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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF U.S. AGRICULTURAL WORKERS AND FARMWORKER ADVOCACY ORGANIZATIONS IN SUPPORT OF DEFENDANTS

Colorado Legal Services, Comité de Apoyo a los Trabajadores Agrícolas, Community Legal Services, Farmworker Justice, Farmworker Legal Services, the Georgia Legal Services Program, Friends of Farmworkers, Inc. d/b/a Justice at Work, Legal Action of Wisconsin, the Legal Aid Society of Mid-New York, Inc., the National Legal Aid & Defender Association, the Northwest Employment Education and Defense Fund d/b/a the Northwest Workers' Justice Project, Polaris, Sur Legal Collaborative, United Farm Workers, the UFW Foundation, the Worker Justice Center of New York, Willie Shelly, and Tyrone Cason request leave to file the attached proposed amicus brief in the above-captioned case.

Proposed amici and their clients have important interests that may be affected by the outcome of this litigation, as discussed in the attached proposed amicus brief. Proposed amici also bring unique perspectives, as U.S. agricultural workers in corresponding employment who directly benefit from the protections of the H-2A program and as organizations who work with U.S. agricultural workers in and out of corresponding employment and with H-2A workers.

The parties consent to this motion. The proposed amicus brief is timely, as it comes one week after the Federal Defendants' brief. *Cf.* Fed. R. App. P. 29(a)(6) ("An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed."). The proposed brief satisfies Local Civil Rule 7.1(a).

Dated this 30th day of October, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Local Civil Rule 5.1, I certify that on October 30, 2024, I caused the foregoing Motion for Leave to File an Amicus Curiae Brief and the Proposed Amicus Curiae Brief on all parties via the CM/ECF e-filing system.

/s/ *Shelly C. Anand*

Shelly C. Anand

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

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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' CROSS-MOTION FOR SUMMARY JUDGMENT

CORPORATE DISCLOSURE STATEMENT

Colorado Legal Services has no parent corporation and issues no stock.

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.

Polaris 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.

The Worker Justice Center of New York has no parent corporation and issues no stock.

STATEMENT OF AMICI'S INTERESTS

Each amicus here except for Colorado Legal Services, Polaris, and the Worker Justice Center of New York signed onto an earlier amicus brief at the preliminary injunction stage. *See* ECF No. 74. Those amici[1] incorporate by reference their earlier statements of amici's interests. *See* ECF No. 74-1 at 3–8.

Colorado Legal Services seeks to provide meaningful access to high quality, civil legal services in the pursuit of justice for low-income persons and vulnerable populations in Colorado. Through its Migrant Farm Worker Division, the organization provides comprehensive legal services to agricultural workers throughout Colorado on a variety of legal issues that have historically gone unmet, such as wage theft, workplace safety, civil rights (including human trafficking and sexual harassment), and immigration (humanitarian visas and naturalization). Although the organization serves agricultural workers in many occupations, it has often found H-2A sheepherders, sheep shearers, and range workers in desperate need of its assistance. Colorado Legal Services has represented H-2A herders and range workers in civil lawsuits and complaints filed with state and federal labor departments, and has recovered hundreds of thousands of dollars in back wages and damages for these workers, in matters involving claims of assault and battery, false imprisonment, denial of medical care, withholding of food and water, confiscating documents, visa fraud, wage theft, and labor trafficking. Colorado Legal Services submitted comments on the 2023 Proposed H-2A Rule on the need for greater protections for

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[1] The amici here who signed onto the earlier amicus brief at the preliminary injunction stage, ECF No. 74, are: Tyrone Cason, Willie Shelly, Comité de Apoyo a los Trabajadores Agrícolas, Community Legal Services, Farmworker Justice, Farmworker Legal Services, the Georgia Legal Services Program, Justice at Work, Legal Action of Wisconsin, Legal Aid Society of Mid-New York, Inc., the National Legal Aid & Defender Association, the Northwest Workers' Justice Project, Sur Legal Collaborative, United Farm Workers, and the UFW Foundation.

H-2A herders and range workers.

