IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

State of KANSAS, State of GEORGIA, State of SOUTH CAROLINA, State of ARKANSAS, State of FLORIDA, State of IDAHO, State of INDIANA, State of IOWA, State of LOUISIANA, State of MISSOURI, State of MONTANA, State of NEBRASKA, State of NORTH DAKOTA, State of OKLAHOMA, State of TENNESSEE, State of TEXAS, State of VIRGINIA, MILES BERRY FARM, and GEORGIA FRUIT AND VEGETABLE GROWERS ASSOCIATION, Plaintiffs, v. The UNITED STATES DEPARTMENT OF LABOR, JOSÉ JAVIER RODRÍGUEZ, Assistant Secretary for Employment & Training, U.S. Department of Labor, *in his official capacity,* and JESSICA LOOMAN, Administrator, Wage & Hour Division, U.S. Department of Labor, *in her official capacity*, Defendants.	Civil Action No. 2:24-cv-76-LGW-BWC

PROPOSED AMICUS BRIEF OF U.S. AGRICULTURAL WORKERS AND FARMWORKER ADVOCACY ORGANIZATIONS IN SUPPORT OF DEFENDANTS AND PROPOSED INTERVENORS

CORPORATE DISCLOSURE STATEMENT

Comité de Apoyo a los Trabajadores Agrícolas has no parent corporation and issues no stock.

Community Legal Services ("CLS") has no parent corporation and issues no stock.

Farmworker Justice has no parent corporation and issues no stock.

Farmworker Legal Services ("FLS") is the statewide component of the Michigan Advocacy Project ("MAP"). MAP is a domestic nonprofit corporation and does not have a parent corporation. Neither FLS nor MAP issues stock.

The Georgia Legal Services Program ("GLSP") has no parent corporation and issues no stock.

Friends of Farmworkers, Inc. d/b/a Justice at Work has no parent corporation and issues no stock.

Legal Action of Wisconsin has no parent corporation and issues no stock.

Legal Aid Society of Mid-New York, Inc., has no parent corporation and issues no stock.

The National Legal Aid & Defender Association has no parent corporation and issues no stock.

The Northwest Employment Education and Defense Fund d/b/a the Northwest Workers' Justice Project has no parent corporation and issues no stock.

Sur Legal Collaborative has no parent corporation and issues no stock.

United Farm Workers has no parent corporation and issues no stock.

The UFW Foundation has no parent corporation and issues no stock.

STATEMENT OF AMICI'S INTERESTS

I. *Individual Amici*

Willie Shelly lives in Schlater, Mississippi. He has worked as an agricultural equipment operator (primarily driving tractors) for the past 26 years for various subsidiaries of Brown Farms of Schlater, Mississippi. **Tyrone Cason** lives in LeFlore, Mississippi. He has worked for Brown Farms as an agricultural equipment operator for 12 years. Both Mr. Shelly and Mr. Cason are U.S. citizens and are currently employed by Brown Farms. Beginning in 2016 and continuing today, Brown Farms has hired H-2A workers for employment as agricultural equipment operators through its wholly-owned subsidiary, Buckhorn Farms Partners. Both Mr. Shelly and Mr. Cason are U.S. workers engaged in corresponding employment with Brown Farms' H-2A workers because each performs the same job duties as their H-2A counterparts.

II. *Organizational Amici*

Founded by farmworkers in New Jersey in 1979, **Comité de Apoyo a los Trabajadores Agrícolas** (CATA) is a non-profit, membership-based organization working to organize and advocate for farmworkers and immigrant communities in New Jersey, Pennsylvania, and Maryland. Its members include both workers on H-2A visas and U.S. employment-authorized members. CATA focuses on advancing workers' rights, health and safety in the workplace, food justice, and immigrants' rights. CATA works to address discrimination in the workplace, unfair firings, and unsafe or unsanitary conditions in employer-owned housing. We seek fair and just treatment for workers by advocating for a higher minimum wage and overtime pay, calling for paid time off and sick leave, and promoting collective bargaining.

Community Legal Services ("CLS") is a nonprofit law firm which advocates for justice for low-income Arizonans. The mission of CLS is to increase fairness in the civil justice system by advocating, litigating, and educating on behalf of Arizona's most underserved communities.

As part of its advocacy, CLS provides free legal services to low-income Arizonans in Maricopa, Mohave, La Paz, Yuma, and Yavapai counties. CLS represents farmworkers throughout Arizona concerning their employment issues throughout the state. The advocacy on behalf of farmworkers extends to H-2A workers who work in Arizona, including workers in corresponding employment.

Farmworker Justice is a national non-profit organization that serves farmworkers, their families, and their communities across the United States to improve living and working conditions, immigration status, health, occupational safety, and access to justice. In particular, Farmworker Justice took a leadership role among 40 signatories in organizing and preparing extensive comments on the 2023 Proposed H-2A Rule, drawing on decades of experience working to equip farmworkers with the tools to seek high wages and better working conditions, end the selective exclusion of agricultural workers from certain labor law protections, and demand effective enforcement of labor laws, so that farmworkers have the same workplace rights as in other occupations and can exercise them without retaliation.

Farmworker Legal Services (FLS) is the statewide division of the non-profit legal services provider, Michigan Advocacy Program, that represents Michigan's indigent migrant and seasonal farmworkers, including H-2A workers and U.S. workers in corresponding employment. Since 1997, FLS has advocated for the rights of farmworkers through its network of community partnerships and its representation of farmworkers in cases involving unlawful recruitment fees, trafficking, wrongful termination, violations of the working arrangement and contract, wage theft, substandard housing or working conditions, retaliation, discrimination, and other exploitative schemes. As a result, FLS and its clients have substantial interests and extensive expertise on the issues before the Court.

The Georgia Legal Services Program ("GLSP") provides civil legal services to persons with low incomes in Georgia, creating equal access to justice and opportunities out of poverty. Georgia is one of the states with the highest number of H-2A jobs. The Farmworker Rights Division of GLSP represents farmworkers, including H-2A workers and U.S. workers in corresponding employment, to address violations of employment rights and labor trafficking.

