**No. 11-2235**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**UNITED FARM WORKERS, *et al.*,**

**Appellants-Defendant Intervenors,**

**v.**

**NORTH CAROLINA GROWERS' ASSOCIATION, *et al.*,**

**Appellees-Plaintiff.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA (Osteen, J.)**

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# APPELLANTS' OPENING BRIEF


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## JURISDICTIONAL STATEMENT

The district court had jurisdiction over this Administrative Procedure Act ("Administrative Procedure Act" or "APA") case under 28 U.S.C. § 1331g . On November 1, 2011, Appellants ("Farmworkers" or "Appellants") filed a notice of appeal of the district court's October 31, 2011 final judgment. This Judgment was pursuant to that court's Order granting Appellees' ("Agricultural Employers" or "Appellees") motion for summary judgment, denying the Farmworkers' cross-motion for partial summary judgment, and dismissing with prejudice the Farmworkers' counterclaims. Joint Appendix (hereinafter referred to as "J.A.") at 236 & 260. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over appeals from such a final decision. Farmworkers timely filed this appeal within thirty days after entry of judgment. See Fed. R. App. P. 4(a)(1)(A); J.A. at 266 (Nov. 1, 2011 Notice of Appeal).

## STATEMENT OF ISSUES

1. Whether the United States Secretary of Labor ("Secretary") complied with the Administrative Procedure Act when she suspended for study regulations after giving notice, considering comments, and stating her reasons for suspension.

2. Whether the Secretary complied with the Administrative Procedure Act in reinstating the previously effective valid regulations as a temporary stopgap

measure during a nine-month period pending an internal review of the suspended regulations.

3. Whether the Secretary complied with the Administrative Procedure Act when she published an interpretive rule on the scope of the term "agriculture," as defined by the Fair Labor Standards Act—a statute Congress has tasked the Secretary with administering—after taking and considering public comment.

## STATEMENT OF THE CASE

This case arises from a challenge to the Secretary of Labor's suspension and reinstatement of regulations related to the temporary agricultural worker program, hereafter called the H-2A program.[1] At issue is the propriety of the actions the Secretary undertook in the spring of 2009 to effectuate her statutory duty to administer the program in a manner that protected the wages and working conditions of U.S. farmworkers against potential adverse impacts from the employment of guestworkers from abroad.

The suit below was filed by 17 entities including harvesting companies, farm

[1]Admission of foreign workers for agricultural jobs is authorized by Section 101(a)(15)(H)(ii)(a) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (2011). Aliens admitted in this fashion are commonly referred to as "H-2A workers," in reference to this statutory provision, and the certification process for employing these workers is commonly referred to as the "H-2A program." See 20 C.F.R. § 655.100(b); Figueroa-Cardona v. Sorrells Bros. Packing Co., Inc., 2007 WL 672303 at *1 (M.D. Fla., Feb. 14, 2007).

labor contractors, growers, and agricultural lobbying associations (collectively "Agricultural Employers") challenging a Department of Labor rule making under the Administrative Procedure Act. See J.A. at 93 (Complaint). The Agricultural Employers sought to enjoin a rule that suspended, for a nine-month period of study, a set of newly enacted H-2A regulations,[2] and temporarily reinstated the previously effective set of H-2A regulations,[3] based on their view that the Secretary's rule making had not complied with the procedures required by the APA.

Under the challenged rule – the Suspension Rule – agricultural employers seeking to hire temporary H-2A foreign guestworkers during the nine months after June 29, 2009—the effective date of the suspension—were required to pay a higher wage rate to the H-2A workers and to the domestic farmworkers who worked alongside them.[4] The methodology for calculating this higher wage rate had been

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[2] See Temporary Agric. Emp. of H-2A Aliens in the United States; Modernizing the Labor Cert. Process & Enforcement, 73 Fed. Reg. 77,110 (Dec. 18, 2008) (referred to herein as the "2008 regulations" or "2008 Rule").

[3] Temp. Emp. of H-2A Aliens in the United States, 74 Fed. Reg. 25,972 (May 29, 2009) (referred to herein as the "Suspension regulations" or "Suspension Rule").

[4] While the Agricultural Employers hire H-2A workers, many of them also employ substantial numbers of United States resident workers, commonly referred to as "U.S. workers." See, e.g., J.A. at 680 ¶2 (Affidavit of Chris Maciborski p. 1) (half of grower's workforce is comprised of U.S. workers); J.A. at 653 (Affidavit of Lee Wicker p. 11) (in addition to 7,000 H-2A workers, members of the North Carolina Growers Association employ "thousands" of U.S. workers).

in effect for nearly 20 years[5] before it was changed by the 2008 Rule.

On June 29, 2009, the scheduled effective date of the Suspension Rule, the district court granted the Agricultural Employers' preliminary injunction motion and enjoined the Suspension Rule from taking effect. North Carolina Growers' Ass'n, Inc. v. Solis, 644 F. Supp. 2d 664 (M.D.N.C. 2009). This injunction left in place the substantially lower wage rates set forth in the 2008 Rule for most farmworkers hired by H-2A employers. See 73 Fed. Reg. 10,289 (February 26, 2008) (publication of 2008 adverse effect wage rates); 74 Fed. Reg. 26,017 (May 29, 2009) (publication of 2009 adverse effect wage rates) (pursuant to the injunction, the North Carolina wage rate changed from $9.34/hour to $8.85/hour; and the Wyoming wage rate dropped from $9.64/hour to $8.74/hour); J.A. at 635–637 (DOL-prepared chart showing that approximately 2,900 employers used the lower 2008 wage rate pursuant to the preliminary injunction).

This injunction benefited not only the Agricultural Employer who are parties to the litigation, but allowed H-2A employers throughout the country to avoid compliance with H-2A program requirements under the Suspension Rule. In issuing the injunction, the district court did not provide for security to allow for workers to recover, in the event that the injunction was later found improvidently issued, the wage differential between the earnings farmworkers would have

[5] The regulation reflecting this long used wage rate went into effect in 1989. See 54 Fed. Reg. 28,037 (July 5, 1989) (Final Rule).

received under the enjoined Suspension Rule and the lower wages they in fact received under the 2008 Rule that remained operative as a result of the injunction. Rather, the district court simply stated that the workers could sue to recover the differential if their claims ultimately prevailed. See North Carolina Growers' Ass'n, 644 F. Supp. 2d at 672.[6] In response, the Farmworkers filed class action counterclaims seeking to recover this wage difference, on behalf of alleged nationwide classes of H-2A and U.S. workers, between the higher wage rate set by the Suspension Rule and the lower wage rate they actually were paid. See J.A. at 168, 183–204 (Third Amended Answer and Counterclaims).

The Agricultural Employers and the Farmworkers cross-moved for summary judgment on the question of whether the Secretary complied with the Administrative Procedure Act when she promulgated the Suspension Rule. J.A. at 230 & 233. In the Order at bar, the district court found in favor of the Agricultural Employers' motion and held that the Secretary's issuance of the Suspension Rule violated APA procedural requirements. J.A. at 236-259 (Order). The district court granted the Agricultural Employers' motion for summary judgment, denied

[6] Both the federal governmental Defendants and the Defendant-Intervenors appealed the district court's preliminary injunction order. See North Carolina Growers' Ass'n v. Solis, No. 09-1878 (4th Cir. filed Aug. 6, 2009); North Carolina Growers' Ass'n v. United Farm Workers, No. 09-2356 (4th Cir. filed Dec. 9, 2009). These appeals were withdrawn as moot when the Secretary of Labor issued new comprehensive H-2A regulations on February 12, 2010. See 75 Fed. Reg. 6884 (Feb. 12, 2010).

Farmworkers' cross-motion, and dismissed the Farmworkers' counterclaims. J.A. at 236 & 260 (Order and Judgment). Because the Secretary had propounded new H-2A regulations prior to the district court's summary judgment rulings, the district court dismissed as moot all claims against the federal defendants.[7] J.A. at 260 & 270 (Judgment and Judgment as to Federal Defts). This appeal followed. J.A. at 266 (Notice of Appeal).

## STATEMENT OF FACTS

The case below involved a dispute regarding what wages and working conditions would be offered to farmworkers over a several month period from June 2009 to March 2010. It affected approximately 40,000 farmworkers employed by approximately 2,900 agricultural operators that sought to hire H-2A guestworkers. See J.A. at 635-637. At issue was which set of Department of Labor regulations should govern these workers' wage rates and working conditions. The legal question was whether the Secretary of Labor complied with the Administrative Procedure Act when she suspended one set of regulations and reinstated another set of H-2A regulations. The regulations at issue are discussed in detail below.