Polaris is leading a survivor-centered, justice- and equity-driven organization working to end sex and labor trafficking and support survivors as they reclaim their freedom. Founded in 2002, Polaris has operated the U.S. National Human Trafficking Hotline since 2007, connecting victims and survivors to support and services 24 hours a day, seven days a week. Through that work, Polaris has built the largest known dataset on human trafficking in North America. Research and intelligence gleaned from that data show that migrant workers, with or without regularized immigration status, are frequently exploited and even victimized by forced labor and other forms of trafficking in many industries. Indeed, exploitation, trafficking, and abuse have become endemic to many of the visa categories including the H-2A visa program.

The **Worker Justice Center of New York** (WJCNY) was originally founded in 1981 as Farmworker Legal Services of New York, which merged with the Workers' Rights Law Center in 2011. WJCNY now provides advocacy and legal services to low-wage workers in New York, with an emphasis on farmworkers, including H-2A workers and farmworkers in corresponding employment. Its outreach and education team speaks directly to thousands of farmworkers per year about their experiences, providing education on relevant legal protections and referring farmworkers who have experienced violations of their labor rights, including H-2A program violations, to its legal team. Its advocacy branch also focuses on the rights of farmworkers at the legislative level.

SUMMARY OF ARGUMENT

Plaintiffs challenged only three provisions of the Final Rule — each relating to worker voice and empowerment. *See* Compl. ¶¶ 68–73 (describing challenged provisions); 20 C.F.R. §§ 655.135(h)(2)(i)–(ii), 655.135(m). The many *unchallenged* provisions of the Final Rule

provide vital protections for workers on H-2A visas, workers in corresponding employment, and U.S. workers similarly employed. *See generally* Improving Protections for Workers in Temporary Agricultural Employment in the United States, 89 Fed. Reg. 33,898 (Apr. 29, 2024) ("Final Rule"). These unchallenged protections are critically important to amici and the vulnerable workers they serve. As described below, the unchallenged provisions include requiring employers to provide transportation with seat belts, restrictions on employers withholding their workers' passports, and protections against retaliation for workers who seek medical care or meet with a member of the clergy. Other provisions, like those defining "single employer," and clarifying "for cause" termination, are explicitly designed to prevent H-2A employers from "circumvent[ing] regulations aimed at protecting workers in the United States." 89 Fed. Reg. at 33,937. Without such provisions, workers with H-2A employers will remain exceptionally vulnerable to employer exploitation — providing unscrupulous agribusinesses an obvious incentive to prefer hiring H-2A workers, and thus adversely affecting U.S. workers.

Federal Defendants and other amici establish why the worker voice and empowerment provisions are entirely lawful, *see* Fed. Defs.' Opp'n & Cross-Mot. for Summ. J. 1–36, ECF No. 114 ("DOL Br."); Amicus Br. of AFL-CIO 3–23, ECF. No. 117, and why, even assuming the agency lacks statutory authority to promulgate the three challenged provisions — 20 C.F.R. § 655.135(h)(2)(i)–(ii), (m) — those provisions are severable and Plaintiffs cannot justify obliterating the entire Final Rule, *see* DOL Br. 41–42; Amicus Br. of AFL-CIO 23–25.

Here, amici illustrate how the unchallenged provisions fall squarely within the Department's statutory authority to issue regulations ensuring the hiring of H-2A workers does not adversely affect U.S. workers, and the devastating real-world impact that striking down the

Final Rule's myriad unchallenged provisions would have on vulnerable farmworkers. To be clear, the provisions profiled in this brief are not an exhaustive list, but are instead intended to illustrate the range of protections that are plainly severable from those that Plaintiffs challenge.

ARGUMENT

I. Seat Belts

The Final Rule includes a basic safety measure that will save lives: requiring "the provision, maintenance, and wearing of seat belts in most employer-provided transportation," which the Department found "would reduce the hazards associated with agricultural worker transportation." 89 Fed. Reg. at 33,903; 20 C.F.R. § 655.122(h)(4). As UFW and the UFW Foundation noted in their comments, "[m]any farm workers report employer-provided transportation having seat belts but only for the drivers" or "either not having seat belts or non-functional seat belts." United Farm Workers & UFW Foundation, Comment Letter on Proposed Rule Improving Protections for Workers in Temporary Agricultural Employment in the United States at 19 (Nov. 14, 2023), https://www.regulations.gov/comment/ETA-2023-0003-0339 ("UFW Comments").

