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Submitted Electronically to
Regulations.gov

Hon. Lori Chavez-DeRemer, Secretary
U.S. Department of Labor
Wage and Hour Division
200 Constitution Avenue NW
Washington, DC 20210

Re: Rescission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States
DOL Docket No. ETA–2025–0007, 90 Fed. Reg. 28919 (July 2, 2025)
RIN 1205-AC25

Dear Secretary Chavez-DeRemer:

Southeastern Legal Foundation (SLF)[1] and the Georgia Fruit and Vegetable Growers Association (GFVGA) appreciate the opportunity to submit comments on the Proposed Rule, *Rescission of Final Rule: Improving Protections for Workers in Temporary Agricultural Employment in the United States*. SLF and GFVGA have experience challenging Department of Labor regulations that unconstitutionally exceed the authority granted to it by Congress. In 2024, GFVGA, represented by SLF, successfully obtained a preliminary injunction halting the enforcement of the rule that would be rescinded in the Proposed Rule. *See Kansas v. U.S. Dep't of Labor*, 749 F. Supp. 3d 1363 (S.D. Ga. 2024).

SLF is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic.® Since 1976, SLF has been going to court for the American people when the government overreaches and violates their constitutional rights. SLF welcomes the announcement of the Proposed Rule as an opportunity for it to demonstrate its longstanding commitment to making America freer and more prosperous.

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[1] Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic.® Founded in 1976, SLF has made it its mission to protect the American people from government overreach, challenge government policies when they violate the Constitution, and restore constitutional balance in our system of government. SLF is proud to serve as Freedom's lawyers.

GFVGA is a membership association that provides a united voice for specialist crop farmers in the Southeast. It offers programs and services to the membership designed to increase production efficiencies, provide educational opportunities, promote new markets, monitor legislation, encourage applied research, and improve communication between GFVGA members and industry suppliers. The mission of GFVGA is to (1) provide a viable and united voice to represent the fruit and vegetable industry in Georgia; (2) encourage efficient production, packing, handling, storing and processing fruit and vegetables; (3) develop marketing and promotional programs to increase public awareness of the health benefits of eating fruits and vegetables; (4) encourage the consumption of more Georgia products; and (5) support applied research that benefits the industry.

Under the Proposed Rule, the U.S. Department of Labor's (DOL) Wage and Hour Division will rescind several burdensome requirements for employers of H–2A temporary agricultural workers. They were enacted in a 2024 farmworker rule under President Biden's Administration (2024 rule). The changes will amend regulations on the certification of agricultural labor provided by temporary foreign workers. It does so by rescinding requirements such as progressive discipline policies, anti-retaliation measures, and extensive data collection on foreign labor recruiters, which have been identified as unnecessary and costly for employers.

SLF supports the rescission of the portions of the 2024 rule that effectively confers collective bargaining rights on H-2A workers. SLF urges DOL to go further to address adverse effect wage rates (AEWRs). It should not merely alter its effective date by returning the effective date to its pre-2024 rule state. The relevant statutory authority does not confer general rulemaking authority to set AEWRs at all. DOL should thus use this opportunity to rescind the AEWR.

Background

The 2024 rule updated several provisions governing the H-2A program, a program which allows foreign workers to temporarily work on U.S. farms. Some of the key changes include workers' rights to organize and engage in collective bargaining activity, visitor access to housing, seat belts in vehicles, and changes to wage rules. It also includes setting an immediate implementation date for AEWRs, and requiring employers to give more information about who owns or runs the business and serves as the H-2A worker's employer.

The 2024 rule was immediately halted by an avalanche of injunctions from different federal courts. The United States District Court for the Southern District of Georgia went first in a case brought by SLF which halted it in seventeen states and as applied to the members of GFVGA and Miles Berry Farms. *See Kansas*, 749 F. Supp. 3d 1363. This court concluded Plaintiffs were likely to demonstrate that the 2024 rule conflicts with the National Labor Relations Act (NLRA). It was therefore unconstitutional because it grants a right to H-2A workers not recognized by Congress. The rescission identifies this ruling in *Kansas v. U.S. Department of Labor* as the first catalyst and one of the primary reasons in support of the need for the recission. *See* 90 Fed. Reg. at 28921.