### The 1987 Regulations

Following the passage of the Immigration Reform and Control Act of 1986,

[7] Because all claims against them had been dismissed as moot, the federal defendants had no basis for appealing the judgment of the district court. As a result, the federal defendants are not parties to this appeal.

Pub. L. 99-603, 100 Stat 3359 (1986), the Secretary of Labor promulgated a comprehensive set of regulations to govern the H-2A program. See Labor Certification for the Temp. Emp. Of Aliens in Agric. & Logging in the United States, 52 Fed. Reg. 20,496 (June 1, 1987) (interim rule and request for comments); 54 Fed. Reg. 28,037 (July 5, 1989) (Final Rule) (hereafter referred to as the "1987 regulations" or "1987 Rule"). The main purpose of these regulations was to effectuate the statutory mandate that U.S. workers be given a preference over foreign workers for jobs that become available, and the mandate that the employment of foreign workers not depress the wages and working conditions of domestic farmworkers. 20 C.F.R. § 655.0(a)(1) (; see also Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex. rel. Barez, 458 U.S. 592, 596, 102 S. Ct. 3260, 3263 (1982). To protect against wage depression resulting from the use of foreign labor, the 1987 regulations required that agricultural employers seeking to hire H-2A workers pay an adverse effect wage rate ("AEWR") to both U.S. and foreign workers, a wage that historically has been in excess of federal and state minimum wages. See Feller v. Brock, 802 F.2d 722, 724 (4th Cir. 1986). To ensure that domestic farmworkers were not driven off farms by low wages, unreasonable job conditions, or lack of access to farm jobs, the 1987 regulations contained a number of additional worker protections, including the mandate that H-2A employers hire qualified U.S. workers until 50% of the period of the work contract, under which

H-2A workers were hired, had elapsed.[8] 52 Fed. Reg. at 20,516 (§ 655.103(e) (1987)). The 1987 regulations remained in effect – with the Department of Labor reevaluating and publishing new AEWRs each year – until January 2009.

**The 2008 Regulations**

On February 13, 2008, the Secretary published a notice of proposed rule making to substantially change the 1987 regulations. See Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement, 73 Fed. Reg. 8538 (February 13, 2008). A final rule was published on December 18, 2008, and became effective on January 17, 2009, just three days before the inauguration of the new Administration. See 73 Fed. Reg. 77,110 (as set forth, supra, referred to herein as the "2008 regulations" or "2008 Rule").

Among other changes, the 2008 regulations altered the method for calculating the AEWRs, switching from reliance on statewide Agriculture Department wage surveys to more localized data collected by the Bureau of Labor Statistics. 73 Fed. Reg. at 77,110-73. For many agricultural employers, including the Appellee Agricultural Employers, this change in methodology substantially reduced the AEWR to their benefit, and correspondingly reduced the wages paid to farmworkers, including the Appellant Farmworkers. Under the 2008 Rule, wages

[8] Commonly referred to as the "50% Rule."

paid by H-2A employers dropped an average of $1.44 per hour from the wage rates that would have been required under the methodology contained in the 1987 regulations. See 73 Fed. Reg. 10,289 (February 26, 2008) (publication of 2008 adverse effect wage rates). In addition, the 2008 Rule dropped the so-called "50% Rule" guarantee that protected U.S. worker jobs by requiring H-2A employers to hire qualified U.S. worker applicants, in preference over H-2A guestworkers, for the first 50% of the contract period. See 73 Fed. Reg. at 77, 128 & 77,214-15. Instead, the U.S. worker protection dwindled to a 30-day guarantee; i.e, H-2A employers were required to hire qualified U.S. workers for only the first 30 days of the H-2A contract period. Id.

**The Suspension Rule**

On March 17, 2009, the Secretary found that exigent circumstances demanded that she propose suspension of the newly instituted 2008 regulations for nine months in order to consider their policy and operational impact. See Temp. Emp. of H-2A Aliens in the United States; Proposed Rule, 74 Fed. Reg. 11,408 (March 17, 2009). In support of the suspension, the Secretary found the changes to the program adversely impacted U.S. workers "in light of the severe economic conditions facing the country" and the "economic downturn." See 74 Fed. Reg. 25,972 (May 29, 2009) (as set forth, supra, referred to herein as the "Suspension

Rule"). The Secretary further cited the uncertain legality of the rule,[9] "disruptive and confusing" administrative, logistical, and technical difficulties in implementing the 2008 regulations; and those regulations' likely depressive effects on the wages of U.S. farmworkers. See 74 Fed. Reg. at 25,972–25,984.

In order to avoid a regulatory vacuum during this nine-month review period, the Secretary proposed that the regulations in effect immediately prior to the effective date of the 2008 regulations (i.e., the 1987 regulations) be reinstated on an interim basis. See 74 Fed. Reg. 11,408. Because agricultural guestworkers are employed in all 50 states, applications from prospective H-2A employers are submitted throughout the year. During suspension, while the 2008 Rule was being reviewed and studied, the Secretary of Labor needed procedures in place to continue timely processing H-2A applications. The Secretary determined that using the previously effective 1987 regulations as a stopgap would provide far superior protections to U.S. workers as compared with the 2008 regulations, and they would result in the most minimal disruption. 74 Fed. Reg. at 25,977–78.

The Secretary solicited comments on the proposed suspension, but requested the public not to submit comments on the substance of the 1987 regulations which would be reinstated if the proposed suspension was adopted. See 74 Fed. Reg. at

[9] A legal challenge was actively being pursued against the 2008 Rule. United Farmworkers, et al. v. Chao, et al., 593 F. Supp. 2d 166 (D.D.C. 2009). At the time the Secretary promulgated the Suspension Rule, the court had yet to rule on the merits of the challenge.

11,408. The Secretary set a 10-day comment period, from March 17, 2009 to March 27, 2009, id., based on "the need for expediency" and the "limited scope of this suspension rulemaking." 74 Fed. Reg. at 25,979.

On May 29, 2009, following the receipt of over 800 comments, including comments from at least 15 of the 18 Appellants, and having "reviewed the comments and taken them into consideration" over a period of two months, the Secretary published a final notice suspending the 2008 regulations for nine months for study, effective June 29, 2009. See 74 Fed. Reg. at 25,973. In support of her final implementation of the Suspension Rule, the Secretary discussed the public's comments and explained why she found suspension of the 2008 regulations appropriate. In addition to reasserting the economic and administrative reasons she had articulated when she initially proposed suspending the 2008 regulations, the Secretary further explained the benefits of directing agency resources towards studying the effect of the 2008 Rule on wages and jobs, rather than implementing a potentially flawed set of regulations. See id. at 25,972–25,984.[10]

[10] Under the Suspension Rule's terms, the reinstatement would have lasted for the nine month study period, after which time the Secretary would have either fully implemented the 2008 Rule or would have engaged in new rulemaking. See 74 Fed. Reg. at 25,979. To lessen the suspension's impact on agricultural employers, the Secretary allowed agricultural employers to "grandfather" into the 2008 regime by filing temporary labor certification applications prior to the effective date of the Suspension Rule. See 74 Fed. Reg. at 25,979. Based on her experience, the Secretary expected this grandfather clause to allow "most" H-2A employers to operate under the terms of the 2008 Rule. Id. at 25,980.

In addition, to fill the void left by the suspension, the Secretary chose to reinstate the 1987 regulations, with their known wage rates and processes, to govern the H-2A program. Id. at 25,973 ("The suspension of the December 2008 Rule and temporary reinstatement of the Prior Rule will allow the Department to review the December 2008 Rule to ensure that it effectively carries out the statutory objectives and requirements of the program in a manner that minimizes disruption to the Department, State Workforce Agencies ("SWAs"),[11] employers, and workers by temporarily reinstating prior regulations which had been in effect for over 20 years and with which the agricultural community already is familiar.").

Simultaneously with the publication of the Suspension Rule, the Secretary published AEWRs for 2009, based on the methodology contained in the reinstated 1987 regulations. See Labor Cert. Process for the Temp. Emp. of Aliens in Agric. & Logging in the US; 2009 AEWR; Allowable Charges for Agric. & Logging Workers' Meals, & Max. Travel Subsistence Reimbursement, 74 Fed. Reg. 26,016 (May 29, 2009). As with the Suspension Rule, the new AEWRs were scheduled to become effective on June 29, 2009. See id.