Less than a month after the agency promulgated the Final Rule, an impaired driver in Florida hit a bus carrying 53 laborers — almost all present in the United States 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.* Sadly, this was not an isolated event. As the agency noted in its NPRM, "[of] the agriculture-related injuries and fatalities that the Department has investigated in the last 5 years, more than 60 percent related to farmworker transportation." 88 Fed. Reg. 63,750, 63,776 (Sept.

15, 2023). In "2022 alone, [the agency] investigated eight incidents involving serious injury or death of farmworkers. Of these incidents, seven involved agriculture-related vehicle crashes . . . . Of the crashes investigated in 2022, all involved at least some workers who were not restrained by seat belts, sometimes with fatal or serious consequences." *Id.*

The seat belt provision of the Final Rule is particularly important for H-2A workers who, as the Department noted, "may have more limited recourse when placed in an inherently dangerous situation, such as being transported in a vehicle without seat belts, than workers in the United States similarly employed," because they "are incentivized to continue employment even when presented with working conditions that are hazardous to their health and safety." 89 Fed. Reg. at 33,963. Rather than pay to install lifesaving equipment, employers may prefer to hire H-2A workers who are unlikely to complain. *See id.* at 33,997 (noting that the record contains "studies showing that H-2A workers are unlikely to complain about unlawful and substandard working conditions because of fear" of retaliation and deportation). That perverse and dangerous incentive structure creates an adverse effect on U.S. workers: as the Department noted, "[a]n employer that only offers dangerous transportation (in this case, transportation without seat belts . . .) has offered terms and working conditions below the minimum level at which a worker in the United States could be expected to accept." *Id.* at 33,963. For instance, U.S. workers might choose to leave jobs upon learning of unsafe conditions, or choose not to take such a job in the first place — precisely the kind of race-to-the-bottom Congress tasked DOL with forestalling.

Plaintiffs do not challenge the new seat belt requirement at 20 C.F.R. § 655.122(h)(4). Neither their complaint nor any of their briefing mentions it. That silence is not surprising because the seat belt requirement has nothing to do with the provisions Plaintiffs *have*

challenged, the worker voice and empowerment regulations. This life-saving provision provides basic protections to amici and the workers amici represent and serve. Plaintiffs have provided no reason to vacate or permanently enjoin it.

II. Passport Withholding

The Final Rule also prohibits employers from unilaterally withholding or confiscating their H-2A workers' passports, visas, or other immigration or government identification documents. 20 CFR § 655.135(o). This protection is critical because workers' isolation and "dependency on a single employer for work, housing, transportation, and necessities," as the Department explained, make them easy targets for unscrupulous employers to confiscate workers' passports "as a means of controlling workers and forcing them to accept substandard and illegal working conditions." 89 Fed. Reg. at 34,016–17.

Amici have seen this exploitation time and again in its most extreme forms. Earlier this month, for example, amicus Colorado Legal Services filed federal trafficking, Fair Labor Standards Act, and state law claims on behalf of three Mexican H-2A workers who allege that a labor contractor and its agents lured them to the United States with a promise of fair-paying work in Uvalde, Texas, but then trafficked them to various potato packing warehouses in southern Colorado, where the labor contractor skimmed their wages, placed them in substandard housing, and subjected them to abusive working conditions. *See* Compl., *Rubio Flores v. J&T Harvesting LLC*, No. 1:24-cv-2853 (D. Colo. filed Oct. 15, 2024), ECF No. 1. The plaintiffs allege that, among other coercive tactics to control their movements, the contractor managers told them they had to give up their passports, which many workers did. *Id.* ¶¶ 163–65.

The conspirators in the Operation Blooming Onion cases currently pending in this court

allegedly did the same — exploiting their foreign workers by, among other things, "holding their identification documents hostage." *See* Indictment ¶ 10, *United States v. Patricio*, No. 5:21-cr-9 (S.D. Ga. Oct. 5, 2021), ECF No. 3. And in another case the Department mentioned in the Final Rule, H-2A workers working as cooks and field workers pursued federal claims alleging that their employer failed to pay them, physically and sexually abused them, seized their passports, and threatened violent retaliation if they attempted to escape. 89 Fed. Reg. at 33,992 (citing *Gonzalez-Rodriguez* v. *Gracia,* No. 5:21–CV–406, 2023 WL 2450170 (E.D.N.C. Feb. 6, 2023)).

