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November 14, 2023

TO: Employment and Training Administration and Wage and Hour Division, Department of Labor

FROM: State of Kansas; Office of the Attorney General of Kansas

RE: Notice of Proposed Rulemaking: "Improving Protections for Workers in Temporary Agricultural Employment in the United States"

Docket No.: ETA-2023-0003

The Attorneys General for the States of Kansas, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah and Virginia, submit the following public comment to the Employment and Training Administration and Wage and Hour Division, U.S. Department Labor (collectively, the Department) in response to the request for comments on its proposed rule titled, *Improving Protections for Workers in Temporary Agricultural Employment in the United States*, 88 Fed, Reg. 63,750 (Sept. 15, 2023).

I. The proposed rule violates the major questions doctrine because Congress did not clearly authorize the Department to grant foreign migrant farmworkers the right to unionize through the rulemaking process

In 1935, Congress passed the National Labor Relations Act (NLRA) which among other things established the right of certain employees to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concentrated activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Since its inception, agricultural workers have been explicitly excluded. Pub. L. 74-198, § 2(3), 49 Stat. 449, 450 (1935) (original version); 29 U.S.C. § 152(3) (current version).

The Department is now seeking to circumvent this clear statement of federal law, which has been in the statute books for nearly ninety years. Oddly, the Department finds its supposed authority in the Immigration Reform and Control Act of 1986 (IRCA), which created a special class of temporary foreign migrant agricultural workers. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). (These workers receive H2-A visas.) The Secretary of Labor's authority under that statute is limited to

certifying that (1) there are not sufficient American or lawful permanent resident workers to perform the necessary work and (2) foreign workers will not adversely affect the wages and working conditions of workers in the United States who are similarly employed. 8 U.S.C. § 1188(a)(1). Yet despite this law's obvious concern about those who are already lawfully working (or available to work) in the United States, the Department perversely claims to be fulfilling this authority by granting foreign workers federal rights *that no American agricultural worker has*.

As the Supreme Court held in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), "in extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [courts] reluctant to read into ambiguous statutory text the delegation that claimed to be lurking there"; an "agency must point to clear congressional authorization for the power that it claims." *Id.* at 2609 (internal quotes omitted). Extraordinary cases include ones that involve "decisions of vast economic and political significance." *Id.* at 2616.

The genesis of what is now the NLRA was Section 7(a) of what was then known as the National Industrial Recovery Act of 1933 which provided protections for collective bargaining. However, the protections were not deemed effective since factory owners regularly broke up strikes and set up "company unions" they claimed complied with Section 7(a)[1]. Two years later, this weakness in the law ultimately led to the passage of the Wagner Act, formally known as the NLRA. This statute is not a minor part of an appropriations bill. It is one that has years of legislative history and has survived for nearly 90 years. It is certainly a piece of legislation that has vast political significance.

For the past eighty-eight years, agricultural workers of all sorts have been explicitly excluded from the NLRA. What the Department is doing now is nothing short of an attempt to sidestep Congress and unilaterally change that. The policy implications of such a measure are extraordinary. In addition, the economic consequences for the consumer are significant as well. Giving unionization protections to a class of employees naturally drives up the cost of doing business for their employers. Most unions will freely admit this. Indeed, that is the very point of labor organization and collective bargaining—if the result were not increased benefits for employees borne by increased costs on the employer, there would be no point in unionization[2]. This in turn would be passed on to all consumers at the grocery store through increased food prices. This certainly presents a decision of "vast economic and political significance." This type of decision must be left to Congress and not the Department.

Unfortunately, the proposed rule does not even attempt to address this issue. Instead it discusses whether the rule would be pre-empted by the NLRA. But that is the *wrong* question. The issue is not pre-emption, but whether Congress gave the Department clear authorization to provide union protections to H-2A workers. It is the Department's burden to demonstrate such clear authorization. The proposed rule does not even attempt to satisfy that burden.

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[1] *See* https://www.fdrlibrary.org/wagner-act

[2] See Bureau of Labor Statistics Table on Employer Costs for Employee Compensation for private industry workers by bargaining and work status (June 2023) - https://www.bls.gov/news.release/ecec.t05.htm

II. Even if the proposed rule did not implicate the major questions doctrine, it would still be unlawful.

There is little doubt that there is high political and economic significance to unionizing temporary foreign farm workers while leaving American agricultural workers behind. But even if there were not, this rule would still be contrary to law. First, Congress has already spoken on the issue. And it has excluded *all* farmworkers from collective bargaining protections. 29 U.S.C. § 152(3). There is no ambiguity in that. There is certainly no support for the position that the Department can override this explicit statutory exclusion through the rulemaking process.