**Subsequent 2010 Rule**

In 2010, after going through notice and comment procedures, the Secretary

[11] State Workforce Agencies play an important role in the recruitment of U.S. Workers for H-2A employment and other operational aspects of the operation of the H-2A program.

issued new H-2A regulations that restored many of the worker protections from the 1987 Rule that had been removed in the 2008 Rule. See Temp. Agric. Emp. of H-2A Aliens in the U.S., 74 Fed. Reg. 45,906 (Sept. 4, 2009) (NPRM); 75 Fed. Reg. 6884 (Feb. 12, 2010) (Final Rule) (referred to as "2010 Rule" or "2010 regulations"). Among other changes,[12] the new regulations formally reinstated the AEWR methodology first employed by the 1987 regulations. Id. at 6891.[13]

## SUMMARY OF THE ARGUMENT

At stake in this appeal are tens (if not hundreds) of millions of dollars in unpaid wages, that the Farmworkers, who are overwhelmingly indigent, would have earned under the reinstated 1987 regulations, but from which they are blocked from seeking as a result of the summary judgment and dismissal Order that is on appeal.

The district court erred in holding that the Secretary's actions in

[12] The Secretary also reinstated the "50 % Rule" to protect U.S. workers' access to farm jobs by requiring H-2A employers to hire qualified domestic workers, instead of H-2A workers, for the first 50% of the H-2A contract period. See 75 Fed. Reg. at 6921.

[13] Agricultural employers, including Appellee North Carolina Growers' Association, filed suit to enjoin the new 2010 regulations, objecting, inter alia, to the reinstatement of the 1987 AEWR methodology. The district court denied the Employers' preliminary injunction motion and the Employers ultimately dismissed their case. See J.A. at 272 -274 (Order Denying Preliminary Injunction); see also NCGA, et al. v. Solis, No. 10-200 (M.D.N.C. filed March 12, 2010).

promulgating the Suspension rule were arbitrary and capricious. The Secretary's decision to reinstate the 1987 regulations—in light of her statutory duty keep the H-2A program functioning and to avoid the wage deflation and increased unemployment she found likely under the suspended 2008 Rule—was not arbitrary and capricious, but instead reflected prudent and careful decision making. The district court further erred in applying the procedural requirements of the Administrative Procedure Act to the Secretary's reinstatement of the 1987 Rule. The statutory text and case law make clear that APA procedures do not apply to reinstatements of old rules that had previously gone through notice and comment rule making. Even if notice and comment rulemaking had been required, the Secretary's explanations in the Final Rule bring her within the "good cause" exception to any procedural requirement to consider comments on reinstatement.

The district court examined the Secretary's action into two parts—suspension of the 2008 regulations and reinstatement of the 1987 regulations— and ruled only on the validity of the reinstatement. The Farmworkers assert that the Secretary acted lawfully both with respect to suspension and reinstatement. The Farmworkers respectfully request that this Court reverse, to enter partial summary judgment for the Farmworkers, and remand to the district court to consider the Farmworkers' counterclaims and related issues.

Finally, the district court ruled incorrectly on the propriety of a discrete

provision in the Suspension Rule regarding the Christmas tree industry. In this ruling, the district court erred by applying APA § 553 procedures to an interpretive rule despite statutory language exempting such interpretive rules from these procedures. Further, the district court clearly erred in holding that the Secretary had not considered certain comments when she plainly discussed those comments in the preamble to the Suspension Rule.

## ARGUMENT

## STANDARD OF REVIEW

An appellate court reviews de novo a district court's grant of summary judgment. Laber v. Harvey, 438 F.3d 404 415 (4th Cir. 2006) (en banc); Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1167 (4th Cir. 1988). A court presented with an Administrative Procedure Act challenge reviews the administrative record under an abuse of discretion standard under which it will only "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2006); Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743–44, 105 S. Ct. 1598 (1985); Darden v. Peters, 488 F.3d 277, 283 (4th Cir. 2007). "[T]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n v. State Farm Mut.

Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2859 (1983). The agency action under review is "entitled to a presumption of regularity." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415, 91 S. Ct. 814, 823 (1971), rev'd on other grounds by Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980 (1977).

## I. The Secretary's Suspension of the 2008 Regulations Complied with the APA

### a. The Secretary Had Authority to Suspend the 2008 Regulations

It is well established that the Secretary has authority to suspend regulations for study. See State Farm, 463 U.S. at 50 n.15 ("[I]t would have been permissible for the agency to temporarily suspend the passive restraint requirement or to delay its implementation date while an airbags mandate was studied."); Nat'l Fed'n of Fed. Emps. v. Devine, 671 F.2d 607, 612 (D.C. Cir. 1982) (upholding suspension despite its indefinite length); see also Public Citizen v. DHHS, 671 F.2d 518, 518 (D.C. Cir. 1981) (refusing to invalidate suspension of regulations despite agency's failure to conduct notice and comment); Consolidated Coal Co. v. Costle, 604 F.2d 239, 248 (4th Cir. 1979) ("A regulatory agency frequently needs to address problems step by step. . . . The administrator's deferral . . . pending further study was prudent and lawful") rev'd on other grounds by EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64 (1980); Pennsylvania v. Lynn, 501 F.2d 848, 861 (D.C. Cir. 1974) (upholding the HUD Secretary's authority to suspend for study programs

Congress had tasked HUD with administering where the Secretary believed the programs could not be administered consistently with Congressional intent); cf. Am. Trucking Ass'ns v. Atchinson, Topeka & Santa Fe Ry. Co., 387 U.S. 397, 416, 87 S. Ct. 1608, 1618 (1967) ("[w]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.").

**b. The Suspension Rule Complied with § 553's Notice and Comment Procedures**

The procedures governing federal agencies in creating regulations is set out at Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.[14] The district court found that the suspension of the 2008 Rule "constituted 'rule making' under [5 U.S.C.] §§ 551 and 553."[15] J.A. at 250 (Order). Although the district court declined to rule on whether the Secretary complied with § 553 in issuing the

[14] The Agricultural Employers' complaint focused on alleged procedural violations of the APA, rather than substantive violations and the Order below similarly limited its analysis to procedural compliance.

[15] The district court later questioned "whether rule suspensions constitute 'rule making' under § 551(5) and must therefore comply with § 553(c)." J.A. at 250 n.6. Assuming for the sake of this appeal that the Secretary "formulated" the Suspension Rule, such that the suspension constitutes rule making constitutes rule making under § 551(5), the Farmworkers submit that the Secretary nevertheless complied – presumably intentionally – with § 553(c) by providing notice, considering public comments, and explaining her reasons for suspension.

Suspension Rule, (id. at n.6), the Farmworkers ask this Court to rule on the adequacy of the Secretary's actions.

Section 553 requires three procedural steps of agencies engaged in rule making: (1) publishing a "[g]eneral notice" of the proposed rulemaking in the Federal Register; (2) "giv[ing] interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments"; and (3) explaining why the agency took the actions it did by including in the final rule "a concise general statement of [the rule's] basis and purpose." 5 U.S.C. § 553(b)–(c). As described below, the Suspension Rule satisfied all three of § 553's procedural requirements.

**i. The March 17, 2009 NPRM gave adequate notice of the proposed suspension of the December 2008 Rule and reinstatement of the 1987 Rule publishing the terms of the proposed regulations and other statutory requirements.**

This Court has made clear that § 553's notice requirements are satisfied if the NPRM "sufficiently alerted" the public to the proposed rule so they "know whether their interests are at stake." Spartan Radiocasting Co. v. F.C.C., 619 F.2d 314, 321 (4th Cir. 1980). Thus, the agency must publish in the Federal Register "a statement of the time, place, and nature of public rule making proceedings" that gives "reference to the legal authority under which the rule is proposed" and that either publishes the "terms or substance" of the proposed rule or describes the issues involved. 5 U.S.C. § 553(b)(1)–(3).

The March 17, 2009 NPRM easily satisfied § 553(b) by publishing in the Federal Register the information including the following: the terms and rationale for the proposed suspension, the terms of the 1987 regulations proposed to be reinstated, a request for public comment, notice of a 10-day deadline for comment submission, and addresses for submission of comments (both web-based and physical). See 74 Fed. Reg. at 11,408, 11,408-11,440; see also 5 U.S.C. § 553(b); Chocolate Manf. Assoc. of the U.S. v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) ("If after comments, the agency had adopted without change the proposed rule as the final rule, there could have been no possible objection to the adequacy of notice.").