A study by amicus Polaris, referenced in the Final Rule, *see* 89 Fed. Reg. at 34,024, confirms that passport withholding is commonly used to compel forced labor and facilitate labor trafficking. The study identified 2,841 H-2A workers who experienced labor trafficking from 2018 to 2020, while acknowledging that trafficking is notoriously underreported and that there are likely more instances of such trafficking. *See* Polaris, *Labor Trafficking on Specific Temporary Work Visas: A Data Analysis 2018–2020* at 25 (2022), https://perma.cc/CP5R-LZ99. Of these over 2,800 workers, a third (33 percent) reported having important documents like their IDs, immigration documents and/or passports withheld or destroyed by traffickers as a means of keeping them under control. *Id.* at 26. The Polaris report identified a total of 15,886 survivors of labor trafficking through its trafficking hotline; when their visa status was known, 72% of these survivors had an H-2A or other temporary visa. *Id.* at 4.

Even aside from the extreme harm of labor trafficking, amici farmworker advocates routinely encounter workers who suffer when they need to leave their H-2A employment but do not have easy access to their passports. Workers may experience a sudden need to leave and return to their home countries for any number of reasons, including for their own physical

wellbeing or to attend to an urgent family situation. Workers who lack ready access to their identification and immigration documents risk significant burdens, including being stuck at border crossings, being unnecessarily detained by immigration officials, or needing to pay additional costs to find replacement travel documents. It also makes it impossible for workers to transfer to new H-2A jobs. And workers do not feel safe traveling without their passports.

The prohibition on passport withholding also directly protects against adverse effects on U.S. workers. Employers who can control H-2A workers and force them to accept substandard and illegal working conditions by withholding their immigration documents have no incentive to hire U.S. workers, who can more easily walk away. *See, e.g.*, 89 Fed. Reg. 33,998 (noting one instance where the Department assessed penalties against two H-2A labor contractor employers who confiscated workers' passports to keep them from leaving their employment after the workers discovered they were being underpaid). This provision helps to put H-2A and U.S. workers on somewhat more equal footing so employers cannot exploit one group in order to replace the other.

And, as with the other provisions discussed here, Plaintiffs do not challenge the passport and immigration documents confiscation prohibition at 20 C.F.R. § 655.135(o). They do not even mention it. And it has nothing to do with the challenged worker voice and empowerment regulations. Indeed, this provision enjoyed widespread support from the majority of commenters, including several private employers. 89 Fed. Reg. at 34,023. Plaintiffs have provided no reason to vacate or permanently enjoin this vital provision to prevent H-2A worker exploitation.

III. Anti-Retaliation Provisions for Consulting with Key Service Providers

The Final Rule prohibits employers from retaliating against H-2A workers or workers in

corresponding employment for speaking with "key service providers." 20 C.F.R § 655.135(h)(1)(v); 89 Fed. Reg. at 33,999. The Final Rule defines "key service provider" as "[a] health-care provider; a community health worker; an education provider; a translator or interpreter; an attorney, legal advocate, or other legal service provider; a government official, including a consular representative; a member of the clergy; an emergency services provider; a law enforcement officer; and any other provider of similar services." 89 Fed. Reg. at 33,995–96 (codified at 20 C.F.R. § 655.103(b)). Notably, labor organizations are *not* explicitly included in this list. *Id.*

This protection is critical for agricultural workers who generally live in sparsely populated regions of the country and have limited access to areas outside of the farm. *Id*. at 33,999. Through key service providers, H-2A and U.S. workers in corresponding employment obtain access to medical care for routine appointments, care for chronic conditions, emergency medical attention, and access to important information about their legal rights. Without such providers, workers may otherwise not receive any services: "workers' isolation and lack of access to information is exacerbated by the fact that internet and cell phone service are extremely limited in these areas." *Id.* at 34,019.