Friends of Farmworkers, Inc. d/b/a **Justice at Work** ("JAW") is a Pennsylvania based non-profit legal services organization founded in 1975. JAW supports low-wage workers as they pursue economic and social justice through the provision of legal services, education, and advocacy. JAW has long conducted regular outreach to farm labor camp housing since its founding to educate farmworkers as to their rights and to provide legal assistance to workers. JAW has regularly participated in rule making for both the H-2A and H-2B temporary worker programs. JAW has represented workers engaged in organizing, unionization and protected concerted activity at workplaces classified as agricultural under federal law which may have protected rights under Pennsylvania law.

Legal Action of Wisconsin (LAW) is the largest non-profit law firm in Wisconsin and provides free legal aid to thousands of low-income persons each year in the state's 39 southern counties. In addition, LAW operates the Farmworker Project and projects serving crime victims and victims of trafficking. The Farmworker Project is devoted to the representation of agricultural workers. For over 50 years, LAW's advocates have worked to ensure that Wisconsin's agricultural workers, including H-2A workers and those in corresponding employment, receive the wages they have earned, live and work in a safe environment, are recruited lawfully and fairly, and have access to the public benefits they are entitled to.

The Legal Aid Society of Mid-New York, Inc., (LASMNY) is a legal services

organization whose Agricultural Worker Project represents farmworkers across New York State. LASMNY advocates for and provides legal services to both H-2A workers and domestic U.S. farmworkers in corresponding employment. LASMNY drafted and submitted comments in support of stronger protections for H-2A and U.S. workers in the Final Rule.

The National Legal Aid & Defender Association (NLADA) is America's oldest and largest national nonprofit organization dedicated to excellence in the delivery of legal services, serving as a collective voice for civil legal aid and public defense systems throughout the nation. NLADA represents thousands of attorneys and advocates in the 50 states, the District of Columbia, American Samoa, Micronesia, Puerto Rico, and the U.S. Virgin Islands. Its membership also includes representatives from communities eligible for legal services. NLADA hosts a section devoted to Farmworker Law, joined comments submitted by Farmworker Justice on the 2023 Proposed H-2A Rule, and submitted its own comments on the Proposed Rule.

The Northwest Employment Education and Defense Fund d/b/a **the Northwest Workers' Justice Project** ("NWJP") is a non-profit law firm that provides civil legal services to low wage immigrant and contingent workers in employment matters. In this capacity NWJP often represents both H-2A agricultural workers and U.S. workers who are employed or seek to be employed by H-2A employers in corresponding employment. NWJP's clients are significantly affected by the rules being challenged here and would be adversely affected by the Plaintiffs' challenges here.

Founded in October 2020, **Sur Legal's** mission is to empower workers and organizers by putting legal tools and knowledge in their hands. Sur Legal seeks to disrupt the labor abuse to deportation pipeline and expose abusive employers, industries, and systems of oppression. Sur Legal provides popular education, training, technical assistance, and direct legal representation to worker communities and the organizers who support them in industries such as agriculture and

meat processing with high incidents of occupational injuries and other forms of labor abuse including wage theft, discrimination, sexual harassment, and interference with worker organizing.

United Farm Workers ("UFW") is the nation's first successful and largest farmworkers' union with a total membership of over 45,000 members across the nation, including farmworkers, both U.S. and foreign, employed at employers that participate in the H-2A temporary foreign worker program. UFW's mission is to support the rights and interests of farmworkers, including advocating for wages and workplace safety, and to provide farmworkers with the tools that they need to succeed. UFW and its membership, which includes H-2A workers, are particularly interested in reforms to the H-2A program in order to address abuse and to prevent the depression of U.S. farm workers' wages and working conditions and their displacement. UFW would have additional ability to work with farm workers under the Department of Labor rule and the rule would strengthen protections for UFW members.

The UFW Foundation, a sister organization to UFW, is a dynamic non-profit organization with the core purpose of empowering communities to ensure human dignity. Through worker engagement and legislative advocacy, the UFW Foundation seeks to advance the rights of farmworkers. In 2023, the UFW Foundation directly served at least 211,000 farm workers through immigration legal services, COVID-19 pandemic disaster relief, storm recovery services, and a call center for farm workers whose employers violated employment-related laws, among other services. It is one of the largest federally accredited immigration legal service providers in California. The UFW Foundation has staff located in Tipton and Hazelhurst, Georgia, and serves farmworkers throughout the state. The UFW Foundation's membership includes H-2A workers and corresponding U.S. farmworkers. It has advocated for H-2A workers' rights and protections to prevent the depression of U.S. farm workers' wages and

working conditions as well as their displacement.

SUMMARY OF ARGUMENT

Plaintiffs' meritless challenge to the Department of Labor's ("DOL's") recently finalized rule pertaining to workers in temporary agricultural employment threatens to drag down wages and decimate working conditions for American and foreign H-2A agricultural workers alike. Plaintiffs insist that, for the benefit of American workers, this Court must strip DOL of its ability to set a floor for wages and working conditions for H-2A workers and the U.S. laborers working in agriculture alongside them. This argument fundamentally misunderstands the H-2A program, the premise of which is to ensure that employers cannot choose to exploit foreign labor at the expense of the U.S. workers they would otherwise hire. Plaintiffs' novel argument that DOL lacks rulemaking authority to carry out its obligations under the H-2A program further ignores basic principles of statutory interpretation. And its requested relief — shredding the *entire* rule, not just the parts Plaintiffs take issue with — is unjustifiable and would have grievous consequences for the U.S. and H-2A workers who depend on those regulatory protections.