**ii. The Secretary properly invited public comment on the suspension.**

The NPRM's success in alerting the public to the proposed suspension can be measured by the public's vigorous response. During the 10-day comment window, the public submitted some 800 comments in response to the NPRM. See 74 Fed. Reg. at 25,973; see generally Administrative Record (DOL000046-2282).[16] The Administrative Record contains approximately 645 comments

[16] The entire Administrative Record has been filed with the district court in CD format, see Rec. Doc. 123, and the parties included in the Joint Appendix the excerpts of the Record on which they rely. Should the Court prefer to receive the entire Administrative Record from undersigned counsel, she will undertake to provide the same.

submitted by individuals or entities who self-identify as "farmers," "growers," "agricultural producers," or "farms." See id. At least fifteen of eighteen Agricultural Employers in the instant appeal submitted comments.[17] The actual participation by most of the Agricultural Employers, and the broad participation by the regulated community, shows the adequacy of the notice here and the sufficiency of the 10-day comment period. See 5 U.S.C. § 553(b) (setting no minimum comment period).[18] In fact, courts have found reasonable shorter periods that resulted in far fewer comments. See, e.g., Omnipoint Corp. v. F.C.C., 78 F.3d 620, 629-30 (D.C. Cir. 1996) (15-day comment period upheld where agency received 45 comments and 42 letters on proposed rule), Florida Power & Light Co. v. United States, 846 F.2d 765, 772 (D.C. Cir. 1988) (considering the 61 comments

[17] See J.A. at 503-504 (comments of ALTA Citrus); J.A. at 436-439 (comments of Florida Fruit & Vegetable Ass'n); J.A. at 505-506 (comments of Florida Citrus Mutual); J.A. at 507-508 (comments of North Carolina Pickle Producers Ass'n); J.A. 326-330 (comments of Forest Resources Ass'n); id. (comments of Maine Forest Products Council); J.A. at 509-510 (comments of H-2A USA); J.A. at 465-466 (comments of Snake River Farmers' Ass'n); J.A. at 511-515 (comments of National Council of Agricultural Employers); J.A. at 516-522 (comments of National Christmas Tree Ass'n); J.A. at 398-421 (comments of North Carolina Growers' Ass'n); J.A. at 523-525 (comments of Titan Peach Farms); J.A. at 526-581 (comments of Virginia Agricultural Growers' Ass'n); J.A. at 582-585 (comments of North Carolina Agribusiness Council); J.A. at 586-588 (comments of North Carolina Christmas Tree Ass'n).

[18] Congress "require[s] publication or service of a substantive rule" for a 30-day minimum time period before an agency can make the rule "effective." 8 U.S.C. § 553(d). This minimum time requirement in § 553(d) shows that Congress knows how to include a minimum time period when it so desires and could have included a minimum time period in § 553(b) had it found it useful.

received, "some of them lengthy," 15-day comment period was sufficient); Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1320 (8th Cir. 1981) (upholding 7-day notice period where 37 comments were received).

### iii. The Secretary included in the final rule a concise general statement of the basis and purpose of the Suspension regulations.

An agency complies with § 553(c) if it provides in its final rule a "'concise and general statement' that 'ventilates' 'major issues of policy' and allows a reviewing court to see why the agency reacted to the policy issues as it did." South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 886 (4th Cir. 1983) (quoting Appalachian Power Co. v. EPA, 579 F.2d 846, 854 (4th Cir. 1978).[19]

[19] The district court noted that the Department of Labor made it "difficult for a reviewing court to determine which comments were considered by DOL." See J.A. at 251 n.7. The court below did not rule on this basis, however. See J.A. at 257 (noting bases for its holding). Had the court ruled based on the agency not specifying which comments it was responding to, however, it would have contradicted the language of the APA and clear Supreme Court and Fourth Circuit authority. See, e.g., State of S.C. ex rel. Tindal v. Block, 717 F.2d 874, 886 (4th Cir. 1983) ("There is no obligation to make references in the agency explanation 'to all the specific issues raised in comments.") (quoting Appalachian, 579 F.2d at 854). The agency's explanation must simply include a "concise general statement of [the regulations'] basis and purpose," 5 U.S.C. § 553(c), to enable a reviewing court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them the way it did." Tindal, 717 F.2d at 886; see also Camp v. Pitts, 411 U.S. 138, 143, 93 S. Ct. 1241 (1973) (The APA requires merely a "curt" explanation of "determinative reason[s] for the final action taken.").

Further, to the extent the district court found the Secretary's explanations inadequate to allow effective judicial review, the proper response would not be to

Although the Order at bar does not acknowledge it, the Administrative Record amply shows that the Secretary responded to the public's comments with reasoned explanations for her actions. See generally 74 Fed. Reg. 25,973–25,982. In the Suspension Rule, the Secretary noted her finding that the 2008 Rule would likely negatively impact domestic farmworkers' wages and that this finding merited study: "[o]ne of the primary reasons that the new Administration wants to review the December 2008 Rule is precisely to determine whether the generally reduced wage rates under that rule are having a depressive effect on farmworker wages." 74 Fed. Reg. at 25,977. This finding gave the Secretary significant authority to take action through suspension; the adverse results of the 2008 Rule made it clearly contrary to Congress's intent in including the Department of Labor in administering the H-2A program. See 8 U.S.C. § 1188(a)(1) (2006) (requiring Secretary of Labor to certify the employment of H-2A workers would not harm domestic workers' wages or working conditions).

In the final Suspension Rule, the Secretary further explained that the

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grant the employers' motion for summary judgment against the agency, but, as directed by Camp v. Pitts and Overton Park, to remand to the agency for a fuller explanation or "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary. See Camp, 411 U.S. at 143, see also Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420-21, 91 S. Ct. 814, 825, 28 L. Ed. 2d 136 (1971). To be clear, however, the Farmworkers believe that the Secretary's explanations in the final Suspension Rule clearly indicated her bases for acting such that affidavits, testimony, or remand are unnecessary.

suspension would last, at most, for nine months to allow her to study the impact of the 2008 Rule on domestic farmworkers' wages and access to farm jobs. 74 Fed. Reg. at 25,979. After which time, the 2008 regulations either would go into effect or the Department would engage in further rulemaking: "The suspension of the December 2008 Rule and reinstatement of the Prior Rule is strictly a temporary measure arising from the Department's need to review in an expeditious manner the December 2008 Rule to ensure that the Department effectively carries out the statutory objectives and requirements of the H-2A program." Id.

The Secretary further set out evidence of delay and confusion in implementing the 2008 Rule, including substantial increases in the number of faulty applications, growth in the numbers of applications that failed to meet the statutory processing requirements in between 27-58% of cases, depending on the week, instances of State Workforce Agencies giving out incorrect information about the then-new 2008 Rule, and other problems. Id. at 25,973–25,977.

In addition, the Secretary responded to technical comments about the suspension, discussing inter alia how the grandfather clause would work, id. at 25,979–25,980; farmers' ability to withdraw from the program, id. at 25,980; whether new applications would be penalized, id.; the removal of loggers from the H-2A program, id. at 25,980–25,981; the reality that many growers already employed two sets of workers subject to different wages and regulatory

requirements, id. at 25,981–25,982; and the removal of Christmas tree workers from within the Department of Labor's interpretation of "agriculture," id. at 25,982.[20] The Secretary also reminded the public that the provisions the Secretary specifically mentioned merely re-adopted provisions that had already been in effect. Id. at 25,973.

Thus, by setting forth the Secretary's rationales for adopting the Suspension Rule, the agency satisfied the APA by "enabl[ing] a reviewing court to see what major issues of policy were ventilated by the informal proceeding and why the agency reacted to them the way it did." Block, 717 F.2d at 886. The APA requires nothing more. Id.; Appalachian, 579 F.2d at 854 ("No exhaustive statement of reasons for the rule is required; what is required is a 'concise general statement of [the regulation's] basis and purpose."); see also 5 U.S.C. § 553(c) ("After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

**c. Suspending the 2008 Rule was a reasonable exercise of the Secretary's Congressionally-mandated duty**

Nor can it be arbitrary and capricious for the Secretary to ensure that the Department of Labor's regulations do not adversely affect the wages of U.S. workers or their access to jobs. See 8 U.S.C. § 1188(a)(1) (2006). Congress tasked the Secretary with doing no less, and fulfilling a Congressional mandate is

[20] This last point is discussed in detail infra at Part III.

an agency's duty. See Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 2782 (1984) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.") (alteration in original). Suspension under these circumstances was a rational choice that merits judicial deference. See 5 U.S.C. § 706(2)(A) (court may set aside agency action only if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Therefore, the Secretary cannot be found to have violated the APA with her Suspension Rule.

## II. The Secretary's Decision to Temporarily Reinstate the 1987 Rule Was Procedurally Valid and Reasonable

The Secretary of Labor's authority to conclude that the 1987 regulations were to be reinstated without new or additional notice and comment can only be set aside if arbitrary or capricious. 5 U.S.C. § 706(2)(A); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 129 S. Ct. 1800, 1810, 173 L. Ed. 2d 738 (2009). As explained in detail infra, the Secretary's decision to temporarily reinstate the 1987 Rule without considering comments was both reasonable and procedurally valid.