Other courts soon followed. The United States District Court for the Eastern District of Kentucky agreed. It issued an injunction blocking key parts of the 2024 rule, extending its reach to four other States and applying to certain covered entities. *Barton v. U.S. Dep't of Labor*, 757 F. Supp. 3d 766 (E.D. Ky. 2024). The United States District Court for the Southern District of

Mississippi then issued a nationwide stay of specific provisions of the 2024 rule. *Int'l Fresh Produce Ass'n v. U.S. Dep't of Labor* (*IFPA*), 758 F. Supp. 3d 575 (S.D. Miss. 2024).[2]

This court went further than the others. The prior rulings held that critical portions of the 2024 rule were unlawful because they contradicted the NLRA. But they affirmed DOL's authority to issue such rules under 8 U.S.C. § 1188(a)(1) (conditioning H-2A petitions upon a finding of the Secretary of Labor that there are not sufficient domestic workers and the employment of an alien will not adversely affect the wages and working conditions of United States workers) and (c)(3) (directing the Secretary of Labor to comply with criteria for certification of eligible individuals) of the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*. (INA). By contrast, the *IFPA* court found that DOL had no authority to confer the collective bargaining provisions in the 2024 rule. The court reasoned that the better read of § 1188 is that it allows DOL to "play a limited role" in the H-2A program. *Id.* at 588. It ruled that the Departments of Justice and Homeland Security are the agencies with broad authority to issue regulations pertaining to the H-2A program. *Id*. Whatever authority Congress gave DOL under § 1188, it did not include the authority to issue rules conferring collective bargaining rights.

I. The Proposed Rule correctly recognizes that the 2024 rule contradicted the NLRA by conferring collective bargaining rights on agricultural laborers.

SLF supports the Proposed Rule because it eliminates all provisions protecting concerted activities and collective bargaining by H-2A workers. *See* 90 Fed. Reg. at 28922. The NLRA was a product of herculean legislative compromise. It did a great deal to settle the turbulent labor unrest at the end of the 19th and beginning of the 20th century. *See* Edward Silver & Joan McAvoy*, The National Labor Relations Act at the Crossroads*, 56 Fordham L. Rev. 181, 181–82 (1987).

The NLRA is the source of what we recognize today as the right to engage in collective bargaining practices. It affords covered employees the right to "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The NLRA also treats it as an "unfair labor practice" for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." *Id*. § 158(a)(2). But the NLRA was a compromise. In exchange for these protections for workers, the NLRA limited the types of employees who were covered.

That compromise proved fatal for the 2024 rule's regulatory protections for agricultural laborers. The courts that issued injunctions did so because the NLRA specifically excludes agricultural laborers. *Id*. § 152(3) (excluding "any individual employed as an agricultural laborer" from the definition of an "employee" under the NLRA). H-2A workers are obviously agricultural laborers. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (creating a class of migrant workers who "com[e] temporarily to the United States to perform *agricultural labor* or services" (emphasis added)); *see*

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[2] The United States District Court for the Eastern District of North Carolina was the lone outlier. *N.C. Farm Bureau Fed'n, Inc. v. U.S. Dep't of Labor*, No. 5:24-cv-00527-FL, 2025 WL 129624 (E.D.N.C. May 5, 2025).

also 8 U.S.C. §§ 1184(c)(1), 1188. So the protections afforded by the NLRA are not available for H-2A laborers. The 2024 rule therefore could not extend NLRA protections to them.

But it did. The 2024 rule provides essentially the same protection afforded under the NLRA to those employees under its reach.

As recognized in *Kansas*, the 2024 rule:

> provides protection for "concerted activity for mutual aid and protection which encompasses numerous ways that workers can engage, individually or collectively, to enforce their rights." 89 Fed. Reg. 34,005. The NLRA uses the same language, protecting employees' right to "engage[] in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Removing the word "bargaining" and changing the location of the word "collective" does not change the fact that the Final Rule mirrors the NLRA. Furthermore, the Final Rule states that H-2A employers cannot "discharge, or in any manner discriminate against . . . any person who has engaged in activities related to self-organization," including "any effort to form, join, or assist a labor organization." 89 Fed. Reg. 34,062. This language effectively does the same thing as the NLRA, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir] rights," 29 U.S.C. § 158(a)(1), that is, their rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," *id*. § 157.

749 F. Supp. 3d at 1377. The *Kansas* court was correct. It concluded these portions of the 2024 rule were unconstitutional.