ARGUMENT

This Court should deny Plaintiffs' motion for preliminary equitable relief because Plaintiffs have not shown a likelihood of success on the merits.[1] *See Curling v. Raffensperger*, 50 F.4th 1114, 1121 (11th Cir. 2022) ("A district court can grant a preliminary injunction only if the moving party establishes, among other things, that it has a substantial likelihood of success on the merits." (cleaned up)). First, the Final Rule is an appropriate exercise of DOL's authority to manage the H-2A program's delicate equilibrium between protecting U.S. workers from the

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation or filing of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

adverse effects of an imported workforce and ensuring agricultural employers have access to adequate labor. Second, the Final Rule falls well within DOL's statutory authority to make rules to carry out its obligations under the H-2A program.

Moreover, even if Plaintiffs were right on the merits as to the handful of provisions in the Final Rule they *do* challenge (which they are not), the relief they request — the annihilation of the entire Final Rule, including a slew of provisions they *do not* challenge — is unjustifiable.

I. The Final Rule Vindicates the H-2A Program's Dual Purposes of Preventing Adverse Effects on U.S. Workers and Ensuring an Adequate Agricultural Labor Supply

Plaintiffs invoke the American worker as a rhetorical cudgel, complaining that the Final Rule protects H-2A workers at the expense of their domestic counterparts.[2] That is just not true. The *purpose* of the H-2A program is to ensure that the provision of non-U.S. agricultural labor does not harm U.S. workers. And the Final Rule is a necessary and appropriate measure to ensure the program fulfills that purpose. In contrast, Plaintiffs' requested relief — shredding the Final Rule — would harm American workers by: (A) stripping the protections the Final Rule provides to hundreds of thousands of U.S. workers in corresponding employment; and (B) creating a race to the bottom in which employers prefer more vulnerable, and thus cheaper, H-2A workers to their U.S. counterparts, harming millions of U.S. workers employed in agricultural labor in the United States.

A. *The Final Rule Appropriately Ensures that the H-2A Program Does Not Harm U.S. Workers in Corresponding Employment*

Plaintiffs' claims to be tribunes of the American laborer are especially ridiculous in the

[2] Although both workers on H-2A visas and U.S. workers in corresponding employment can be thought of as "H-2A workers" because both groups operate under the terms and conditions laid out in H-2A job orders, *see* Part I.A., this brief uses "H-2A worker" as a shorthand for the former group — those workers present in the United States on H-2A visas.

context of U.S. workers in corresponding employment. Though Plaintiffs never mention the concept in their request for preliminary equitable relief, corresponding employment means "[t]he employment of workers who are not H–2A workers by an employer who has an approved Application for Temporary Employment Certification in any work included in the job order, or in any agricultural work performed by the H–2A workers." 20 C.F.R. § 655.103(b). Following Congress's mandate to ensure the employment of H-2A workers does not "adversely affect the wages and working conditions of workers in the United States similarly employed," 8 U.S.C. § 1188(a)(1), DOL requires H-2A employers to treat H-2A workers and U.S. workers in corresponding employment equally. Among other things, this means that an employer cannot pay less or provide worse working conditions to a U.S. employee who works side-by-side with an H-2A employee. *See, e.g.*, 20 C.F.R. § 655.122(a) ("[T]he employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers."). In practice, the corresponding employment requirement provides U.S. workers and H-2A workers with a range of protections. *See, e.g., id.* § 655.120(a) (requiring employers to offer the highest of the adverse effect wage rate, prevailing wage rate, or CBA wage if that is higher than the applicable minimum wage); *id.* § 655.122(e) (requiring employers to provide workers' compensation, where many states would otherwise exempt agricultural workers from state workers' compensation laws); *id.* § 655.122(n) (protection from termination without cause).

Hundreds of thousands of U.S. workers benefit from these protections, including those who labor in Plaintiffs' states or farms. For example, in FY 2023 (the most recent year for which complete data are available) Miles Berry Farm — the only individual plaintiff here — entered five job orders into the interstate clearance system. Its Applications for Temporary Employment

Certification stated a need for a total of 760 workers. Of those 760 workers, only 152 were certified for an H-2A visa. This indicates that Miles Berry Farm employed at least 608 U.S. workers in corresponding employment last year. Those U.S. workers had the same protections and rights under the H-2A regulations and contracts as the (maximum) 152 H-2A visa workers Miles Berry Farm employed to work alongside them.[3]

Miles Berry Farm is no outlier when it comes to corresponding employment. In FY 2023, H-2A employers reported needing 481,578 workers; requested to hire 389,908 H-2A workers; and received DOL certifications to hire 378,513 H-2A workers.[4] Thus, over 100,000 U.S. workers were in corresponding employment during that time.[5] Those U.S. workers in corresponding employment receive the same protections of the H-2A statute and regulations as do their H-2A coworkers, precisely because DOL is carrying out its statutory mandate to protect these U.S. workers.

In short, Plaintiffs' claim that it is "implausible" the rule "*benefits* American farmworkers through some odd, not-fully-explained transitive property," Pls.' Mem. Supp. Mot. for Stay/Prelim. Inj./TRO 27–28, ECF No. 19-1 ("Pls.' Mem."), reflects either a total

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[3] *See* DOL, H-2A Disclosure Data: FY2023 Q4, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Disclosure_Data_FY2023_Q4.xlsx (last visited July 11, 2024) (summation of rows 5808, 6194, 6312, 14593, and 17530 for column BP (total workers needed) and column BS (H-2A positions certified)). This Court may take judicial notice of these public records. *See* Fed. R. Evid. 201(b)(2); *Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999)..

[4] *See* Dep't of Labor, H-2A Disclosure Data: FY2023 Q4, https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2A_Disclosure_Data_FY2023_Q4.xlsx (last visited July 11, 2024) **(**sums of columns BP, BQ, and BR, respectively).

[5] In Amici's experience, many employers indicate only the number of *additional* workers they need; *i.e.*, they do not count those workers they already employ. Those U.S. workers already employed but not counted on employers' applications to hire H-2A workers are still in "corresponding employment." Moreover, DOL numbers do not capture U.S. workers who apply for and obtain positions during the recruitment period. *See* 20 C.F.R. § 655.121(g). Thus, the above estimates for the numbers of U.S. workers in corresponding employment are conservative.

misunderstanding or a willful blindness as to the structure of the H-2A program. For the record: the rules are meant to protect U.S. workers, and huge numbers of U.S. workers can and do directly invoke the protections of the rule just the same as any H-2A worker.

