Southern District of Georgia observed that "the Rule mirrors the NLRA." *Kansas*, 2024 WL 3938839 at *8. By importing NLRA protections into a

separate statutory framework while ignoring the NLRA's exemption for agricultural laborers, Defendants have attempted to bypass express congressional intent. This transparent attempt to override the NLRA's exemption must be rejected.

### B. The Rule violates the private Plaintiffs' First Amendment Rights

The Private Plaintiffs are also likely to prevail on their First Amendment claim.

#### 1. Paragraph (h)(2)(ii) is a content- and speaker-based burden on protected expression that fails strict scrutiny

"[A]n employer's free speech right to communicate his view to his employees is firmly established and cannot be infringed." *Brown & Root v. NLRB*, 333 F.3d 628, 634 (5th Cir. 2003) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). And "[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). Paragraph (h)(2)(ii) is unlawful under these standards. By prohibiting employers from disciplining in any way an employee who fails to attend a meeting where the employer talks about unionization, the Rule is content- and speaker-based and thus triggers strict scrutiny. Such laws virtually never survive judicial review.

***a. Content-based.*** The First Amendment's "most basic" principle is that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merchants Association*, 564 U.S. 786, 790-91 (2011). "Content-based regulations" are those that "target speech based on its communicative content." *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 766 (2018) ("*NIFLA*") (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* Strict scrutiny is strict because "governments have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.*

Paragraph (h)(2)(ii), concerning mandatory employee meetings, is a content-based burden on protected expression. Under that provision, an employer may require its employees to attend a

paid, mandatory meeting on various favored topics—workplace safety, farm operations, or even the employer's views about an upcoming election. But an employer may not require its employees to attend meetings on a topic disfavored by DOL—an employer's opinion on unionization. 20 C.F.R. § 655.135(h)(2)(ii). In other words, the Rule draws distinctions based on the message an employer conveys. An official enforcing the Rule would have to "ascertain the subject matter" of the speech to determine if the Rule was violated. *National Press Photographers Association v. McCraw*, 90 F.4th 770, 791 (5th Cir. 2024); *see also Honeyfund.com v. Governor*, 94 F.4th 1272 (11th Cir. 2024). That is "the definition of a content-based restriction." *National Press Photographers*, 90 F.4th at 791.

***b. Speaker-based.*** The Supreme Court is also "deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others." *NIFLA*, 585 U.S. at 777-778 (cleaned up). Speaker-based laws "present serious First Amendment concerns" especially when they "fall upon only a small number" of speakers. *TBS v. FCC*, 512 U.S. 622, 659 (1994).

Paragraph (h)(2)(ii) is speaker-based in just this way. It does not forbid every speaker's opinion addressing the topic of organized labor; it applies only when "the primary purpose of the meeting is to communicate the *employer's* opinion." 20 C.F.R. § 655.135(h)(2)(ii) (emphasis added). For example, an employer *may* hold a mandatory meeting with a union representative sharing his or her views. The Rule thus facially—and impermissibly—regulates based on the speaker's identity, suppressing speech that opposes unionization and empowering DOL to tilt the playing field in favor of unions. *NIFLA*, 585 U.S. at 778 (holding laws that restrict speech based on the speaker's identity "run the risk that the State has left unburdened those speakers whose messages are in accord with its own views").

***c. Strict scrutiny.*** Because the Rule imposes a content- and speaker-based speech restriction, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *NIFLA*, 585 U.S. at 766. To sur-

vive strict judicial scrutiny, DOL must show that it has "[1] adopt[ed] the least restrictive means of [2] achieving a compelling state interest." *Americans for Prosperity v. Bonta*, 594 U.S. 595, 607 (2021) ("*AFP*") (cleaned up). Strict scrutiny is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The Rule does not survive strict scrutiny. First, DOL has no permissible interest in protecting employees from their employers' views on unionization (let alone a compelling one). Whatever interest Congress may have in protecting employees from unfair labor practices, it cannot justify censoring employers' speech. Decades of cases have recognized that "uninhibited, robust, and wide-open debate in labor disputes" is the best way to achieve sound labor policy. *Brown*, 554 U.S. at 68 (quotation omitted); *see also Florida Steel Corp. v. NLRB*, 587 F.2d 735, 753 (5th Cir. 1979) ("[a]nti-union bias, strong convictions against unions or opposition to the underlying philosophy of the Labor Management Relations Act [i]s not itself an unfair labor practice").