This isolation creates a unique need to access service providers and an equally critical need to protect from retaliation those who need outside services. For example, the agency cited the case of "a farmworker from Oaxaca who fainted because of the heat and . . . was fired after going to the doctor." *Id.* at 33,999. Another H-2A farmworker explained "that his employer prohibited him from meeting with a key service provider and that he feared retaliation if the employer found out about the meeting." *Id.* Still another "H-2A worker in Nevada stated that

workers on his farm have to pay for each medical visit outside of their workplace, and, if the worker gets too sick, the employer sends them back to their home country so that the employer is not responsible for any medical bills." *Id.* That worker "also commented that two H-2A farmworker colleagues died in a car accident in October 2023 and their employer refused to do anything about it until the Mexican consulate intervened." *Id.* The agency also noted testimony "which described egregious incidents such as armed camp guards interfering with workers' access to legal services employees, workers not being permitted to see close family members, and a Catholic priest and nun witnessing or experiencing interference while trying to connect workers to medical care." *Id.* at 34,019–20.

The examples cited in the Final Rule are consistent with organizational amici's experience. For example, amici routinely represent H-2A workers who have been blacklisted (*i.e.*, not rehired) merely for speaking or working with government agencies or other third-party intermediaries. In one instance, a New York farm owner not only blacklisted a worker for availing himself of a USDA relief program, but also used the worker as an example to the remaining workers, warning them that if they spoke with any state or federal agencies, service providers or unions, they would meet the same fate.

In another instance, when one of amici's outreach workers accompanied a migrant education recruiter, a promotora,[2] and a pesticides inspector from the state department of agriculture to visit H-2A workers at the workers' housing, the employers pulled out a handgun

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[2] Promotores de salud, or promotoras, are community health workers who work in collaboration with agencies and others to provide vital support and services to people in agricultural and rural areas. Promotoras live in the geographic region in which they work and have strong connections to agricultural workers there. *See* Project Protect Food Systems Workers, *Project Protect Promotora Network*, https://perma.cc/8YBM-8NDD (last visited Oct. 28, 2024).

and warned the service providers that it was unsafe to come onto other people's property.

Plaintiffs do not take issue with the Final Rule's key service provider provisions; thus, even if this Court agrees with Plaintiffs that the worker voice and empowerment provisions are unlawful, there is no basis to block these crucial protections for vulnerable workers. And this provision falls squarely within the Department's statutory authority to craft regulations that ensure that the H-2A program does not adversely affect U.S. workers. U.S. workers — who tend to be less dependent on their employers for housing, work, and lawful status — are generally less vulnerable to efforts to isolate them. The presence of a disproportionately isolated, and thus exploitable, workforce will depress wages and working conditions for U.S. workers, unless H-2A workers are afforded protections to counterbalance their exceptional vulnerability.

IV. Wage Transparency and Accountability

The Final Rule includes a requirement that employers "offer and advertise on the job order any applicable prevailing piece rate" — productivity-based pay — "the highest applicable hourly wage rate, and any other rate the employer intends to pay, and to pay workers the highest of these wage rates, as calculated at the time work is performed." 20 C.F.R. §§ 655.120(a), 655.122(l); 89 Fed. Reg. at 33,902.

This clarification is long overdue. Under the prior rules, employers would often pay the hourly Adverse Effect Wage Rate ("AEWR") instead of prevailing piece rates even when doing so resulted in workers earning wages far below their experience level and far below what they would have earned if paid prevailing piece rates. As amicus Farmworker Justice pointed out, "at least 70% of harvest workers earn more than the AEWR when harvesting by the piece in the Northwest Region, and those workers earn an average of 41% more an hour than harvest workers

paid at an hourly rate." *See* Farmworker Justice, Comment Letter on Proposed Rule Improving Protections for Workers in Temporary Agricultural Employment in the United States, at 35 (Nov. 14, 2023), https://www.regulations.gov/comment/ETA-2023-0003-0296 ("Farmworker Justice Comments").

The Final Rule also ameliorates the frequent problem of farmworkers being promised wages based on the amount they harvest, but then, once the work is complete, receiving an hourly rate that garners them far below what they would have earned under the promised piece rate. Amici United Farm Workers and UFW Foundation highlighted for the Department workers' stories that illustrated this common wage theft tactic, which often harms not only H-2A workers, but also domestic workers with years of farmwork experience. *See* UFW Comments at 11–12. For example, one lawful permanent resident of California with 14 years of experience reported working for a month picking tangerines, for which the contractor had promised to pay her a piece rate. *Id.* at 12. But after the harvest was done, the contractor tried to back out of paying her the higher piece rate wages she was due, necessitating that UFW intervene on her behalf to help her recover her lost wages. Another U.S. farmworker with 19 years of experience saw employers changing the wage rate in this way to underpay workers time and again — enticing them to work extra hard, and then paying them by the hour once the work was done. *Id.*