B. *By Preventing the Exploitation of H-2A Workers, the Final Rule Protects Similarly Employed U.S. Agricultural Employees from a Race to the Bottom*

The H-2A program is also intended to protect the millions of U.S. agricultural workers who are not in corresponding employment. *See Mendoza v. Perez*, 754 F.3d 1002, 1017 (D.C. Cir. 2014) (explaining the intent of 8 U.S.C. § 1188(a)(1) is to protect "(1) the American workers who would otherwise perform the labor that might be given to foreign workers, and (2) American workers in similar employment whose wages and working conditions could be adversely affected by the employment of foreign laborers."). Congress structured the H-2A program to supply agricultural employers with sufficient labor, while simultaneously ensuring those employers are not incentivized to prefer H-2A labor over U.S. workers. This is the balance enshrined in the dual mandate of 8 U.S.C. § 1188(a)(1), in which DOL must certify "(A) there are not sufficient [U.S.] workers who" can "perform the labor or services involved in the petition" and "(B) the employment of the [H-2A worker] in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed." If the balance tips too far — that is, if employers could hire U.S. workers, but prefer not to do so because they can make more money by hiring and exploiting H-2A workers — then the incentives are perverted. Amici see the results every day: Employers rationally choose to hire more profitable foreign labor, and U.S. workers face a choice between accepting a job for low wages and worse working conditions, or seeking work elsewhere. This is the race to the bottom which Congress entrusted DOL with forestalling and which the Final Rule is meant to prevent.

Plaintiffs' contention the Final Rule disturbs this equilibrium by providing more rights to

H-2A workers than to U.S. workers, *see, e.g.*, Pls.' Compl. 2–3, ECF No. 1, is baseless. As discussed above, U.S. workers in corresponding employment receive the same protections under the Final Rule as do their H-2A coworkers. And to the extent the Final Rule provides H-2A workers protections that some U.S. workers outside corresponding employment do not enjoy, those additional protections are necessary to place H-2A workers on an equal footing with U.S. workers (and thus prevent a race to the bottom) for a simple reason: H-2A workers are uniquely vulnerable to workplace exploitation, so without additional protection, employers will hire them over their domestic counterparts.

The notion that employers might prefer H-2A workers because they are often more vulnerable than U.S. workers is not a matter of dry economic theory. Consider a series of cases in this very Court arising out of Operation Blooming Onion. *See* Indictment, *United States v. Patricio*, No. 5:21-cr-9 (S.D. Ga. Oct. 5, 2021), ECF No. 3 ("*Patricio* Indictment"). As this Court well knows, Operation Blooming Onion — among the largest human trafficking cases ever charged in U.S. history — involves horrific allegations against a host of conspirators, several of whom have pled guilty. DOL summarized some of those allegations in its Notice of Proposed Rulemaking, including that the defendants "fraudulently used the H-2A program to smuggle agricultural workers into the United States" who "were forced to dig onions with their bare hands, earning $0.20 for each bucket harvested, . . . were threatened with guns and violence," and "were detained in crowded, unsanitary buildings with little or no food." *See* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 88 Fed. Reg. 63,750, 63,800 n.80 (Sept. 15, 2023); *see also* Final Rule, 89 Fed. Reg. 33,898, 34,017 n.96 (June 28, 2024) (noting this scandal as a reason to strengthen worker protections under the H-2A program). DOL further noted that the investigation revealed "multiple instances in which

workers' personal cellular telephones have been seized by employers." 88 Fed. Reg. at 63,801.

The abuses do not stop there. The conspirators in the Operation Blooming Onion cases allegedly "exploited these foreign workers by demanding they pay unlawful fees, by holding their identification documents hostage . . . and by threatening them with deportation and violence." *See Patricio* Indictment ¶ 10. An alleged conspirator "repeatedly raped, kidnapped, and tried to kill" a victim. *Id.* ¶ 63(v). Workers were allegedly "detained . . . in a work camp surrounded by an electric fence." *Id.* ¶ 63(gg), (hh). Defendants allegedly "sold approximately thirty workers to a conspirator in Indiana for $21,481." *Id.* ¶ 63(u). Two victims died as a result of the alleged conspiracy. *Id.* ¶ 63(y), (cc).[6]

The defendants in the Operation Blooming Onion cases did not commit these alleged crimes out of sadism, but greed. The conspirators allegedly "illegally profited over $200,000,000 from this illegal scheme." *Id.* ¶ 11. Operation Blooming Onion illustrates that when employers can make money by hiring and abusing H-2A workers, some unscrupulous employers will choose to do so. And when avarice drives employers to pick exploitable H-2A workers, the U.S. workers who would otherwise fill those roles lose out.

To be sure, agricultural workers may face profit-driven exploitation whatever their immigration status. But as Operation Blooming Onion illustrates, H-2A workers are often even more vulnerable to such abuses than their U.S. counterparts. Unlike workers who are U.S. citizens or who hold lawful permanent resident status, H-2A workers are lawfully present in the United States only while they are employed, meaning that fleeing an abusive boss can expose

[6] Of course, allegations against defendants who have not been convicted are just that — allegations. But a rulemaking is not a criminal trial; DOL need not prove the facts underlying the charged offenses in *United States v. Patricio* beyond a reasonable doubt in order to conclude that the evidence supporting the charges and guilty pleas indicates that H-2A workers are especially vulnerable to exploitation.

