RECORD NO. 11-2235

In The
United States Court of Appeals
For The Fourth Circuit

UNITED FARM WORKERS, *et al.*,

***Defendants – Appellants*,**

v.

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

***Plaintiffs – Appellees*.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT GREENSBORO**

BRIEF OF APPELLEES

William R. Loftis, Jr. (N.C. Bar #2774)
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Growers' Association, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member.

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on 11/22/11 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ W.R. Loftis, Jr. 11/22/11
(signature) (date)

11/17/2011
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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Christmas Tree Association
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member.

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Florida Fruit & Vegetable Association
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Virginia Agricultural Growers Association, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Snake River Farmers Association
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Council of Agricultural Employers
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Christmas Tree Association
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Pickle Producers Association
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

Mt. Olive Pickle Company

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Florida Citrus Mutual
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

North Carolina Agribusiness Council, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Maine Forest Products Council
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Alta Citrus, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Everglades Harvesting & Hauling, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Desoto Fruit and Harvesting, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

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I certify that on 11/22/11 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ W.R. Loftis, Jr. 11/22/11
(signature) (date)

11/17/2011
SCC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Forest Resources Association
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☑ YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

No such member

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Titan Peach Farms, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

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(signature) (date)

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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

H-2A USA, Incorporated
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 11-2235 Caption: North Carolina Growers' Association, Inc. et al. Hilda L. Solis et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Overlook Harvesting Company, LLC
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

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JURISDICTIONAL STATEMENT

The Plaintiff-Appellees agree with the Jurisdictional Statement set forth in the Appellant-Defendant Intervenors' Opening Brief at 1.[1]

STATEMENT OF THE ISSUES FOR REVIEW

1. Did the District Court correctly find that, although misnamed a "suspension," the 2009 Rule was in actuality a nullification or revocation of the validly promulgated Chao Rule and its replacement with an entirely different regulatory regime, and thus that the 2009 NPRM and 2009 Rule had to be issued in compliance with the Administrative Procedure Act?

2. Did the District Court correctly find that the 2009 Final Rule was not issued in compliance with the notice and comment provisions of the Administrative Procedure Act and was arbitrary and capricious, in that

    a. The 2009 Rule was issued after a 10-day comment period that occurred during the height of NCGA' planting season and after many in the regulated community had made irrevocable contractual and financial commitments for the 2009 season?

    b. The 2009 NPRM contained a "content restriction" that deterred meaningful input from the affected members of the regulated community and allowed the DOL to make after-the-fact capricious rejections of comments it received, and also made it impossible for a court to determine which comments had been considered by the DOL and which had not?

[1] Except where party designations are necessary to prevent confusion, the Appellee-Plaintiffs will be referred to in this Brief as "NCGA"; and the Appellant-Defendant Intervenors will be referred to as "the UFW."

c. The discussion in the Preamble to the 2009 Rule of the reasons supporting the DOL regulatory changes, including the "sequence of operational events," "lack of resources," "disruption and confusion," and "processing delays," indicated that the DOL failed to provide a reasoned analysis, relied on data not subject to public comment and, in addition, gave no serious consideration to any comments offering counter evidence and opposing the 2009 Notice of Proposed Rulemaking?

3. Did the District Court correctly find that the "Christmas Tree Rule" in the 2009 Rule is not reasonable and not entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944), or *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778 (1984), for the reasons set forth in this Court's decision of *U.S. Dep't of Labor v. N.C. Growers' Ass'n, Inc.*, 377 F.3d 345 (4th Cir. 2004)?

STATEMENT OF THE CASE

On June 9, 2009, NCGA filed a Complaint (J.A. 95) in the U.S. District Court for the Middle District of North Carolina and simultaneously filed a Motion for Preliminary Injunction, seeking to temporarily and permanently enjoin the Government from putting into effect *Temporary Employment of H-2A Aliens in the United States*, 74 Fed. Reg. 25972 (May 29, 2009) ("the 2009 Rule"), on the ground that it violated the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* ("APA"). The original defendants were Secretary of Labor Hilda L. Solis, the U.S. Department of Labor ("DOL"), Secretary of Homeland Security Janet Napolitano, and the U.S. Department of Homeland Security ("the Government Defendants").