Paragraph (h)(2)(ii) also is not narrowly tailored. "To survive strict scrutiny," DOL "must do more than [identify] a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest" (*Burson v. Freeman*, 504 U.S. 191, 211 (1992)) and "that it does not unnecessarily circumscribe protected expression" in the process (*Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002)). Paragraph (h)(2)(ii) fails on each count: it is "both underinclusive and overinclusive." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978).

A content-based regulation of speech must "satisfactorily accomplish[] its stated purpose." *The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989). A regulation that is "underinclusive" in scope—one that is ineffectual in advancing the interests invoked to justify it—"raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. Here, inasmuch as DOL is concerned about preventing threats, intimidation, or coercion against unionization, paragraph (h)(2)(ii) does too little. It restricts mandatory meetings where an employer merely discusses un-

ionization—but it leaves alone the possibility of threats, intimidation, or coercion in *other* settings. "A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a re-striction upon [political] speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *White*, 536 U.S. at 780.

At the same time, paragraph (h)(2)(ii) is overinclusive. Paragraphs (h)(1) and (h)(2) separately bar employers from intimidating, threatening, restraining, and coercing agricultural employees with respect to labor organizing. Paragraph (h)(2)(ii)'s ban on mandatory meetings is therefore not necessary to prevent such activity. Either it is redundant of those prohibitions (and thus unnecessary), or, in doing more, it simply suppresses innocuous employer speech on union issues, apart from any concern for intimidation or coercion. Ironically, for example, paragraph (h)(2)(ii) bars an employer from holding a mandatory meeting at which he or she shares an opinion *supporting* labor organizing. That is textbook overinclusion. *See Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046, 1049 (5th Cir. 1985) (school requirement that meetings during non-class hours "must concern school-sponsored or related activities" violated First Amendment because it was overbroad and chilled speech).

More generally, a restriction is not narrowly tailored "if there is a less restrictive means that 'would be at least as effective in achieving the legitimate purpose' that is being served." *SEIU v. City of Houston*, 595 F.3d 588, 596 (5th Cir. 2010). The NLRA itself demonstrates that DOL could have taken a narrower approach to paragraph (h)(2)(ii). In the NLRA, Congress recognized that restraint of employer speech on matters as important as labor rights risks grave constitutional concerns. It thus drafted the NLRA narrowly to avoid encroaching on speech rights and expressly provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c). The NLRA adequately protects labor and employers alike in the contexts

where it applies. There is thus no denying that "there is a less restrictive means" that would be at least as effective in achieving the purpose being served. *SEIU*, 595 F.3d at 596.

It is no answer to say that farmers voluntarily participate in and benefit from the H-2A visa program and thus willingly accept paragraph (h)(2)(ii). "Even though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996).

**2. The terms of paragraph (h) are vague and chill protected speech**

The Rule also prohibits speech with terms too vague for farmers to know what they may or may not say. In particular, paragraph (h)'s prohibitions on meetings with a "primary purpose" to share opinions about organizing, and on "intimidat[ion]" and "threat[s]," are impermissibly vague and will have a speech-chilling effect.

Generally, a regulation is void for vagueness if its prohibitions are not "clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Such laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Id.* Here, the Act's vague terms fail to "give fair notice of conduct that is forbidden or required" (*FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)) and are "so standardless" as to "encourage[] seriously discriminatory enforcement" (*United States v. Williams*, 553 U.S. 285, 304 (2008)).

Indefinite speech regulations "chill protected speech." *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). "First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the [regulation]." *Id*. Thus, it is "well established" that laws infringing "sheltered First Amendment freedoms" are "held to stricter standards of definiteness." *Angelico v. Louisiana*, 593 F.2d 585, 588 (5th Cir. 1979); *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976) ("The general

test of vagueness applies with particular force in review of laws dealing with speech.").

**b.** In two respects, farmers "must necessarily guess at [the Rule's] meaning" (*Hynes*, 425 U.S. at 620) in violation of the First Amendment.

First, employers participating in the H-2A program are forbidden to hold mandatory meetings or disseminate mandatory materials where they communicate their own opinions on unionization—but only when doing so is the "primary purpose" of such meeting or communication. 20 C.F.R. § 655.135(h)(2)(ii). The Rule provides no guidance for whether a meeting is held for the "primary purpose" of communicating the employer's opinion "concerning any activity" protected by the subpart. 20 C.F.R. § 655.135(h)(2)(ii). Does this standard require more time spent on those topics than any other, even if only a few minutes? Or does it have to be a majority of the meeting? Does it forbid an employer inviting a third party to address regulated topics when the third party shares his or her own opinion, and the opinion happens to be the same as the employer? Employers "must necessarily guess at [the] meaning" (*Hynes*, 425 U.S. at 620) of paragraph (h)(2)(ii)'s mandatory-meeting prohibition. The First Amendment does not permit this type of vagueness. This Court recently held in a separate context that the word "primarily" is "unclear" in the First Amendment sense and granted a preliminary injunction. *See NetChoice v. Fitch*, 2024 WL 3276409, at *15 (S.D. Miss. 2024), *appeal pending*. The same outcome is warranted here.