### a. The Secretary's Reinstatement of the 1987 Rule was not Arbitrary and Capricious and Therefore Complied with the APA.

Although § 553 rule making procedures did not apply to the reinstatement, as discussed infra at II.b. and II.c., the Secretary's reinstatement, as "agency action," is subject to judicial review, and therefore must be reasonable, i.e., not arbitrary or capricious. See 5 U.S.C. § 702 (allowing judicial review of agency action); see also 5 U.S.C. § 706(2)(A) (setting arbitrary and capricious as the standard of judicial review of agency actions). Therefore, by overturning the Secretary's action, the district court found her action to be arbitrary and capricious, even though the district court never specifically stated this outside the 553 procedural context. To the extent that the district court created a second holding that reinstatement was arbitrary and capricious, independent of the § 553 ruling, see J.A. at 257 n.8,[21] the court erred because the reinstatement was reasonable, as described below.

In reviewing the agency's actions, "to decide whether an administrative agency's decision is arbitrary or capricious, the court must determine whether a reasonable person, considering all the evidence in the record, would fairly and honestly be compelled to reach a different conclusion; if not, no abuse of discretion

[21] The Order states in n.8: "The argument that reinstatement was necessary to avoid a regulatory vacuum created by the suspension is not persuasive because the suspension was self-imposed by the agency. Notwithstanding the failure to comply with the APA, the suspension process urged by the Federal Defendants, if taken to hits extreme, would permit a complete circumvention of the APA and judicial review by the enactment of suspensions and temporary implementations." J.A. at 257.

has occurred and the agency decision must be upheld." 73A C.J.S. Public Administrative Law and Procedure § 418. Review under § 706 is "highly deferential, with a presumption in favor of finding the agency action valid." Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009).

Applying this standard in this case, a reasonable person would fairly and honestly be compelled to do as the Secretary of Labor decided to do. When she issued the Suspension NPRM, the Secretary would have anticipated that if she concluded that the 2008 regulations needed to be suspended pending further scrutiny, she would be faced with the problem of how to keep the H-2A program in place. H-2A applications would continue to be submitted, but the Department would have no standards under which to process them. Such a void would have left the Secretary in dereliction of her congressionally-delegated duty to administer the H-2A program. See 8 U.S.C. § 1188 (requiring Secretary of Labor to certify lawful H-2A applications).

In addition, the suspension would have left applicants without a means to obtain foreign labor in the absence of some stopgap system to fill the regulatory void created by suspension. In this case, more than 2,900 agricultural employers submitted H-2A applications for a total of over 40,000 positions between the date on which the suspension was to take place (June 29, 2009) and the effective date of the 2010 regulations (Mar. 15, 2010). See J.A. at 635-637 (Chart showing H-2A

employers' use of the 2008 Rule AEWR after the enjoining of the Suspension Rule).

To fill the vacuum, the Secretary had a choice of only two comprehensive labor certification processes which had been subjected to notice and comment: (1) the 2008 regulations and (2) the 1987 regulations. The legal question is whether the Secretary's decision to select as a stopgap to fill the regulatory vacuum the certification system set out in the 1987 regulations, rather than that provided in the 2008 regulations, was arbitrary and capricious under the APA. As discussed previously, in suspending the 2008 regulations, the Secretary acted reasonably, responsibly, and lawfully. If indeed there was good reason to suspend the 2008 regulations, it must necessarily be reasonable not to choose the 2008 regulations as the temporary stopgap, leaving the 1987 regulations as the only reasonable option.

The Secretary's decision to select the labor certification system established in the 1987 regulations, rather than the system under the 2008 regulations, was reasonable, given inter alia, the data indicating the 2008 regulations were likely depressing the wages of U.S. workers and reducing U.S. workers' access to farm jobs. See 74 Fed. Reg. at 25,977. For example, the 2008 Rule limited domestic farmworkers' access to jobs at H-2A employers' operations by reducing what is commonly known as the "50% Rule." Compare 73 Fed. Reg. 77,214–15 with 75 Fed. Reg. 6921. Under the 1987 regulations, H-2A employers were required to

hire domestic farmworkers who applied for jobs anytime in the first 50 percent of the (typically 9- to 10-month) H-2A contract. See 52 Fed. Reg. at 20,516 (§ 655.103(e) (1987)). The 2008 regulations, however, had cut that protection to a 30-day period. H-2A employers therefore had to hire domestic farmworkers only during the first month of the H-2A contract. 73 Fed. Reg. 77,214–15.

In addition, for 85 percent of the North Carolina H-2A workers, the new methodology under the 2008 regulations resulted in a 2009 AEWR of $7.25 per hour, 22.4 percent less than the 2009 North Carolina AEWR of $9.34 rate computed under the 1987 regulations. See J.A. at 645 ¶ 5 (Affidavit of Lee Wicker); 73 Fed. Reg. 10,289 (February 26, 2008) (publication of 2008 adverse effect wage rates); 74 Fed. Reg. 26,016 (May 29, 2009) (publication of 2009 adverse effect wage rates). Likewise, under the new methodology adopted in the 2008 regulations, the 2009 AEWR for Michigan Christmas tree grower Chris Maciborski's operations dropped from $10.01 to $7.74 per hour, 22.3 percent less than the wage guaranteed his workers the year before. See J.A. 681 ¶4 (Affidavit of Chris Maciborski).

Nor were these isolated wage declines. Data gathered from a rule making in 2009 confirmed that under the 2008 Rule, wages paid by H-2A employers dropped an average of $1.44 per hour from the rates under the methodology incorporated in the 1987 regulations. 74 Fed. Reg.at 45,911, 45,927 (September 4, 2009). By

lowering the AEWR to approximately the minimum wage, the 2008 Rule made many farm jobs infeasible for unemployed U.S. workers. Local workers are not entitled to free daily transportation to and from the job. 73 Fed. Reg. at 77,149. At approximately $9 an hour (the pre-2008 Rule AEWR in North Carolina), local workers were willing to drive out to the relatively nearby countryside and take a farm job. However, cutting the wages to as low as $7.25 per hour, coupled with the spike in gas prices, made these jobs far less attractive to local commuters. Absent the potential to hire H-2A workers, agricultural employers may have increased their pay rates until their jobs attracted U.S. farmworkers. The Secretary reasonably concluded that the 1987 regulations, more than the 2008 regulations, would be a better fit to fill the suspension void. The Secretary concluded that the 2008 Rule may have been having an immediate impact on wages and domestic farmworkers' access to jobs. 74 Fed. Reg. at 25,977. These impacts conflicted with her statutory duty to protect wages and domestic farm workers' jobs. See 8 U.S.C. § 1188(a)(1). In light of these conditions, the Secretary's choice to re-implement the 1987 regulations, rather than allowing a continuance of the suspended 2008 regulations, was not arbitrary or capricious, but rather reasonable and prudent. Fox Television, 556 U.S. at 502 ("If the Commission's action here was not arbitrary or capricious in the ordinary sense, it satisfies the Administrative Procedure Act's 'arbitrary [or] capricious' standard."); State Farm, 463 U.S. at 43

("a court is not to substitute its judgment for that of the agency"); Ohio Valley Envtl. Coal. v. Aracoma Coal Co., 556 F.3d 177, 192 (4th Cir. 2009) ("The court is not empowered to substitute its judgment for that of the agency") (quoting Overton Park, 401 U.S. at 416, 91 S.Ct. 814)); Va. Agric. Growers Ass'n, Inc. v. DOL, 756 F.2d 1025, 1031 (4th Cir. 1985) (upholding agency action supported by a rational basis). The district court erred in not recognizing valid agency action to reinstate a prior regulation based on a legally valid suspension. See generally Associated Builders & Contractors, Inc. v. Herman, 976 F. Supp. 1, 5-6 (D.D.C. 1997).

The court below erred in dismissing this regulatory vacuum as irrelevant because it was "self-imposed" through agency action, rather than through a court order or Congressional interference with a regulation. J.A. at 257 n.8. The Supreme Court approved such a regulatory suspension based purely on agency decision-making, i.e.,where no external mandates—such as Congressional action or a court order—were at issue. State Farm, 463 U.S. 29. In State Farm, the agency's action was based on the agency's own determination that the regulations in effect no longer fulfilled agency objectives. Id. at 38 ("NHTSA maintained that it was no longer able to find, as it had in 1977, that the [regulatory] requirement would produce significant safety benefits."). Under these circumstances, the Supreme Court found "it would have been permissible for the agency to temporarily suspend" the regulations. Id. at 50 n.15. In the instant case, the

district court's holding that the "self-imposed" vacuum created by the Secretary's suspension of the 2008 Rule without court order or Congressional action conflicts with State Farm and must be rejected.