them to deportation and immigration bans. *See, e.g.*, *Arreguin v. Sanchez*, 398 F. Supp. 3d 1314, 1320 (S.D. Ga. 2019) (Wood, J.) (describing case in which H-2A employer "threatened [workers] with deportation on multiple occasions" and "told [the workers] that if they left his employment, he would report them to immigration services, and they would be deported. He also told them that if they were deported, they would never be allowed to enter the United States again through a work visa."). Speaking up can mean an employer refuses to call that H-2A worker back the following year, cutting off a crucial source of income. H-2A workers are often housed in camps on the employer's property, in isolated rural locations, with no means of transportation. They often speak little or no English and do not know their rights. *See, e.g., id.* at 1325 ("[W]here Plaintiffs as foreign immigrants were in an unknown location with significant debts incurred as a result of Defendant's preemployment fees, Defendant's threats of deportation or losing H-2A privileges were used to coerce Plaintiffs into continuing to work for him, despite their terrible working and living conditions."). Simply put, H-2A workers are frequently severed from the kinds of local, communal, religious, and familial networks their U.S. counterparts are embedded in, and it is those connections that can inoculate workers against employer abuses.[7]

This is why absent robust enforcement of strong legal protections, H-2A workers may

[7] Unfortunately, Operation Blooming Onion is not an isolated incident. Between 2018 and 2020, the Polaris Project identified 15,886 survivors of labor trafficking through its trafficking hotline, 72 percent of whom had an H-2A or other temporary visa. *See* Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018–2020*, at 4 (May 2022), https://polarisproject.org/wp-content/uploads/2022/07/Labor-Trafficking-on-Specific-Temporary-Work-Visas-by-Polaris.pdf. In a 2020 report by Centro de los Derechos del Migrante ("CDM"), 26 percent of H-2A workers interviewed said they paid illegal recruitment fees as high as $4,500. *See* Tina Vásquez, *Human Trafficking or a Guest Worker Program? H-2A's Systemic Issues Result in Catastrophic Violations*, PRISM (April 14, 2023), https://perma.cc/C9FH-JANM. A 2013 CDM report found 58 percent of H-2A workers surveyed had been charged an illegal recruiter fee. *Id.* In 2021 and 2022, 73 percent of the back wages owed and civil penalties assessed by DOL were against H-2A employers. *See* Daniel Costa & Philip Martin, *Record-Low Number of Federal Wage and Hour Investigations of Farms in 2022*, ECON. POL'Y INST. (Aug. 22, 2023), https://perma.cc/56MW-9ZUC.

swiftly become a captive workforce — sometimes literally, as Operation Blooming Onion shows. *See Patricio* Indictment ¶ 63(hh) ("Victims 15 and 16 escaped from [a defendant's] work camp with an electric fence. After their escape, Victims 15 and 16 hid in the woods and were rescued by federal agents."). A captive H-2A workforce is a profitable workforce, so the incentive to instead hire U.S. workers with nearby families and communities, and who are thus less vulnerable to this type of captivity, evaporates. And conditions do not need to be as egregious as those revealed in Operation Blooming Onion to trigger this race to the bottom. Farmworker advocates like amici field cases every year where just the threat of deportation is enough to coerce an H-2A worker into taking lower wages or enduring deplorable housing and working conditions. *See, e.g.*, *Arreguin*, 398 F. Supp. 3d at 1325 ("[The H-2A workers] were at [the employer's] mercy and had no choice but to continue to work for him without pay or risk being deported as [the employer] threatened."). This everyday exploitation means fewer job opportunities for the U.S. workers whom amici serve and for whom Plaintiffs feign concern.

II. The Final Rule Does Not Exceed DOL's Statutory Rulemaking Authority

Amici agree with and adopt by reference DOL's and the Proposed Intervenors' cogent explanations why 8 U.S.C. § 1188 and other aspects of the H-2A statutory scheme expressly authorize DOL to conduct legislative rulemaking. *See* DOL Opp'n Pls' Mot. for Stay/Prelim. Inj./TRO 15–28, ECF No. 69 ("DOL Br."); Proposed Intervenor-Defs.' Mem. Opp'n Pls.' Mot. for Stay/Prelim. Inj./TRO 18–29, ECF No. 67-6 ("Proposed Intervs.' Br."). But even in a world in which Congress did not *explicitly* authorize DOL to make legislative rules, this Court should nevertheless deny the Plaintiffs' requested preliminary equitable relief because: (A) statutory rulemaking authority may be implicit, rather than explicit; and (B) Congress has ratified and acquiesced in DOL's rulemaking authority.

A. *Even if the H-2A Statute Did Not Grant DOL Explicit Rulemaking Authority, it Would Do So Implicitly*

For the reasons explained by DOL and the Proposed Intervenors, IRCA grants DOL ample explicit authority to promulgate legislative rules like the one at issue here. But even if this Court were to agree with Plaintiffs that "8 U.S.C. § 1188(a)(1) provides no express authority for [DOL] to issue regulations," Pls.' Compl. ¶ 64, ECF No. 1, the statute would do so implicitly. It is black-letter law that "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy *and the making of rules* to fill any gap left, *implicitly or explicitly*, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (emphasis added); *see generally HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) (explaining that courts "have recognized that agencies enjoy some powers that were not expressly enumerated by Congress," *i.e.*, those powers that are "statutorily implicit" (cleaned up)). Thus, although Plaintiffs are correct that an agency can only make rules if Congress says it can, they ignore that the "delegation [of rulemaking authority] need not be express." *Outdoor Amusement Bus. Ass'n, Inc. v. Dep't of Homeland Sec.*, 983 F.3d 671, 684 (4th Cir. 2020).