By Order dated December 3, 2009, the District Court allowed the UFW to intervene. (J.A. 164)

After a hearing on June 22, 2009, this Court preliminarily enjoined the Government Defendants from giving effect to the 2009 Rule, leaving its predecessor rule in effect. *Temporary Agricultural Employment of H-2A Aliens in the United States: Modernizing the Certification Process and Enforcement Final Rule*, 73 Fed. Reg. 77110 (December 18, 2008) ("the Chao Rule"). Absent the preliminary injunction, the 2009 Rule would have taken effect June 29, 2009, for all applications for H-2A workers that were filed on or after that date.

On September 4, 2009, after the District Court had enjoined the 2009 Rule, the DOL issued a Notice of Proposed Rulemaking that would supplant the enjoined 2009 Rule. *See Temporary Agricultural Employment of H-2A Aliens in the United States; Proposed Rule*, 74 Fed. Reg. 45906 (September 4, 2009) ("the 2010 NPRM"). On February 12, 2010, the DOL issued a Final Rule regarding the H-2A program, which became effective March 15, 2010, for all H-2A applications filed on or after that date. *See Temporary Agricultural Employment of H-2A Aliens in the United States; Final Rule*, 75 Fed. Reg. 6884 ("the 2010 Rule"). NCGA does not challenge the 2010 Rule. Thus, the time period relevant to the instant appeal is June 29, 2009 (the date that the 2009 Rule would have taken effect) through March 14, 2010 (the last day before the 2010 Rule took effect).

Although the 2009 Rule never took effect, this case is not moot. During the relevant time period many employers paid their H-2A workers the adverse effect wage rate ("AEWR") that applied under the Chao Rule. It is undisputed that, in many instances, this resulted in H-2A workers' receiving a lower wage than they would have received if the 2009 Rule had applied. Accordingly, the UFW filed a Third Amended Answer, Affirmative Defenses and Counterclaims against NCGA, seeking to recover the differential between the AEWR as calculated under the Chao Rule and the AEWR as calculated under the 2009 Rule for the period of June 29, 2009-March 14, 2010 ("the Wage Differential"). (J.A. 168)

On August 31, 2010, NCGA filed a Motion for Summary Judgment (J.A. 230) with respect to its claims and the UFW's counterclaims. On December 14, 2010, the UFW filed a cross-Motion for Partial Summary Judgment. (J.A. 233) By Order dated October 4, 2011, the Honorable William L. Osteen, Jr., granted NCGA's Motion for Summary Judgment and denied the UFW's Motion for Partial Summary Judgment. (J.A. 236) The Government Defendants were subsequently dismissed on grounds of mootness. (J.A. 270) The UFW filed a timely Notice of Appeal. (J.A. 266)

STATEMENT OF FACTS

NCGA instituted this action for declaratory and injunctive relief related to *Temporary Employment of H-2A Aliens in the United States*, 74 Fed. Reg. 25972

(May 29, 2009) ("the 2009 Rule"); and *Temporary Employment of H-2A Aliens in the United States; Proposed Rule*, 74 Fed. Reg. 11408 (March 17, 2009) ("the 2009 NPRM"). The 2009 Rule entirely rewrote a valid H-2A rule promulgated by the DOL under former Secretary Elaine L. Chao, *Temporary Agricultural Employment of H-2A Aliens in the United States: Modernizing the Certification Process and Enforcement Final Rule*, 73 Fed. Reg. 77110 (December 18, 2008) ("the Chao Rule"). The Chao Rule, which took effect January 17, 2009, in turn replaced an H-2A rule, the major provisions of which were promulgated by the DOL in 1987 ("the 1987 Rule"). NCGA contends that the 2009 Rule was promulgated in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*. ("APA").