Second, H-2A employers are also forbidden to "intimidate" or "threaten" or "in any manner discriminate against" any person because of their "activities related to self-organization" or their refusal to attend mandatory employee meetings. 20 C.F.R. § 655.135(h)(1), (2). These limitations are far fuzzier than the NLRA's rule against discrete "threat[s] of reprisal or force" (29 U.S.C. § 158(c)) and are in addition to the prohibitions on the *conduct* of restraining, coercing, blacklisting, or discharging employees in response to protected activities. *Id.* § 655.135(h).

These terms give no guidance to employers, who cannot "know when the expression of [their] views or opinions . . . will be interpreted" as intimidations or threats. *E.g.*, Little Bear Decl.,

Ex. 20, ¶ 12. When does a genuine but heated statement of disagreement cross from permissible expression over to impermissible intimidation or threat? When does a statement of disapproval of a particular viewpoint cross from protected speech over to impermissible discrimination "in any manner"? These terms plainly prohibit more than genuine threats of force or physical intimidation, such as those that might be covered by the NLRA's narrower and more definite ban on "threat[s] of reprisal or force." 29 U.S.C. § 158(c). The certainty of chilled speech is easy to see.

## II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM WITHOUT AN IMMEDIATE STAY OF THE RULE

If the Rule is not temporarily stayed, plaintiffs will suffer irreparable harm. "A showing of irreparable harm requires a demonstration of 'harm for which there is no adequate remedy at law.'" *Louisiana v. Biden*, 55 F.4th 1017, 1033-1034 (5th Cir. 2022) (citation omitted). "[C]omplying with [an agency rule] later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs." *Wages & White Lion*, 16 F.4th at 1142. Such costs include those occasioned by "necessary alterations in operating procedures" to achieve compliance and "immediate threats of costly and unlawful adjudications of liability." *Career Colleges*, 98 F.4th at 235.

"When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Book People, Inc. v. Wong*, 91 F.4th 318, 340-41 (5th Cir. 2024). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Here, Plaintiffs are suffering all of the above. The private plaintiffs' members depend on the H-2A program to operate their farms and will participate in the program for the 2024-2025 season. *E.g.*, Brookside Farms Decl., Ex. 13, ¶ 6. Their farms "would not be able to operate during peak harvest season" without H-2A workers, and risk closure. *See id.*; Little Bear Decl., Ex. 20, ¶ 8 (union ac-tivity threatens "the ongoing viability of my company which already works with tight gross

margins"). They also will need to expend time and resources familiarizing themselves with the Rule and implementing its requirements. *See, e.g.*, Don Hartman Farms Decl., Ex. 16, ¶ 13.

That is especially burdensome for farms with multistate operations that cover states where the Rule is currently enjoined and states where DOL has decided to continue to enforce the Rule. For example, the additional regulatory burdens generated by the different reporting and application requirements for H-2A workers in each type of state impose not only significant cost burdens to retain their H-2A workers, but also inject significant uncertainty whether these farms will have the labor needed to maintain their productive capacity. *See* Chamber Decl., Ex. 4, ¶ 10.

The Rule further requires the private Plaintiffs' members to alter their operating procedures and subjects them to increased costs and inefficiencies. Little Bear Produce holds mandatory, paid meetings to discuss various subjects, including matters of public concern to the agricultural community. Little Bear Decl., Ex. 20, ¶ 7. But under the Rule, it may no longer do so for meetings that communicate Little Bear's opinions about organizing. *Id.* ¶ 12. Further, increased union activity will disrupt members' farm operations by making employee interaction more complicated, contentious, and inefficient. *E.g.*, Berry Brothers Decl., Ex. 12, ¶ 8.