If there was any ambiguity at all, it is the agency charged with administering the statute that would have some level of deference in interpreting it.[3] Therein lies another problem with the rule. The statute the Department is utilizing to implement this unlawful rule is ultimately an immigration statute. Therefore, to the extent any agency would get deference, it would be the United States Citizenship and Immigration Services (USCIS), a component of the Department of Homeland Security (DHS).[4] Not the Department. The Department has a ministerial function in issuing certifications to H-2A employers in the IRCA but it is ultimately USCIS' statute to implement.

The rule is also arbitrary and capricious. Under the Administrative Procedures Act (APA), a court must also "hold unlawful and set aside agency action" that is "arbitrary, capricious [or] an abuse of discretion." 5 U.S.C. § 706(2)(A). An agency acts arbitrarily and capriciously when it departs sharply from prior practice without reasonable explanation or fails to consider either alternatives to its action or the affected communities' reliance on the prior rule. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020).

The IRCA has been in effect since 1986. At no point was there an intent to utilize the statute to unionize the class of H-2A workers that it created. Yet 37 years later (and without reasonable explanation), the Department suddenly realized this statute gives them the authority to override 88 years of settled law. This interpretation was clearly designed to obtain political ends that the could not be done through the proper avenue, which is going through Congress. Such actions are arbitrary and capricious.

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[3] *See Chevon v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984), "We have long recognized that considerable weight should be accorded to an executive department's construction of *a statutory scheme it is entrusted to administer*" (emphasis added) and *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990), "Moreover, even if AWPA's language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of §1854 because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute. A precondition to deference under *Chevron* is a congressional delegation of administrative authority."

[4] At the time IRCA was passed, the Immigration and Naturalization Services (a component of the Department of Justice) was tasked with administering the statute but that agency was disbanded as a result of the Homeland Security Act of 2002 and its responsibilities were transferred to USCIS.

III. The rule violates the Fifth Amendment because it involves a taking without just compensation.

In *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) the Supreme Court reiterated that "government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation." *Id.* at 2074. This includes instances where the government "has appropriated a right of access to . . . property, allowing union organizers to traverse it at will" during specified times. *Id.* Such government actions are "a *per se* physical taking" that require compensation. *Id.*

The proposed rule brazenly violates this precedent by mandating union organizer access to workers with no compensation to the affected employers. This rule requires employers to allow unions a right of access in commons and outdoor areas of migrant housing that are not publicly accessible for up to ten hours a month.[5] 88 Fed. Reg. at 63,825. The rule mentions nothing about providing just compensation for these takings. The Department should know better.[6] If the rule is going to mandate union organizer access, the rule must also contain provisions for determining and paying employers' just compensation, and the Department must also have an authorized appropriation for that purpose.

IV. The rule prioritizes the interest of foreign agricultural workers over American ones

This rule is not just a violation of the law. It is bad policy. It would create a situation where temporary foreign migrant workers receive collective bargaining protections that American farmworkers are statutorily denied. This is not only absurd but wrong. The combined effects of high inflation and interest rates have left countless Americans (including farmworkers) behind. Prioritizing the interests of foreign agricultural workers over those of Americans simply adds insult to injury. The Department must change course to avoid this situation.

V. Conclusion

For the foregoing reasons, the Department should withdraw the proposed rule insofar as it includes collective bargaining protections for H-2A agricultural workers. It should also withdraw the proposed rule insofar as it provides a right of access to unions on employer property.

Sincerely,

Kris W. Kobach
Kansas Attorney General

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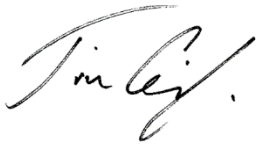
[5] The "duration of an appropriation . . . bears only on the amount of compensation," not whether a taking has in fact occurred. *Cedar Point*, 141 S. Ct. at 2074.

[6] The Acting Secretary was Secretary of California's Labor and Workforce Development Agency at the time the Supreme Court struck down the California rule in *Cedar Point*.

Steve Marshall
Alabama Attorney General



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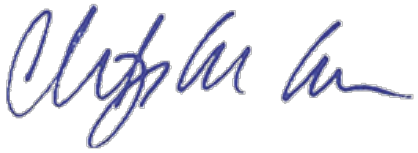

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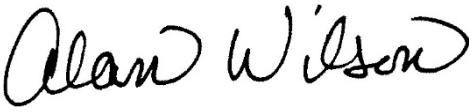

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