The Appellee-Plaintiffs consist of (1) farmers, including Christmas tree farmers; (2) growers' associations whose membership consists of farmers; (3) farmer advocacy groups; and (4) forest products industry associations, whose membership consists of logging employers as well as employers who purchase and use lumber and wood pulp. The Appellant-Defendant Intervenors are the United Farm Workers union, the Farm Labor Organizing Committee union, and a number of non-immigrant agricultural guestworkers under the so-called "H-2A" program. As stated above, unless party designations are necessary to prevent confusion, the

Appellee-Plaintiffs will be referred to as "NCGA," and the Appellant-Defendant Intervenors will be referred to as "the UFW."

Overview of the H-2A program. The H-2A program replaced the prior H-2 program, and provides a legal means by which agricultural employers can obtain the temporary services of foreign agricultural workers when U.S. workers are unavailable. The H-2A program was instituted in 1987 after the enactment of the Immigration Reform and Control Act ("IRCA") amendments to the Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.* ("INA"). The name "H-2A" comes from the statutory provision that creates the program, 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

Under the H-2A program, employers must apply to the U.S. Department of Labor ("DOL") (as well as the U.S. Department of Homeland Security and the State Department) and be approved to hire H-2A workers. The employers must meet a number of stringent regulatory requirements regarding the wages paid, reimbursing or furnishing of certain transportation expenses, furnishing of housing, and the like. All of these terms are set forth in a contract (Agricultural and Food Processing Clearance Order, or "Clearance Order") that must be approved by the DOL and is provided to the H-2A worker. The H-2A program was not designed to replace U.S. farm workers with H-2A workers: as a prelude to hiring an H-2A worker, farmers must make concrete efforts to find qualified U.S. workers and,

among other requirements, offer a specified wage that is designed to ensure that U.S. workers' wages are not adversely affected by the use of H-2A workers (typically by paying the "Adverse Effect Wage Rate" ("AEWR")). Before an employer can proceed to hire H-2A workers, the DOL must first certify that there are insufficient U.S. workers available and that the employer's use of H-2A workers will not adversely affect the wages and working conditions of similarly situated U.S. workers. *See* 8 U.S.C. §§ 1188(a)(1)(A), (B). The H-2A program also guarantees to workers employment contracts, certain benefits including free housing, and other rights. For the NCGA, the H-2A program creates access to legally authorized employees for their farms and provides some stability and security to the employment relationship.

The H-2A program under the 1987 Rule had been plagued by severe processing and administration problems, and was criticized by both workers and farmers. One criticism of the 1987 Rule from the standpoint of farmers was is that some of the requirements and processes were so cumbersome and prone to severe delay that they actually had the perverse effect of discouraging farmers from participating in the H-2A program. *See*, *e.g.*, Notice of Proposed Rulemaking, *Temporary Agricultural Employment of H-2A Aliens in the United States; Modernizing the Labor Certification Process and Enforcement; Proposed Rule*, 73 Fed. Reg. 8538, 8541-42 (Feb. 13, 2008) ("Chao NPRM"); Chao Rule, 73 Fed.

Reg. 77111 (Dec. 18, 2008). One of the Appellee-Plaintiffs, the North Carolina Growers' Association, had been requesting changes to the 1987 Rule since 1991.

The "Chao Rule." In August 2007, the Administration of then-President George W. Bush announced that the DOL would review the H-2A program and consider proposing changes to the program regulations. Even before the DOL formally proposed changes through the Chao NPRM, farmers, agricultural associations and farmworker advocates provided the DOL with suggestions for reforms to the H-2A regulations.

Then, on February 13, 2008, then-Secretary of Labor Elaine L. Chao issued the Chao NPRM, which specified a "re-engineering" of the existing H-2A regulations. 73 Fed. Reg. 8538. Among other changes, former Secretary Chao proposed a modernized process by which farmers could apply for H-2A workers, a reduction in duplication of efforts among the DOL and State Workforce Agencies ("SWAs"), a more accurate and precise method of setting Adverse Effect Wage Rates ("AEWRs"), increased protections for workers, and clarification regarding reimbursement of workers' inbound transportation and related expenses. The comment period was open for 60 days, and the DOL received approximately 11,000 comments from farmers, state labor agencies, academics, farmworker unions and advocacy organizations. On December 18, 2008, and after

approximately six more months of deliberation, the DOL promulgated the Chao Rule[2].