The Rule also burdens and chills speech. The private Plaintiffs' members have previously discussed labor organization on their farms. Desert Premium Farms Decl., Ex. 15, ¶ 11. But these private Plaintiffs' members also "do not know when the expression of [their] own views or opinions" will be interpreted as intimidation, threats, or discrimination under the Rule, because those terms are vague and not defined. *Id.* ¶ 12. Fearing civil penalties and debarment, the private Plaintiffs' members will "generally stop talking with [their] employees about unionizing." Brookside Farms Decl., Ex. 13, ¶ 10. These injuries to their First rights Amendment activities are "unquestionably" irreparable. *Elrod*, 427 U.S. at 373.

## III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR PRELIMINARY RELIEF

The balance of the hardships and public interest also favor an immediate stay or preliminary injunction. These elements "merge when the Government is a party." *VanDerStok v. Black-Hawk Manufacturing Group*, 659 F. Supp. 3d 736, 744 (N.D. Tex. 2023) (cleaned up).

It is well established that "the public's interest in having governmental agencies abide by the federal laws that govern their existence and operations weighs in favor of an injunction." *Id.* By contrast, "there is generally *no* public interest in the perpetuation of unlawful agency action." *Louisiana*, 55 F.4th at 1035 (citation omitted) (emphasis added). Thus, upon a finding that the agency action at issue is likely to be invalidated, the "the government-public-interest equities [effectively] evaporate." *Alliance for Hippocratic Medicine v. FDA*, 78 F.4th 210, 251 (5th Cir. 2023).

In defense of the Rule in the Georgia federal case, DOL insisted that the Rule serves the public interest because it "aligns with Congress's stated policy goals." *Kansas* DOL PI Opp. 38. But that simply assumes that the government is right on the merits, which it isn't. And anyway, DOL has not shown that the Rule addresses any systemic or frequently recurring problems.

## IV. A SECTION 705 STAY OF THE RELEVANT ASPECTS OF THE RULE IS PARTICULARLY APPROPRIATE IN THESE CIRCUMSTANCES

Preliminary relief is warranted, whether in the form of a Section 705 stay of the Rule or injunctive relief that extends to plaintiff associations and their members. We respectfully submit that a Section 705 stay is the most appropriate temporary remedy. "In the same way that a preliminary injunction is the temporary form of a permanent injunction, a [Section 705] stay is the temporary form of vacatur," which is the traditional relief in an APA suit. *Hippocratic Medicine*, 78 F.4th at 254. In prior cases, DOL has argued for party-specific preliminary injunctions. But the Fifth Circuit has recognized that, "the scope of preliminary relief" should "align[] with the scope of ultimate relief under Section 706, which is not party-restricted and allows a court to 'set aside' an unlawful agency action." *Career Colleges*, 98 F.4d at 255.

Moreover, "[b]etween vacatur and an injunction, the former is the 'less drastic remedy' . . . because vacatur does not order the defendant to do anything" and instead "only removes the source of the defendant's authority." *Hippocratic Medicine*, 78 F.4th at 254. A Section 705 stay, in other words, is not an injunction that runs against executive officers to undertake or refrain from specific actions, thus stressing separation-of-powers dynamics between the judiciary and executive. Instead, it operates against the regulation itself, merely placing it on hold and maintaining the status quo. A Section 705 stay is also in keeping with the practicalities of the H-2A program. Given the complex arrangements involving thousands of parties, a stay would avoid the tremendous practical challenges that would follow from enjoining the Rule on a party-specific basis, especially for multistate businesses that have operations that span state lines. *See* Chamber Decl., Ex. 4, ¶ 10.

If the Court nonetheless decides to enter party-specific relief, it should extend such relief to all of the trade association plaintiffs and their members. Courts routinely grant such relief. *See, e.g.*, *Career Colleges*, 98 F.4th at 233 (initially granting "a temporary administrative injunction limited to CCST and its members"); *NetChoice*, 2024 WL 3276409, at *18 (granting a injunctive relief to "Plaintiff NetChoice, LLC and its members"); *Chamber of Commerce v. CFPB*, 2023 WL 5835951, at *11 (E.D. Tex. Sept. 8, 2023) (extending injunctive relief "to plaintiffs' members"); *NAM v. DHHS*, 491 F. Supp. 3d 549, 571 (N.D. Cal. 2020) (granting a PI "with respect to Plaintiffs and, with respect to the association Plaintiffs, their members").

## CONCLUSION

The Court should enter a Section 705 stay by or before the end of November to extend for the duration of judicial review, including any appellate proceedings before the Fifth Circuit or Supreme Court. Alternatively, it should enter an order temporarily enjoining defendants from enforcing or implementing the Rule as against the plaintiffs and their members.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record. Additionally, I certify that I have sent a copy of the foregoing pleading or other paper via certified mail on the following:

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