**b. Section 553 Does Not Apply to an Agency Reinstating a Rule**

The district court erred in holding that "reinstating" the 1987 Rule constituted "formulating" a rule and therefore "constituted 'rule making' under §§ 551 and 553." See J.A. at 250 n.6. This conflation of "reinstating" and "formulating" underpinned the district court's finding that § 553 notice and comment rulemaking applied to the reinstatement. Id.; see 5 U.S.C. § 553 (requiring agencies engaged in rule making to engage in notice and comment procedures) (emphasis added).

As this Court has said, "[u]nder the most basic canon of statutory construction, we begin interpreting a statute by examining the literal and plain language of the statute." Carbon Fuel Co. v. USX Corp., 100 F.3d 1124, 1133 (4th Cir. 1996). It is well-established that statutory language—such as 5 U.S.C. § 551(5)'s definition of "rulemaking" as an agency's process for "formulating, amending, or repealing" a rule—is to be interpreted as the "commonly accepted" meaning of the word unless Congress has indicated otherwise. See e.g., Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship, 507 U.S. 380, 391, 113 S. Ct. 1489, 1496, 123 L. Ed. 2d 74 (1993); see also Broughman v. Carver, 624 F.3d

670, 675 (4th Cir. 2010) ("'Absent explicit legislative intent to the contrary,' we give the words of a statute their 'plain and ordinary meaning.'"). However, "reinstating" is not "formulating." The two terms have materially different meanings in ordinary usage.

According to Black's Law and other dictionaries, to "reinstate" means to "restore." Black's Law Dictionary, 9th ed. 2009 ("Reinstate: To place again in a former state or position; to restore"); see also The Oxford English Dictionary, 2d ed. 1989, Vol. XIII ("Reinstate: 1: to reinstall or re-establish (a person or thing) in a place, station, condition, etc. . . . 2: to restore to or in a proper state, to replace"); Webster's Third New International Dictionary, 1981 ("Reinstate: 1: to instate again: place again (as in possession or in a former position; 2: to restore to a proper condition: replace in an original or equivalent state"). Thus, by definition, "reinstating" is not new creation, but rather is restoration.

In contrast, to "formulate" means to "reduce to a formula" or to "devise." See The Oxford English Dictionary, 2d ed. 1989, Vol. VI ("Formulate: to reduce to a formula; to express in (or as in) a formula; to set forth in a definite and systemic statement"); Webster's Third New International Dictionary, 1981 ("Formulate: 1a: to reduce to or express in or as if in a formula: put into a systematized statement or expression; . . . 1b: to plan out in an orderly fashion:

devise").[22] In other words, "formulating" is creating something new.

Thus, the two words are not synonyms, as shown by how this Court uses "formulating" to mean "devising" or "creating," but not "reinstating." For example, in Thompson v. E.I. DuPont, when this Court spoke of a panel "formulating [a] definition" for the term "excusable neglect," 76 F.3d at 533, a synonym for "formulating" would be "devising," but "reinstating" would not make sense as a synonym. Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 533 (4th Cir. 1996). Similarly, in Willie M. v. Hunt, when this Court discussed the parties' understandings in "formulating the class definition," the terms "creating" or "drafting" would be appropriate synonyms for "formulating" but "reinstating" would not make sense. Willie M. v. Hunt, 657 F.2d 55, 61 (4th Cir. 1981).

This difference in meaning is why courts, when presented with an agency's reinstatement of regulations that had previously gone through notice and comment procedures, do not require a second rule making process before reinstatement. See American Mining Congress v. EPA, 907 F.2d 1179, 1191 (D.C. Cir. 1990) ("We agree with the agency that the APA imposed on it no obligation to hold a new period of notice and comment before promulgating the 1988 Rule. As noted above, the agency did hold two periods of notice and comment prior to issuing the 1988

[22] Black's Law Dictionary's 9th edition does not define "formulate" or any variant of the verb "to form."

Rule."); American Fed'n of Gov't Emps., AFL-CIO v. Office of Personnel Mgmt., 821 F.2d 761, 764 (D.C. Cir. 1987) (holding that the APA does not require an additional notice and comment period before implementing regulations that had gone through a complete notice and comment period followed by a suspension); Associated Builders, 976 F. Supp. at 3 (accepting without discussion the validity of an agency reinstating, without notice and comment, a former rule to replace a suspended rule); cf. Frederick County Fruit Growers Ass'n v. Martin, 968 F.2d 1265, 1271 (D.C. Cir. 1992) (holding that district court ordering Secretary of Labor to adopt a new interpretation of a validly promulgated regulation did not constitute a new rule making requiring notice and comment).

Here, the Secretary's reinstatement of the 1987 regulations did not involve formulating any new language; rather she was restoring the previously-created language of the 1987 regulations in the Federal Register. See 74 Fed. Reg. at 25,982 (Final Rule) (responding to a comment about how "the reinstatement of the Prior Rule verbatim" would include references to statutory text that had since been amended); 74 Fed. Reg. at 11,409 (NPRM) ("If a final decision is reached to suspend the H-2A Final Rule, DOL would reinstate the previous rules verbatim on an interim basis to avoid a regulatory vacuum while judicial and administrative review of the H-2A Final Rule proceed.").

The district court's creative interpretation of "reinstating" to require agency

compliance with § 553 rulemaking erroneously required the Secretary to engage in more process than the Administrative Procedure Act required of her.[23, 24] See Fox Television, 556 U.S. 502, 129 S. Ct. 1800, 1810, 173 L. Ed. 2d 738 (2009) ("The Administrative Procedure Act, 5 U.S.C. § 551 et seq., . . . sets forth the full extent of judicial authority to review executive agency action for procedural correctness"); Vermont Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc., 435 U.S. 519, 524, 98 S.Ct. 1197, 1202 (1978) ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not

[23] The most straightforward reading of the district court's Order is that the entirety of the Order rested on the Secretary's alleged violation of § 553. See J.A. at 251-257 (citing § 553 and cases interpreting § 553, such as State Farm, as the basis for finding the Secretary's actions arbitrary and capricious).

[24] The district court created a novel "content restriction" basis for invalidating the Suspension Rule and reinstatement. See, e.g., J.A. at 252, 257. This "content restriction" basis does not come from the Administrative Procedure Act, which requires only notice, opportunity to comment, and a statement of the basis and purpose of the final rule. 5 U.S.C. § 553. Nor does case law give rise to the district court's "content restriction" basis to invalidate agency action. The district court cited no law in which a "content restriction" made an agency action arbitrary and capricious, and undersigned counsel has found no such case law. The Farmworkers urge this Court to reject the district court's attempt to craft new requirements, beyond what the APA requires, for the Secretary to meet. See F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 129 S. Ct. 1800, 1810, 173 L. Ed. 2d 738 (2009) ("The Administrative Procedure Act, 5 U.S.C. § 551 et seq., . . . sets forth the full extent of judicial authority to review executive agency action for procedural correctness"). In fact, for NPRM's to be intelligible, they must restrict comments to what will inform the rulemaking, which in this case was the suspension of the 2008 Rule.

chosen to grant them."). Where a district court's ruling rests on an error of law, reversal of the order is the appropriate remedy. See, e.g., White v. Investors Mgmt. Corp., 888 F.2d 1036, 1042 (4th Cir. 1989) (reversing grant of summary judgment where district court "committed a clear error of law"); C.I.R. v. Kohn, 158 F.2d 32, 33 (4th Cir. 1946) ("[A]s we believe the [lower court's] decision here was a clear-cut mistake of law, we must reverse that decision."). The Farmworkers urge this Court to reverse the grant of summary judgment below and the attendant dismissal of the Farmworkers' counterclaims.

**c. The Secretary's Reinstatement of the 1987 Rule Fell Within the Good Cause Exception to Notice and Comment**

Even if the Court should find that § 553's rule making requirements apply to reinstatements, the Secretary's explanations in the Final Rule should bring her within the "good cause" exception to the statutory obligation to consider comments on the merits of the reinstatement. See 5 U.S.C. § 553(b)(B). According to the plain language of § 553(b)(B), an agency is "exempt," or does not need to provide an opportunity for notice and comment, "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." See United States v. Gould, 568 F.3d 459, 469 (4th Cir. 2009) (emphasis added).