The Final Rule's wage transparency and accountability changes are especially important to the most vulnerable sector of the H-2A workforce: sheepherders and range workers. Sheepherders, sheep shearers, and range workers must generally reside in mobile or range housing and travel to various remote worksites far away from towns and cities. As amici pointed out to the Department, "these workers are even more isolated than other H-2A workers and are

entirely dependent on their employers for access to food and water, medical care, and other basic essential needs." 89 Fed. Reg. at 34,020 (describing comments from amici Farmworker Justice and National Legal Aid & Defender Association). As a result, sheepherders and range workers have "been subject to some of the most egregious reports of abuse and exploitation — including assault and battery, false imprisonment, denial of medical care, withholding of food and water, confiscating documents, visa fraud, wage theft, and labor trafficking." *Id.* Thus, among other protections for sheepherders and range workers, the Final Rule revises regulatory provisions on the contents of herding and range livestock job orders, 20 C.F.R. § 655.210(g), and on the herding and range livestock wage range, *id.* § 655.211, to make clear that employers' obligations to offer and advertise in the job order all potentially applicable rates of pay, and then to pay workers the highest of these wage rates as calculated at the time work is performed, equally apply to herding and range livestock production occupations.

Advertising and then paying workers the highest of the applicable wage rates is the only policy consistent with the statutory mandate in 8 U.S.C. § 1188. As both amici and the Department have observed, domestic workers rely on the opportunity to earn higher piece rate wages during harvest periods to support their families in the off season. And employers have had to offer these rates to attract these experienced local workers. Allowing these employers to bring temporary foreign workers to do this work without requiring that employers pay these piece rates drives away U.S. workers and has precisely the negative effect on local wages and working conditions that Congress directed the Department to prevent.

As with the previously mentioned protections, Plaintiffs have not challenged the wage transparency and accountability provisions of the Final Rule. These regulations have nothing to

do with the worker voice and empowerment provisions, are clearly severable, and so should not be vacated or enjoined.

V. Enhancing Integrity and Enforcement Provisions against Employer Agents

The Final Rule contains several provisions clarifying and strengthening the Department's enforcement actions against employers' agents, such as recruiters, supervisors, contractors, joint employers, successors in interest, and other entities that should be considered a single employer for purposes of the H-2A program. *See* 89 Fed. Reg. at 33,936–52; 20 C.F.R. § 655.104. These provisions, aimed at preventing H-2A employers from "bypass[ing] statutory and regulatory requirements to receive a temporary agricultural labor certification or to circumvent regulations aimed at protecting workers in the United States," 89 Fed. Reg. at 33,937, close loopholes that have long allowed bad actors to exploit both H-2A and U.S. workers.

For example, the Final Rule's new recruitment disclosure provision, requiring employers to identify recruiters and provide copies of any contractual agreements between employers and recruiters, is a critical step in stemming pervasive recruiter abuse. *See* 89 Fed. Reg. at 34,025; 20 C.F.R. §§ 655.137, 655.135(p), 655.167(c)(8). Amici routinely represent workers who complain of exorbitant and illegal recruitment fees despite the H-2A regulatory proscription against them. As described in the Final Rule, Farmworker Justice noted that 58% of workers recruited from Mexico "'reported paying a recruitment fee that on average amounted to $590 per worker' and almost half of these workers 'needed to take out a loan to cover illegal recruitment fees and other pre-employment expenses.'" *See* 89 Fed. Reg. at 34,027 (quoting Farmworker Justice Comments); *see also* UFW Comments at 16. The debt workers accrue to pay recruitment costs can be crippling; according to Centro de los Derechos del Migrante, H-2A workers reported

paying anywhere from 5% to 79% interest on their loans and leaving deeds to property or titles to automobiles as collateral. *See* Centro de los Derechos del Migrante, *Recruitment Revealed, Fundamental Flaws in the H-2A Temporary Worker Program and Recommendations for Change* 18, https://perma.cc/BZQ9-K3KW. The recruitment disclosure provisions provide much-needed transparency in the recruiting pipeline, allowing both workers and employers to feel confident in the process. Indeed, acknowledging that employers may not always be aware of their agents' malfeasance, the Department noted that in addition to protecting workers, the "disclosures of information about the recruitment chain are necessary . . . [to] ensure equitable administration of the H-2A program for law abiding employers." 89 Fed. Reg. at 33,902. Preventing this kind of indentured servitude also ensure that U.S. workers are not shunted aside in favor of a more captive, more compliant workforce.