Moreover, these portions of the 2024 rule either disadvantaged American workers in a manner contrary to § 1188(a)(1)'s mandate or ran an end-run around the NLRA by conferring upon American workers the right to engage in concerted activities specifically exempted by statute. In the *Kansas v. U.S. Department of Labor* case, the government struggled to take a position on whether the right to engage in concerted activities provided by the 2024 rule to H-2A employees also extended to some American agricultural workers.

That the government found itself in this conundrum is unsurprising. On the one hand, if the right to engage in concerted activities extended only to H-2A workers, then the 2024 rule placed foreign workers in a position advantageous to American workers by federally protecting such activity by H-2A workers where American agricultural workers are exempted from protection under the NLRA, *see* 29 U.S.C. § 152(3). If so, it would run directly contrary to Congress's purpose in enacting the H-2A program and delegating authority over the program to the executive branch. *See* 8 U.S.C. § 1188(a)(1)(B) (mandating that the H-2A program "not adversely affect the wages and working conditions of workers in the United States similarly employed"). On the other hand, if the 2024 rule's extension of certain labor rights to a "worker in corresponding employment engaged in agriculture," *see, e.g.*, 89 Fed. Reg. at 34063, granted protections to American agricultural workers, then it applies to *all* agricultural laborers, despite the clear text of the NLRA. This would mean that the 2024 rule, once again, ran headlong into the carefully balanced

compromise reached by Congress when passing the NLRA. *See* 29 U.S.C. § 152(3) (excluding "agricultural laborer[s]" from protection under the NLRA).

For these reasons, SLF agrees with DOL that the 2024 rule is "inconsistent with the NRLA [sic]." 90 Fed. Reg. at 28923. Any time a regulation is not "in accordance with law," it must be set aside. 5 U.S.C. § 706(2)(A). "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Kansas*, 749 F. Supp. 3d at 1376 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001)). DOL thus is performing its required duty to uphold the expressed limits of the NLRA by rescinding these portions of the 2024 rule.

No agency can take shortcuts around the legislative process. The 2024 rule is a textbook example of an agency taking the limited powers given to it by Congress as an "open book to which the agency may add pages and change the plot line." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quotation marks and brackets omitted). Congress has affirmatively forbidden any agency from providing the protections embedded into the NLRA to any agricultural worker. The 2024 rule was an attempt by DOL to rewrite a law delicately drafted by Congress. That was wrong.

Perhaps this carefully negotiated compromise was unwise. Perhaps it is outdated. But it was decided upon by Congress. Ultimately it must be up to Congress to reconsider. DOL is wise to return this debate to the legislative branch.

II. Because DOL lacks general rulemaking authority under § 1188 of the INA by eliminating AEWRs.

The proposed rule also includes a laudable change that SLF urges for AEWRs. SLF and GFVGA urge DOL to discontinue use of AEWRs because it lacks statutory authority to set them altogether.

The Proposed Rule seeks to rescind the immediate effective date of AEWRs. 90 Fed. Reg. at 28925. This practice departed from prior practice of providing a reasonable adjustment period after the revised AEWRs were published. Elimination of the effective date is surely beneficial to American employers. But this modest change is not enough. It still assumes that DOL has rulemaking authority to issue AEWRs under § 1188 to begin with or to have issued any provision in the 2024 rule addressing issues outside of the employers obligation to provide housing for some H-2A workers, *see* 8 U.S.C. § 1188(c)(4) (specifically delegating to the Secretary of Labor the power to "issue regulations which address the specific requirements of housing . . . .").

Congress never delegated general rulemaking authority to DOL under § 1188 to regulated working conditions or to issue AEWRs.

The *IFPA* case explains why. In *IFPA*, the court correctly recognized that the INA does not contain broad rulemaking authority. 758 F. Supp. 3d at 588. DOL cited § 1188(a)(1) and (c)(3) as authority for the 2024 rule. *Id.* at 586. But § 1188(a)(1) just sets the criteria for approving a petition to import an alien as a H-2A worker. It does not mention rulemaking power. Only § 1188(c)(3) even plausibly confers any kind of power to DOL.

This statutory provision does not authorize the setting of AEWRs either. The operative language only requires DOL to certify that the employer has "*complied* with the criteria for certification." 8 U.S.C. § 1188(c)(3)(A)(i) (emphasis added). It does not authorize DOL to *prescribe* the criteria for certification through rules. And it certainly does not authorize DOL to

dictate what to pay the employee. The criteria for DOL to certify is set by Congress. They are found in § 1188(a). That is DOL's role. DOL's effort to set AEWRs has long exceeded its statutory authority.