From the standpoint of farmers who employ H-2A workers, the Chao Rule contained a number of welcome improvements over the 1987 Rule. The H-2A application process was streamlined, removing the burdens of duplicative filing requirements and a tedious, time-consuming approval (or denial) process. The Chao Rule also clarified issues related to reimbursement of travel expenses, calculation of the applicable wage rate, handling of workers' compensation benefits when the H-2A requirement appeared to conflict with applicable state law, ensured additional due process rights for applicants, improved worker protections, and many other issues, providing much-needed legal certainty to both farmers and workers. Finally, the Chao Rule also provided that logging guestworkers, previously included in the "H-2B non-agricultural" program, would henceforth be included in the H-2A program.

A. Christmas tree farmers. The Chao Rule provided that Christmas tree farmers were "agricultural" rather than "forestry" employers and therefore exempt

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[2] The DOL concedes that the Chao Rule was validly promulgated. *See United Farm Workers v. Solis*, Case No. 1:09-cv-00062 (D. D.C. 2009). *Compare* AMENDED COMPLAINT [Doc. 20], pp. 65-69, ¶¶299-307 (alleging that Chao Rule violated APA) with FEDERAL DEFENDANTS' ANSWER [Doc. 39], pp. 34-35 at ¶¶299-307 2009) (denying that Chao Rule violated APA). The Federal Defendants' Answer was filed on April 3, 2009, after Secretary Solis had taken office and after she had issued the 2009 NPRM. (The court in the *United Farm Workers* case ultimately granted summary judgment to all defendants. [Doc. 77])

from the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.* ("FLSA"), § 203(f). (Forestry workers are generally non-exempt.) The Chao Rule was consistent with the only known court decision on the issue: *U.S. Dep't of Labor v. N.C. Growers Ass'n*, 377 F.3d 345 (4th Cir. 2004) ("*NCGA*" or "the *NCGA* case"), which found that prior DOL opinions to the contrary conflicted with the clear language of the FLSA and therefore failed to meet the requirements for deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944).

B. The forest products industry. The Chao Rule provided that logging guestworkers would be subject to the H-2A program. The forest products industry (which includes logging as well as "downstream" industries that use lumber and wood pulp products) is highly dependent on seasonal non-immigrant, primarily Canadian, guestworkers to harvest and transport forest products to consuming mills. (J.A. 315, 327) Before the Chao Rule took effect, logging guestworkers were admitted under the H-2B program. (J.A. 331-32) The number of H-2B visas available for foreign workers to be admitted to work in the United States each year is subject to a federally mandated "cap." (J.A. 327) In years past, Congress has exempted returning H-2B workers from the caps; however, that exemption provision expired, and during the summer 2008 harvest season, more than 600 Canadian loggers were denied re-entry into the United States because Congress had failed to extend the exemption and there was an insufficient number of visas to

meet demand. (J.A. 327, 639) As a result, the forest products industry suffered a severe labor shortage and lost revenues, and the resulting artificial shortage of raw material created a supply crisis and drove costs to unsustainable levels for manufacturing facilities that used lumber. (J.A. 639)

By March 17, 2009, the date that the 2009 NPRM was published, the 2009 H-2B visa "cap" had been exhausted for two months. *Id.* However, because the Chao Rule provided that logging workers would be classified as H-2A workers, this was not an issue, and in 2009 – for the first time in years – the logging industry had enough workers to meet its needs. *Id.*

C. Farmers. The Chao Rule was issued about the same time that farmers began their financial and business planning for 2009. (J.A. 344) Many of the Appellee-Plaintiffs and other farmers procured loans (often using their homes, farmland, and equipment as collateral) and made other business commitments for the 2009 season based in substantial part on the substantive provisions of the Chao Rule, including its lower compliance costs, of which labor costs made up a significant portion. In many cases, crops had already been planted, and other irreversible commitments had been made. (J.A. 345) (corn detasseling operation in Iowa had already made commitments for 2009 season based on Chao Rule); (J.A. 347) (North Carolina tobacco farmer had already entered contracts for prices based on budgets set in accordance with Chao Rule); (J.A. 349) (Kentucky farmer

obtained loan for 2009 season based on labor costs that would have applied under Chao Rule); (J.A. 352) (same).