The enhanced integrity provisions also protect workers from unscrupulous employers. The Final Rule's addition of a "single employer" analysis to determine if separate employers are in fact a single employer for purposes of the H-2A program targets employers who seek to avoid the H-2A obligations through corporate maneuvering. 89 Fed. Reg. at 33,903. This provision springs in large part from the Department's recognition that employers were manipulating corporate formalities *to pay their U.S. workers less than their H-2A workers*. In the Final Rule, the Department noted that a growing number of H-2A employers had been utilizing multiple seemingly distinct corporate entities under common ownership. *Id.* at 33,946. Although the two groups of workers "generally work alongside one another, performing the same work, under the same common group of managers, subject to the same personnel policies and operations," they were put on separate payrolls, as if they were employed by distinct farms, allowing the

employers to "deprive corresponding workers of the protections of the H-2A program by superficially circumventing an employment relationship with the H-2A employer . . . contrary to the statute's requirements." *Id.*; 8 U.S.C. § 1188(a)(1). The Final Rule remedies this "burgeoning business practice" by codifying the Department's long-standing practice of applying the "single employer" test to determine liability and ensure that workers are treated fairly and paid correctly.

Relatedly, the Final Rule makes it harder for employers who violate the H-2A program's requirements to get around "debarment" by transferring operations to a successor in interest. *See* 89 Fed. Reg. at 33,950–52; 20 C.F.R. § 655.104. As Farmworker Justice's comments in support of the Final Rule documented, in recent years there have been numerous incidents in which the relatives of debarred employers were able successfully to petition for H-2A workers under slightly different corporate names. *See* Farmworker Justice Comments at 81. For instance, Steve Boyum of Minnesota was debarred for three years beginning on March 2, 2021. Shortly before his debarment began, however, his daughter formed an LLC to run a farm on the same property and successfully petitioned to hire H-2A workers. *Id.*

Like the recruiter and "single employer" rules, the successor in interest provision is plainly within the agency's statutory authority to issue regulations ensuring the hiring of H-2A workers does not adversely affect U.S. workers. Consider Big River Honey, a Florida LLC owned by Joseph Cantu. *See* Ryan Murphy, *Employers Banned From Hiring H-2A Workers Can 'Reinvent' Themselves to Hire Again*, Investigate Midwest (Sept. 14, 2023), https://perma.cc/5ZC3-83PT. Big River Honey was debarred for "treat[ing] H-2A and domestic workers differently, . . . fail[ing] to provide workers with required paperwork," and for underpaying its workers. *Id.* But last year, DOL "certified a job order for Cantu Apiaries of Florida," which "is

located at the same address as Big River Honey" and is nominally controlled by Joseph Cantu's mother, Leslie Cantu. *Id.* If employers who underpay and treat H-2A workers worse than their U.S. counterparts can so easily circumvent efforts to bar them from the H-2A program, then those employers will continue to hire and exploit H-2A workers at the expense of U.S. workers.

Again, Plaintiffs do not even mention, much less challenge, these integrity and enforcement provisions, which are entirely separate from the worker voice and empowerment aspects of the Final Rule. Whatever the merits of Plaintiffs' arguments against the worker voice and empowerment provisions, there is no reason to throw out unrelated provisions that are so obviously necessary and appropriate for the proper functioning of the H-2A program.

VI. Termination for Cause and Progressive Discipline

The Final Rule clarifies "for cause" termination to "ensure that disciplinary and termination processes are justified and reasonable." 89 Fed. Reg. at 33,901; 20 C.F.R. § 655.122(n). These new provisions make clear that "[a] worker is not terminated for cause where the termination is: contrary to a Federal, State, or local law; for an employee's refusal to work under conditions that the employee reasonably believes will expose them or other employees to an unreasonable health or safety risk; [or] because of discrimination on the basis of race, color, national origin, age, sex (including sexual orientation or gender identity), religion, disability, [or] familial status." 20 C.F.R. § 655.122(n)(2)(ii). Further, except where a worker engages in "intentional or reckless conduct that is plainly illegal, poses imminent danger to physical safety, or that a reasonable person would understand as being outrageous," an employer must attempt to "correct[] the worker's performance or behavior using progressive discipline, which is a system of graduated and reasonable responses to an employee's failure to

satisfactorily perform job duties or comply with employer policies or rules." *Id.* § 655.122(n)(i)(E).