As a threshold matter, Appellants acknowledge that the Secretary did not

expressly incorporate the specific words "unnecessary," "impracticable," or "contrary to the public interest" when she acted to reinstate the 1987 regulations. However, courts will waive an express invocation where the agency adequately explains the bases for good cause. See Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States, 59 F.3d 1219, 1224 (Fed. Cir. 1995) ("Customs did not expressly cite section 553(b)(B) in the interim regulations. This slight oversight, however, does not prejudice Customs' invocation of the good cause exception."); Central Lincoln Peoples' Utility Dist. v. Johnson, 735 F.2d 1101 (9th Cir. 1984) (no language may be found in the regulations regarding why the agency dispensed with a public comment period before the regulations went into effect, but court still found good cause); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974) (although "the Government has stipulated that the finding required to invoke the exception was not made. . . . we are satisfied that there was in fact 'good cause' to find that advance notice of the freeze was 'impracticable, unnecessary, or contrary to the public interest' within the meaning of § 553(b)(B)").

In Tasty Baking Co. v. Cost of Living Council, one court went as far as to take judicial notice of the emergency conditions that existed at the time the regulations were promulgated. 529 F.2d 1005, 1014 (Emer. Ct. App. 1975) (explaining that despite the conclusory claims of "good cause," the regulations

could stand because the court could take judicial notice of the emergency nature of the legislation and accompanying regulations). Here, the Court need not go so far, because the Secretary did cite in the regulations reasons for finding good cause, but merely failed to use the words "impracticable," "unnecessary," or "public interest." A court may uphold a finding of good cause justified by obvious and compelling facts that can be judicially noticed. See Mobil Oil Corp. v. Dep't of Energy, 728 F.2d 1477, 1490 (Temp. Emer. Ct. App. 1983); Nader v. Sawhill, 514 F.2d 1064, 1068 (Temp. Emer. Ct. App. 1975)); DeRieux, 499 F.2d at 1332 ("This conclusion is based upon facts so obvious that they may be judicial[l]y noticed.").

The Secretary implicitly incorporated her findings and expressly included multiple statements and reasons for not taking comments on the merits of reinstating the 1987 regulations, permitting a reviewing court to decide whether the basis for applying the good cause exception existed. A court's "inquiry into whether the [agency] properly invoked 'good cause' proceeds case-by-case, sensitive to the totality of the factors at play." Alcaraz v. Block, 746 F.2d 593, 612 (9th Cir. 1984). Given "the totality of the circumstances" here, the Secretary acted quickly to assure domestic agricultural workers fair wages and access to jobs and to ensure as minimal disruption as possible to the agency, the employers, and all

others who were affected by the newly instituted 2008 Rule.[25] Therefore, if the Court finds that § 553 does apply to reinstatement, the Farmworkers urge the Court to find that, in this case, "the urgent necessity for rapid administrative action under the circumstances of the present case would justify the [DOL's] finding of 'good cause.'" Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1321 (8th Cir. 1981).

**i. Exigent circumstances support a finding of good cause**

The Secretary acted at a time of great distress in the U.S. economy and rising U.S. unemployment. See 74 Fed. Reg. at 25,977. The Secretary sought to address serious administrative difficulties and policy concerns that she confronted as a result of the 2008 Rule; challenges the nation could ill afford in light of rising unemployment and continuing economic problems. 74 Fed. Reg. at 25,972 (DOL "immediately encountered a number of operational challenges which continue to prevent the full, effective and efficient implementation of the December 2008 regulation . . . . without further consideration of the relevant legal and economic concerns that have arisen since its publication was proving to be disruptive and confusing . . . especially in light of the severe economic conditions facing the

[25] The Secretary stated that the 2008 Rule was "proving to be disruptive and confusing not only to the Department's administration of the H-2A program but also to State Workforce Agencies (SWAs), agricultural employers, and domestic and foreign workers, especially in light of the severe economic conditions facing the country." 74 Fed. Reg. at 25,972.

country.").

The Secretary considered the 2008 Rule's change in the manner of setting AEWRs as especially critical for reconsideration in light of the economic conditions facing the country. 74 Fed. Reg. at 25,982-83. Indeed, the Secretary recognized that to the extent that the 2008 AEWR rule change permitted H-2A employers to employ H-2A workers at lower wage rates, a resultant increased demand for H-2A workers would consequently and adversely impact the employment of U.S. workers, further contributing to rising U.S. unemployment, a matter of urgent public concern.

The Secretary believed reinstatement "necessary due to the time constraints and concerns inherent in the Department's administration of the H-2A program," 74 Fed. Reg. 11,409, and because of the "need to review in an expeditious manner the December 2008 Rule," 74 Fed. Reg. 25,979, without considering comment on the substance of the prior rule. To consider comments would have necessitated extensive delay. For example, the 2008 rule took more than 11 months from NPRM to effective date – from the February 13, 2008 NPRM to the January 17, 2009 effective date; and, the 2010 rule took more than 7 months from NPRM to effective date – from the September 4, 2009 NPRM to the March 15, 2010 effective date. Further emphasizing the need for clarity, it is generally understood that the nation was experiencing the worst unemployment rates since the Great

Depression at the time that the new administration took office and around the time the 2008 Rule took effect in January 2009. Thus, it was reasonable given the circumstances for the Secretary to attempt to reverse any harmful consequences the new rule was exacerbating.

Taking all of this into account, she expressly stated her findings of exigency supporting her action:

> the disruptive effect of implementing a complex regulatory scheme without further consideration of the legal and economic concerns that have arisen during the current economic downturn, such as the rising unemployment among U.S. workers and the impact that may have on the Department's H-2A statutory obligation to ensure no adverse effect on the U.S. worker population from the introduction of the foreign workforce

74 Fed. Reg. at 25,977, which demanded immediate action.

Courts have found good cause permitting an agency to dispense with notice and comment where regulation is needed to address exigent circumstances. In Texaco, Inc. v. FEA, 531 F.2d 1071 (Em. App. 1976), the court found that the agency was exempt from notice and comment where the government had an immediate need to impose a regulation promulgated as part of market stabilization efforts during the 1970's oil crisis. While the agency did not expressly include an explanation of this in its rulemaking, the court found "[i]ts purpose was indicated as being to preserve the existing price structure pending resolution of the rule

making proceedings initiated…(and that subsequent hearings) demonstrated the continuing urgency of the entire problem." Id. at 1082.

Similarly, in National Customs Brokers, 59 F.3d 1219 (Fed. Cir. 1995), a case involving interim regulations promulgated by the customs service dealing with the importation of merchandise, the court found good cause where it would have been contrary to the public interest and where the agency explained in the regulations that it "believes the public wants these new statutory minimums to become effective as soon as possible as the public should benefit from the efficiencies and savings resulting therefrom." See id. at 1223 (citing 59 Fed. Reg. at 30,292).

In Mid-Tex Electric Cooperative, Inc. v. FERC, 822 F.2d 1123, 1132-33 (D.C. Cir. 1987), involving a utility rate-setting rule, the court found good cause in the agency's assertion that requiring notice and comment would have been contrary to the public interest, given (1) the interim nature of the rule in question, (2) that the regulatory approach underlying the rule was supported by a broad and substantial record that had previously been subjected to judicial review, and (3) that delaying adoption until completion of notice and comment procedures would be contrary to the interest in having a clear and identifiable rule and in avoiding irremedial financial consequences and regulatory confusion.

Finally, in Coalition for Parity v. Sebelius, 709 F. Supp. 2d 10, 20-21

(D.D.C. 2010), the court found good cause under § 553(b)(B) where the agency explained, "[b]ased on the fact that there was an urgent need for regulatory guidance, we also believed that there was good cause to issue an interim final rule and that notice and public comment thereon would be impracticable, unnecessary and contrary to the public interest." Id. The Court may find here that the Secretary acted to the benefit of the public under these exigent circumstances.