The Fourth Circuit's decision in *Outdoor Amusement* is illustrative. That case involved the H-2B program; the relevant question was whether the Departments of "Homeland Security or Labor had statutory authority to promulgate" a set of rules that — like the Final Rule challenged here — "establish[ed] the standards governing the labor-certification-application process." *Id* at 684, 676. The court noted that the H-2B statute "leaves gaps to be filled" by an agency. *Id* at 684. For instance, like the H-2A program, the government can only issue "an H-2B visa . . . if American workers cannot be found to fill the relevant jobs." *Id.* at 685. But that raises the question "as to how to determine when U.S. workers are available." *Id.* Thus, the visa-issuing agency (for the H-2B program, Homeland Security) "sensibly chose[] to rely on Labor's

expertise in the labor market to make a two-part determination for issuing a labor certification: 'whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.'" *Id.* Further, "Labor could make rules to define how it would judge whether" a given application for an H-2B worker meets that test — a test that parallels the H-2A standard. *Id.* In short, "[t]he statutory circumstances reveal that Congress implicitly delegated Labor rulemaking authority to administer its labor certifications as part of its duty as the consulting agency." *Id.* at 684.

Bayou Lawn & Landscape Services v. Secretary of Labor, 713 F.3d 1080 (11th Cir. 2013), on which Plaintiffs rely, is not to the contrary. *Bayou* held that DOL's rulemaking authority regarding H-2B workers was not "implied by" the relevant statute. *Id.* at 1084. *Bayou* did not hold that rulemaking authority can *never* be implied by a statutory scheme, nor did it hold that DOL lacks implied rulemaking authority with respect to the H-2A program. Indeed, *Bayou* rested its holding in part on the fact that the same statute "expressly *grants* DOL rulemaking authority over the agricultural worker *H-2A* program." *Id.* at 1084 (emphasis in original). Far from justifying Plaintiffs' position, *Bayou* kneecaps it.[8]

If there were any remaining doubt that Congress granted DOL either explicit or implicit rulemaking authority, consider the absurdity of the counterfactual: that Congress intended to forbid DOL from using rulemaking to "fill [the] gap[s]" left in the statute. *Morton*, 415 U.S. at 231. In Plaintiffs' world, DOL is left to determine anew in every single case — for hundreds of

[8] Plaintiffs handwave away this holding of *Bayou* by claiming the provision cited, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), "is limited to defining 'agricultural or labor services' and not a general grant of rulemaking over the entire program." Pls.' Mem. 12 n.2. But Plaintiffs ignore the myriad other explicit grants of rulemaking authority found throughout the statute, as well as the well-established rule that rulemaking authority can be implicit in a statutory scheme.

thousands of H-2A workers annually — whether "sufficient [U.S.] workers" are available and whether hiring H-2A workers would "adversely affect the wages and working conditions of [U.S.] workers." 8 U.S.C. § 1188(a)(1). "Neither judgment is self-evident." *Outdoor Amusement*, 983 F.3d at 685. Thus, "[t]he alternative [to rulemaking] is for Labor to use an unstructured ad hoc process or return to informal guidance letters, both of which could lead to further delays, costs, and reduced accountability through shifting determinations." *Id.*

Plaintiffs' interpretation would serve only to throw sand in the gears of the administrative process and harm employers and workers alike. By making DOL reinvent the wheel in every adjudication in which an agricultural employer applies for permission to hire H-2A workers, Plaintiffs would deny employers the stability and predictability that comes with rulemaking. That would be disastrous for agricultural employers who depend on a stable and predictable supply of labor to stay afloat. Plaintiffs provide no reason why Congress would have intended to structure the statute to frustrate the statutory goals of the H-2A program, presumably because no such reason exists. Plainly, "the best reading of [the] statute is that it delegates discretionary authority to [the] agency," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2024 WL 3208360, at *14 (2024), and that discretion includes not only the determination whether an individual H-2A application would have an adverse effect on U.S. workers, but also the discretion to issue rules governing all such determinations.[9]

[9] Plaintiffs may argue that the Supreme Court's recent decision to overrule the *Chevron* doctrine in *Loper Bright* somehow limits Congress's ability implicitly to delegate statutory rulemaking authority. That argument would be wrong. The cases recognizing that Congress may implicitly delegate rulemaking authority predate *Chevron*. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199 (1974). If DOL were arguing that this Court should defer to the agency's interpretation of an ambiguous statutory term to hold that Congress delegated rulemaking authority, *Loper Bright* might come into play. But there is no need to defer here; indeed, DOL has not even asked for deference. The best reading of the statute is that Congress delegated rulemaking authority to DOL, either explicitly or implicitly, and so "the role of the reviewing court under the APA is, as

B. *Congress has Ratified and Acquiesced in DOL's Exercise of Rulemaking Authority*

Even if Plaintiffs might at one point have been able to argue that Congress has not authorized DOL to exercise rulemaking authority, that ship has long since sailed. DOL has been exercising this rulemaking authority for decades. Indeed, DOL was issuing regulations on guest agricultural workers before the H-2A statute even existed. And it is not as if Congress was in the dark. To the contrary, from the earliest days of the agricultural guest worker program, Congress has repeatedly said it is acutely aware DOL uses rulemaking to carry out its responsibilities. Under these circumstances, Congress has ratified the agency's exercise of rulemaking authority and acquiesced in the agency's interpretation of the statute allowing it to do so.

Acquiescence and ratification are venerable rules of statutory construction. "It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (cleaned up); *accord Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *Green Rock LLC v. IRS*, 104 F.4th 220, 228 (11th Cir. 2024) (where Congress is aware of an agency regulation interpreting a statute, legislates on the same subject, "and does not disturb an agency's existing regulation," courts "presume . . . [that] Congress ratifies the agency's legal interpretation"); *Outdoor Amusement*, 983 F.3d at 687 ("That Labor has been providing labor certifications and has promulgated rules governing them for decades before the [challenged] Rules without serious challenge from the political branches or courts is at least some evidence that Congress intended that [DOL] could rulemake" vis-à-vis the H-2B program).

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always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." *Loper Bright*, 2024 WL 3208360, at *14.