These revisions provide workers important safeguards against arbitrary or pretextual termination, the consequences of which can be devastating for both H-2A and U.S. workers. Prior to the Final Rule, the H-2A regulations prohibited termination without cause, but neither defined "cause," nor provided a mechanism for assessing the circumstances behind a termination, allowing employers to evade the proscription by supplying false or "evolving" reasons, or disguising the termination as job abandonment. 89 Fed. Reg. at 33,970. Yet the effects of termination "for cause" are severe. H-2A workers and U.S. workers in corresponding employment who are terminated early through no fault of their own are entitled to their outbound transportation, § 655.122(h)(2), and to payment of three-fourths of the hours in their contract, including meals and housing until the worker departs for other employment or to his home, § 655.122(i). U.S. workers are further guaranteed a call-back the following season. *Id.* § 655.153; *see* 89 Fed. Reg. at 33,968–69. Termination "for cause" cuts off these protections, resulting in myriad challenges for workers. H-2A workers may be stranded, without sufficient funds to return home, even as the validity of their visas runs out. U.S. workers may struggle to obtain unemployment benefits or find subsequent work. Moreover, U.S. workers may be fired simply to make way for employers to hire H-2A workers, under the guise that U.S. workers are unwilling or unavailable.

Protections against arbitrary termination are especially crucial to H-2A workers whose visas, "encompassing both their authorization for employment and right to remain in the United States, are tied to a single employer." 89 Fed. Reg. at 33,988 (citing comments from the

California LWDA, a State labor agency). For a worker on an H-2A visa, being fired means losing access to their housing and often means having to leave the country. 8 C.F.R. §§ 214.2(h)(5)(vi)(B)(1)(iii), 214.2(h)(5)(viii)(B). To take just one example from Farmworker Justice's comments, when one worker "who labored all day in 90-degree heat, only to return to a trailer that was 100-degrees Fahrenheit . . . asked his employer for air conditioning, he was put on a bus to Mexico." *See* Farmworker Justice Comments at 68. Absent clear criteria defining "for cause" termination and progressive discipline requirements, the exceptional vulnerability of H-2A workers to arbitrary termination often dissuades workers from advocating for themselves.

The consequences these workers fear are far from hypothetical. Organizational amici regularly respond to workers who call for help from gas stations or bus stops because they are without outbound transportation after having been fired allegedly "for cause" under 20 C.F.R. § 655.122(n)(1). In response, amici scramble to identify resources for emergency shelter, transportation, and food. Organizational amici's H-2A worker clients include labor trafficking survivors who did not report dangerous working conditions because they faced implicit or explicit threats of losing their jobs and work authorization. Indeed, in one case an amicus here dealt with, a supervisor repeatedly told a group of workers that he could fire them at any time and that "ordering new workers is like ordering a pizza."

Because H-2A workers risk losing work authorization and legal status if they lose their jobs, such unscrupulous employers have an obvious incentive to hire H-2A workers and hold the threat of arbitrary termination or discipline over their heads. Employers have a concurrent incentive to fire and replace U.S. farmworkers with a more compliant, more exploitable H-2A workforce. Thus, absent the protections afforded by the Final Rule, the H-2A program adversely

affects U.S. workers. Once again, Plaintiffs do not challenge these provisions. Shredding these vital provisions anyway — as Plaintiffs request — will accomplish nothing except to harm U.S. workers and workers on H-2A visas alike.

CONCLUSION

For the foregoing reasons, amici respectfully request this Court deny Plaintiffs' motion for summary judgment and grant the Federal Defendants' cross-motion for summary judgment.

Dated this 30th day of October, 2024.

Respectfully submitted,

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PROPOSED ORDER

The Proposed Amici's Motion for Leave to File an Amicus Curiae Brief is **GRANTED**. The clerk shall docket the Proposed Amicus Brief.

SO ORDERED.

_____ _____, 2024

Hon. Lisa G. Wood