In addition to the exigent circumstances already exhaustively discussed herein, the Secretary clearly stated in the proposed suspension and reinstatement that she needed to reinstate the prior regulations "to avoid the regulatory vacuum that would result from a suspension," forming the basis for good cause due to impracticability. See 74 Fed. Reg. 11,408 (emphasis added). She supported this regulatory guidance argument in the final rule, discussing at length the need to avoid confusion and disruption under the procedures of the 2008 Rule. 74 Fed. Reg. 25975-76. Courts have found that avoiding disruption of a regulatory scheme is one reason supporting a finding of good cause. See Coalition for Parity, 709 F. Supp. 2d at 20 ("Another factor to be considered is the regulated industry's need for guidance…").[26]

[26] Disruption of a regulatory scheme is not just disruptive to H-2A employers. The Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. § 1801, et seq. protects migrant and seasonal agricultural workers (referred to herein as "U.S. workers"). Among its protections, the AWPA requires farm labor contractors and agricultural employers to provide a detailed written disclosure of

### ii. The Reinstatement was for an interim period, weighing in favor of finding good cause.

The Secretary made clear that reinstatement would be a temporary solution until "the Department will either have engaged in further rulemaking or lift the suspension" and continue with the current rule. 74 Fed. Reg. at 25,972. The interim nature of the reinstatement of the 1987 Rule is another factor for this Court to weigh in favor of the agency's invocation of good cause under either the impracticable or public interest prongs. The Secretary justified her need to act quickly by explaining that the best course of action would be to reinstate, on an interim basis, the rules that were in place on January 16, 2009, by republishing those previous regulations. See 74 Fed. Reg. at 25,972. The Secretary proposed and intended to utilize this interim time period to study the effects of the 2008

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the terms and conditions of employment to farmworkers specifying, inter alia, the wage rates to be paid. 29 U.S.C. §§ 1821(a)(2) and 1831(a)(1)(B). The disclosure requirements are rooted in Congress's concern that farmworkers "are the most abused of all workers in the United States." H.R. Rep. 885, 97th Cong., 2d Sess. 1982, 1982 U.S.C.C.A.N. 4547, 4548, 1982 WL 25163, 2. The disclosure requirement reflects Congress's intent "to ensure that workers to the greatest possible extent have full information about where they are going and what the conditions will be when they arrive, before they begin the journey." Vega v. Nourse Farms, Inc., 62 F. Supp. 2d 334, 346 (D. Mass. 1999) (quoting H.R. Rep. No. 885, 97th Cong., 2d Sess., 14). The courts' and Congress's recognition that farmworkers are particularly needy of accurate disclosures of wages and working conditions should be considered in examining the Secretary of Labor's action. A U.S. worker's confusion about wage changes wrought by the 2008 regulations converted into guesswork the critical decision about whether to migrate to a job. This guesswork by a highly vulnerable workforce is exactly what the AWPA, which the Secretary is required to enforce, intended to prevent.

Rule. The Secretary specifically explained the temporary nature of her reinstatement of the prior rule as a means to assist in her ultimate goal of finalizing the rules in this case. This should weigh strongly in favor of finding that the Secretary properly invoked good cause.

The Secretary sought to provide a temporary fix while undertaking a longer effort to correct the problems that arose with the new 2008 Rule, similar to agency action in other cases where good cause was found. For example, Mid-Tex v. FERC involved a challenge to the Federal Energy Regulatory Commission's interim rule which allowed the utilities industry to include a portion of their construction work-in-progress costs in rate base while it used the time to formulate permanent regulations in this area. 822 F.2d 1123. In Mid-Tex, "the D.C. Circuit found that the agency had 'good cause' based on the interim nature of the challenged rule, the agency's ongoing procedures to devise a final rule, and the regulated industry's need for some regulation to be in place to avoid regulatory confusion." See id. at 1132-34. As in Mid-Tex, the Court should find that the Secretary had good cause in the temporary and interim way in which she issued the reinstatement.

Also, in Nat'l Women, Infants, & Children Grocers Ass'n v. Food & Nutrition Srv., 416 F. Supp. 2d 92, 104 (D.D.C. 2006), the U.S. Food and Nutrition Service (FNS) issued an interim rule necessary to "develop better assessment and

evaluation tools to ensure that the Reauthorization Act [was able to] achieve its goals of cutting program costs and ensuring containment of costs among [certain] vendors." In that case, the court evaluated four different reasons advanced by the agency, including the interim nature of the rule, to find in favor of the agency. The court there concluded that after "having examined the totality of circumstances in which the interim rule was promulgated, the Court finds that the FNS' invocation of the good cause exception is justified." Id. at 108. Here, given the various reasons upon which the Secretary determined to reinstate the regulations, plus the interim quality of the reinstatement, the Farmworkers request the Court to similarly conclude that the Secretary acted with good cause.

Finally, if the review of the 2008 Rule revealed the need for new rule making, the public would have had an opportunity to comment on the regulations they wanted. As the Secretary explained, "comments on the merits of the existing and previous program would be appropriate when the merits of the program are actually at issue in that rulemaking." 74 Fed. Reg. at 25,979.

Therefore, the Secretary should be found to have established good cause for the reinstatement in that (1) considering merits comments would have been impracticable and contrary to the public interest, as there was exigent need for action and an immediate need for prompt regulatory guidance, (2) the reinstatement was for an interim period of time.

## III. No Notice and Comment Was Necessary with Regard to the Christmas Trees Interpretive Rule.

The district court erred in at least two ways in its ruling on the Secretary's exclusion of Christmas trees from the definition of agriculture under the Fair Labor Standards Act ("FLSA"). See J.A. at 255-256.

First, the district court clearly erred in finding that the Secretary did not consider comments opposing her removal of Christmas tree growing from the definition of FLSA agriculture, because she expressly did consider such comments. Compare J.A. at 255 (holding that DOL had "failed to 'examine relevant data'" by failing to consider a comment supporting including Christmas tree growing as farming) with 74 Fed. Reg. at 25,982 (responding to "[c]omments from growers and representatives of [the Christmas tree] industry opposed [to] suspension of these FLSA revisions"). The Secretary responded to these comments from the Christmas tree industry by pointing to the Department's position, from the 1950's until the 2008 Rule, that Christmas trees were "forestry products" that were not included within the Fair Labor Standards Act's definition of "agriculture." 74 Fed. Reg. at 25,982. The Secretary further explained that the 2008 Rule's re-interpretation of FLSA agriculture to include Christmas tree growing made Christmas tree growers newly exempt from paying overtime wage rates and from complying with child labor laws. See id.; see also 29 U.S.C. § 213(a)(6)(A) (2006); id. § 213(b)(12); id. § 213(c). The Secretary explained her decision to

revert to the Department's "longstanding" interpretation of "agriculture" to exclude the Christmas tree industry due to concerns for the "Nation's most vulnerable workers, including low-wage workers and youth." 74 Fed. Reg. at 25,982. The Department further explained that the 2008 Rule had not invited, and thus had not received, comments on the impact this changed definition of agriculture would have on children working in the Christmas tree industry. Id. In light of this discussion in the final Suspension Rule, the district court committed clear factual error in finding that the Secretary had not considered comments from Christmas tree growers.

Second, the district court improperly applied § 553 procedural requirements to the Secretary's decision to change her interpretation of "agriculture." Section 553 expressly exempts "interpretive rules," such as DOL's interpretation of "agriculture," from its notice and comment requirements. See 5 U.S.C. § 553(b)(A) ("this subsection does not apply . . . to interpretative rules"); Long Island Care at Home v. Coke, 551 U.S. 158, 173, 127 S. Ct. 2339 (2007) (notice and comment is not required when an agency produces an interpretive rule).

Congress has tasked the Secretary with interpreting the FLSA, including the scope of FLSA agriculture. See, e.g., IntraComm, Inc. v. Bajaj, 492 F.3d 285, 291 (4th Cir. 2007) (noting the "broad authority" Congress granted to the Secretary of Labor in administering the Fair Labor Standards Act). The Secretary's

interpretation of "agriculture" as excluding Christmas tree growers was embodied in interpretive regulations at 29 C.F.R. Parts 780 and 788. As with other interpretive rules, the Department's interpretation of "agriculture" is not a legislative rule with the force of law, rather it "simply state[s] what the administrative agency thinks a statute means, and only remind[s] affected parties of existing duties." Chen Zou Chai v. Carroll, 48 F.3d 1331, 1340-41 (4th Cir. 1995).

For these reasons, the district court erroneously required the Secretary to follow § 553 procedures in issuing her interpretation of FLSA agriculture. See 5 U.S.C. § 553(b)(A); Vermont Yankee, 435 U.S. at 524 (1978) (courts cannot impose additional requirements on an agency not in the APA).

## CONCLUSION

For all the foregoing reasons, Farmworkers request this Court to reverse the Order at bar, vacate the summary judgment grant to the Agricultural Employers, enter summary judgment for the Farmworkers, and remand for proceedings on the Farmworkers' counterclaims and related issues.

## STATEMENT REGARDING ORAL ARGUMENT

Farmworkers' counsel believes oral argument would be helpful in this case due to the involved factual background, the somewhat sparse nature of APA case law on suspensions and reinstatements, and the large potential impact of this Court's ruling on thousands of farmworkers and their families.

## CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Rule 32. This brief contains 12,823 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Signed this 12th day of March, 2012.

*s/ Naomi Tsu*
Naomi Tsu
Southern Poverty Law Center

*On behalf of Counsel for Appellant Farmworkers*

## CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2012, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification to the following: William Randolph Loftis, Jr. and Robin E. Shea.

This is the 12th day of March, 2012.

*s/ Naomi Tsu*

Naomi Tsu
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*On behalf of Counsel for Appellant Farmworkers*