Phillip C. ex rel. A.C. v. Jefferson County Board of Education, 701 F.3d 691 (11th Cir. 2012), is a good example of how acquiescence and ratification work in practice. *Phillip C.* involved a local board of education's challenge to a longstanding U.S. Department of Education rule interpreting the Individuals with Disabilities in Education Act ("IDEA") to require the state to reimburse parents for certain independent educational evaluations ("IEEs"). *Id.* at 694–95. As here, the Board argued that the regulation exceeded the agency's statutory authority. *Id.* at 695. But the Eleventh Circuit disagreed. The court noted ample evidence that Congress was plainly aware of the regulation in question. *Id.* at 696. Moreover, in the decades following the promulgation of the regulation, "Congress reauthorized the IDEA in 1990, 1997, and 2004 without altering a parent's right to a publicly financed IEE." *Id*. Explaining that "'Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it reenacts a statute without change,'" the court held that "doctrine is particularly applicable here, where a parent's right to a publicly financed IEE has endured since the [agency] first implemented the IDEA." *Id.* at 696–97 (quoting *Lorillard*, 434 U.S. at 580). Thus, "Congress has clearly evinced its intent that parents have the right to obtain an IEE at public expense," and the regulation was within the agency's statutory authority. *Id.* at 697.

This logic fits the history of DOL's rulemaking authority like a glove. First, Congress has obviously known about the DOL's exercise of rulemaking authority. As the agency points out, Congress copied IRCA's two-prong test for whether DOL can approve a labor certification directly from a 1978 DOL regulation on guestworkers that predates the H-2A program itself. *See* DOL Br. 16 n.8 (citing Temporary Employment of Alien Agricultural and Logging Workers in the United States, 43 Fed. Reg. 10,306 (Mar. 10, 1978)); *see also AFL-CIO v. Brock*, 835 F.2d 912, 914 (D.C. Cir. 1987) (noting that IRCA "expressly incorporates the adverse effect

prohibition that [DOL] had earlier introduced by regulations"); *United Farm Workers of Am., AFL-CIO v. Chao*, 227 F. Supp. 2d 102, 108 n.12 (D.D.C. 2002) (ditto). Quite literally from the birth of the H-2A program almost forty years ago, Congress knew about and not only declined to disturb, but expressly ratified, DOL's rulemaking authority. *See Phillip C.*, 701 F.3d at 695–96 (finding ratification/acquiescence in agency's statutory authority in part because Congress codified one such pre-existing agency regulation).

Further, Congress is plainly aware that DOL thinks it can issue rules on the H-2A program; the face of the statute repeatedly references DOL regulations. *See, e.g.*, 8 U.S.C. § 1188(b)(1) (forbidding DOL from issuing a labor certification if "[t]here is a strike or lockout . . . which, *under the regulations*, precludes such certification" (emphasis added)); *id.* § 1188(c)(3)(B)(i) (requiring certain employers to "offer to provide benefits, wages and working conditions required pursuant to this section *and regulations*" (emphasis added)); *id.* § 1188(c)(3)(B)(vi) (exempting employers from liability under an existing regulation under certain circumstances); *id.* § 1188(c)(4) ("Employers shall furnish housing in accordance *with regulations*." (emphasis added)); *id.* (referencing "temporary labor certification *regulations* in effect on June 1, 1986" (emphasis added)). There is no need to wonder if Congress has legislated with full awareness that DOL has always read the guestworker statutes to allow the agency to issue appropriate regulations. Congress has said as much.

Not only has Congress known the whole time that DOL reads the statute to grant rulemaking authority; in the years following IRCA, Congress has repeatedly legislated in this area without disturbing that authority. Consider a sampling of DOL rulemaking and Congressional action related to 8 U.S.C. § 1188, the statute on which DOL primarily relies for its statutory authority to issue the Final Rule, in the years following IRCA's passage:

- 1986: Congress passes IRCA, ratifying prior DOL regulations as discussed above. *See* Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

- 1987: DOL promulgates by regulation the first set of rules under the H-2A program, establishing an AEWR and various other protections that form the basis of the current regulations. *See* Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States, 52 Fed. Reg. 20,496 (June 1, 1987). DOL relies on the same statutes it does in the Final Rule: 8 U.S.C. §§ 1101(a)(15)(H)(ii)(A), 1184(c), and 1188.[10] *Compare* 52 Fed. Reg. at 20,507, *with* 89 Fed. Reg. at 34,059 ("The authority citation for [20 C.F.R.] part 655 continues to read as follows: . . . Subpart B issued under 8 U.S.C. [§§] 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 C.F.R. § 214.2(h).")

- 1988: Congress revises and reenacts what is now 8 U.S.C. § 1188, including some technical corrections and renumbering the section, but without making any substantive change. *See* Pub. L. No. 100-525, § 2(*l*), 102 Stat. 2609, 2612 (Oct. 24, 1988).

- 1989: DOL by regulation updates its methodology for computing AEWRs, again citing 8 U.S.C. §§ 1101(a)(15)(H), 1184(c), and 1188 for its authority to do so. *See* Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; Adverse Effect Wage Rate Methodology, 54 Fed. Reg. 28,037, 28,046 (July 5, 1989).

- 1991: Congress makes technical corrections to 8 U.S.C. § 1188, again without disturbing any DOL regulatory authority. Pub. L. No. 102-232, §§ 307(*l*)(4), 309(b)(8), 105 Stat. 1733, 1756, 1759 (Dec. 12, 1991).

- 1994: Congress amends 8 U.S.C. § 1188, and — once again — stays mum about DOL's rulemaking authority. *See* Pub. L. No. 103-416, § 219(z)(8), 108 Stat. 4305, 4318 (Oct. 25, 1994).

- 1999: Congress amends 8 U.S.C. § 1188, this time by adjusting certain timelines, and without touching DOL's rulemaking authority. Pub. L. No. 106-78, § 748, 113 Stat. 1135, 1167 (Oct. 22, 1999).

- July 2000: DOL promulgates a rule implementing the DOJ's delegation of authority to adjudicate H-2A petitions. DOL lists 8 U.S.C. § 1188 as statutory authority. *See* Labor Certification and Petition Process for the Temporary Employment of Nonimmigrant Aliens in Agriculture in the United States; Delegation of Authority to Adjudicate Petitions, 65 Fed. Reg. 43,538, 43,542 (July 13, 2000).