Section 1188(c)(3) is a simple certification provision. No more and no less. Section 1188(c)(3) makes it abundantly clear that the only criteria the Secretary of Labor is empowered to make are the criteria for "the recruitment of eligible individuals"; it relates that on the issue of *recruitment* the "criteria" are to be "prescribed by the Secretary." *Id*. If the Secretary could set criteria on *all* aspects of the certification requirement, such would subsume the authority to set the criteria for recruitment. This reading would "render use of the phrase in the parenthetical surplusage." *IFPA*, 758 F. Supp. 3d at 588 (citing *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 583 U.S. 109, 128 (2018)). That is an impermissible interpretation. Courts and the DOL are obligated to give effect to every word Congress has used. *See id.* Interpreting § 1188(c)(3) in a manner that authorizes DOL to set *all* of the criteria for certification—not just for recruitment—is an impermissible read of the statute.

But that is not the only thing wrong with this interpretation. The court in *IFPA* further looked at the role of DOL vis a vis the rest of the INA. Broadly read, DOL is supposed to have a "limited role in effectuating the H-2A program." *Id*. The sorts of broad grants of rulemaking authority claimed by DOL do exist within the INA. But they were granted to the Departments of Justice and Homeland Security. *Id* (citing 8 U.S.C. § 1103(a)(1) (assigning Homeland Security rulemaking power) and 1103(g)(2) (doing the same for Justice)). If Congress wished for DOL to have rulemaking authority that was similarly broad, it would have done so the way it did with the other agencies. Instead, it used different, and far more modest, language limiting DOL to a certification role. That is not how Congress spoke when it gave the other agencies involved in the H-2A program rulemaking power. That means Congress did not give that power to DOL.

Indeed, DOL appears to recognize that the scope of its rulemaking authority is questionable. It recognized in the Proposed Rule that the 2024 rule's collective bargaining provisions "may not be authorized by the INA . . ." 90 Fed. Reg. at 28923. While correct, DOL's logic applies equally to its authority to set AEWRs because this power exceeds the narrow confines of the simple certification role provided for it under § 1188.

DOL might be tempted to argue that because Congress conditions approval of H-2A petitions on it not having any adverse effects on domestic workers, 8 U.S.C. § 1188(a)(1)(B), it therefore may accomplish that goal through AEWRs. But that ignores that, other than the narrow authorization to set criteria for recruitment of eligible individuals, no part of § 1188 allows the Secretary of Labor to do anything more than certify the conditions have been met; it cannot issue regulations supposedly designed to facilitate those conditions. *See* 8 U.S.C. § 1188(a), (c)(3)(A). Also, H-2A employers are already prevented from turning to H-2A employees at the expense of American workers. Section 1188(c)(3)(A)(i) requires DOL to ensure that H-2A visas are only issued if there is insufficient domestic labor supply to meet demand. *See* 8 U.S.C. § 1188(c)(3)(A)(ii). If there is sufficient domestic labor to meet demand, then DOL should not certify. If there are not, then it should. American workers are protected if DOL sticks to its statutorily-authorized certification role. In the end, DOL cannot resort to the use of a tool denied to it by Congress just because it would aid it to better accomplish the goals of the INA.

DOL should therefore rescind the AEWRs. When an agency exceeds its statutory authority, its action must be set aside. 5 U.S.C. 706(2)(C). An agency "literally has no power to act … unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Congress has not given DOL the tremendous power to set an AEWR. Setting AEWRs is far more than simply certifying that the employer has met the criteria for certification set by Congress. 8 U.S.C. § 1188(c)(3)(A)(i). And it does not pertain to the recruitment of eligible individuals, but what to pay those eligible individuals. As a result, DOL lacks authority to set AEWRs at all.

In closing, we note that recent Executive Order 13132, *see* 64 Fed. Reg. 43255, requires the rescission of any regulations that are inconsistent with the agency's *clear* statutory authority. The authority to issue AEWRs is anything but clear.

Conclusion

We support you in your efforts to rein in the administrative state. On behalf of SLF and GFVGA, we thank you for the opportunity to be heard in this process. We urge DOL to consider our proposals and incorporate them in full. If we can lend you any additional assistance, please reach out.

Yours in Freedom,

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