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[10] The agency cited 8 U.S.C. § 1186, which Congress transferred to 8 U.S.C. § 1188 the following year.

- December 2000: Congress amends 8 U.S.C. § 1188 to tweak when DOL must determine that employer-provided housing is adequate. In a now-familiar pattern, Congress says nothing whatsoever about DOL's rulemaking authority — even though DOL had long-since published regulations governing the adequacy of employer-provided housing. *See* Pub. L. No. 106-554, § 105, 114 Stat. 2763, 2763A-11 (Dec. 21, 2000).[11]

The July 2000 rulemaking and December 2000 legislation noted above are particularly instructive. In addition to amending § 1188's timeline for determining the adequacy of housing, Congress also forbade DOL from implementing the July 2000 rule. *See* Pub. L. No. 106-554, § 104, 114 Stat. 2763, 2763A-11 (Dec. 21, 2000). But Congress expressed no skepticism of DOL's general ability to make rules under § 1188. Far from it. Congress included a proviso stating "[t]hat nothing in this section shall prohibit the development or revision of such a rule, or the publication of any similar or successor proposed or final rule . . . or other activities necessary and appropriate in preparing to implement such a rule with an effective date after September 30, 2001." *Id.* In effect, Congress told DOL the agency could not enact the July 2000 regulation now, *but it could do so later* — a legislative instruction completely at odds with Plaintiffs' theory that DOL cannot regulate in this space at all.

In sum, since the inception of the H-2A program, Congress has not just expressly incorporated DOL regulations into the statute and demonstrated in the statute's text it knows full well DOL understands the statute to grant rulemaking authority. Congress has tinkered repeatedly with that statute, all without ever hinting it disagrees with the agency's interpretation of 8 U.S.C. § 1188 to authorize rulemaking. These circumstances provide as clear an example of congressional ratification and acquiescence as one could hope to come across.

III. Plaintiffs' Requested Relief is Wildly Disproportionate to their Claims

DOL and the Proposed Intervenors have eloquently explained why Plaintiffs' requested

[11] Congress last amended 8 U.S.C. § 1188 in 2000.

relief — gutting the *entirety* of the Final Rule across the country — is far outside the scope of the provisions of the Final Rule they actually challenge, even if Plaintiffs were correct on the merits (which they are not). DOL Br. 38–41; Proposed Intervs.' Br. 39–40. Amici agree that Plaintiffs' requested relief is overbroad both geographically and with respect to which provisions of the Final Rule they seek to block. Rather than duplicate that briefing, Amici hope to illustrate the grievous effects Plaintiffs' requested relief would have on both U.S. and H-2A workers.

For example, two amici here are U.S. workers in corresponding employment, working on farms in the Mississippi Delta. They fear that if Plaintiffs receive their overbroad relief, they will lose the protections of the progressive discipline provisions found at 20 C.F.R. § 655.122(n). Like other growers in the Delta, their employer has been gradually reducing its longtime workforce of local Black workers and replacing them with H-2A workers. Amici fear that without the enhanced protections found at 20 C.F.R. § 655.122(n) — which Plaintiffs seek to enjoin, stay, and vacate *but do not challenge* — they will fall victim to this same trend.

Other amici work closely with H-2A workers and U.S. workers in corresponding employment who will benefit from the enhanced protections provided in the Final Rule. For example, the Final Rule will "require the provision, maintenance, and wearing of seatbelts in most employer-provided transportation, which would reduce the hazards associated with agricultural worker transportation." 89 Fed. Reg. at 33,903; 20 C.F.R. § 655.122(h)(4). This requirement could not be more timely. Two months ago today, a drunk driver in Florida hit a bus carrying 53 laborers — almost all here as H-2A workers — killing eight and wounding dozens more. *See* Hannah Critchfield & Juan Carlos Chavez, *When a Bus Without Seat Belts Met a Dangerous Driver, Florida Farmworkers Paid the Price*, TAMPA BAY TIMES (May 17, 2024), https://perma.cc/SH7Q-7ER3. The bus did not have seat belts. *Id.* Plaintiffs do not challenge the

new seatbelt requirement at 20 C.F.R. § 655.122(h)(4); they do not even mention it. But the relief requested in the Complaint and motion for preliminary equitable relief would block this life-saving protection all the same.

To name just a few other protections provided by the Final Rule, H-2A employers also cannot retaliate against employees for filing or participating in a civil or criminal case. 20 C.F.R. § 655.135(h)(1)(vii). H-2A employers cannot block workers from having guests over to their employer-provided housing. *Id.* § 655.135(n). H-2A employers who have been "debarred" from the program for violating the statute or regulations can no longer escape that limitation by simply transferring their operation to a successor-in-interest. *Id.* § 655.104. H-2A employers cannot intimidate, blacklist, or fire a worker for speaking with an attorney about their workplace. *Id.* § 655.135(h)(1)(iv). And so on. This list is not meant to be exhaustive, but merely to illustrate the breadth and importance of protections that Plaintiffs do not challenge on the merits but nevertheless ask this Court to strip from hundreds of thousands of vulnerable workers.

CONCLUSION

For the foregoing reasons, Amici respectfully request this Court deny Plaintiffs' motion for preliminary equitable relief.

Dated this 15th day of July, 2024.

Respectfully submitted,

/s/ *Nathan Leys*
Nathan Leys (*pro hac vice* motion forthcoming)
Kelsey Eberly (*pro hac vice* motion forthcoming)
FarmSTAND
712 H St. NE, Suite 2534
Washington, D.C. 20002
Phone: (202) 630-3095
E-mail: nathan@farmstand.org
E-mail: kelsey@farmstand.org

/s/ *Shelly C. Anand*
Shelly Anand
Georgia Bar No.: 222839
Sur Legal Collaborative
P.O. Box 1606
Decatur, Ga 30031
Phone: (678) 532-8419
E-mail: shelly@surlegal.org