The 2009 NPRM. In December 2008, while still a California Congresswoman, Hilda L. Solis publicly expressed hostility toward the then-recently promulgated Chao Rule in a posting on her website. Then-Rep. Solis said,

> . . . This recent action by the Bush Administration is just the latest example of how out of touch the president is with working families, expecially with Latino families that make up a large portion of the farmworkers in this country. There is no question that the guestworker program needs significant overhaul but slashing wages [sic] and reducing basic rights for the most vulnerable workers in our country, especially hardworking Latino farmworkers, is not the answer.

(J.A. 676)

On or about March 13, 2009, Ms. Solis was sworn in as Secretary of Labor under President Obama. Within hours, she had issued a press release indicating her intent to suspend the Chao Rule. (J.A. 678) Four days later, on March 17, 2009, Secretary Solis issued the 2009 NPRM, misleadingly referred to as a "notice of suspension."[3] According to the 2009 NPRM, the Chao Rule would remain

[3] It is highly unlikely that the Secretary could draft, revise, and publish a Notice of Proposed Rulemaking in four days, and thus reasonable to infer that the 2009 NPRM was drafted before she even took office. Indeed, the Preamble to the 2009 NPRM removes virtually all doubt in this regard: The Secretary refers to a then-pending UFW lawsuit challenging the Chao Rule and says, "The [DOL]'s answer is due in the district court on March 13, 2009." Although this is worded as if the answer deadline is in the future, March 13 was the date that Secretary Solis took office, and the date of the NPRM was March 17, *four days after* the March 13 deadline. 74 Fed. Reg. 11408-09.

effective for all applications filed on or before the effective date of the proposed "suspension," but the 1987 Rule would apply to all applications filed afterward. (NCGA will refer to this as the "Grandfather Clause.") Among the significant proposed changes to the Chao Rule were the following:

A. Christmas tree farmers. Under the 2009 Rule, Christmas tree farmers would be "agricultural" for H-2A purposes (meaning that the farmers had to comply with the stringent H-2A regulatory requirements) but "non-agricultural" for FLSA overtime purposes. 74 Fed. Reg. 11439-40. The 2009 NPRM provided no rationale for changing the Christmas tree rule, depriving the public of notice and an opportunity for comment. (J.A. 180, 311)

B. The forest products industry. The 2009 NPRM proposed that logging guestworkers would come under the H-2B program rather than the H-2A program. *See* 74 Fed. Reg. 25980-81, 26002, *et seq.* (May 29, 2009). Had the 2009 Rule not been enjoined and then replaced[4], the forest products industry would have suffered devastating labor shortages in 2009 and beyond. (J.A. 334-35, 339, 342)

C. Farmers. They primary impact of the 2009 NPRM was that it would reinstate wage rates calculated using the methodology that applied under the 1987 Rule, which were generally higher than the wages calculated under the Chao Rule.

[4] Under the 2010 Rule, logging workers retain their H-2A status. *See*, *e.g.*, 75 Fed. Reg. 6890.

This threatened severe economic hardship to the affected farmers, who had already planned for 2009 in reliance on the Chao Rule.

In actuality, the DOL's "notice of suspension" was a Notice of Proposed Rulemaking, subject to the requirements of the Administrative Procedure Act. The 2009 NPRM did much more than just "suspend" a particular regulatory provision; it proposed to nullify the entire H-2A regulatory structure that was currently in place (the Chao Rule) and *supplant* it with a void and inconsistent set of regulatory standards (the 1987 Rule).

The 2009 NPRM provided several supposed rationales for the proposed "suspension" but only one that rang true: the statement that the new administration did not agree with the approach taken by its predecessor. 74 Fed. Reg. 11409. The other reasons cited appear to have been "sham" reasons given to obscure the fact that the new administration wanted to quickly revert to the 1987 Rule.

The Secretary said, "As we move forward with implementing the [Chao Rule], . . . it is rapidly becoming evident that the [DOL] and the [State Workforce Agencies, or "SWAs"] may lack sufficient resources to effectively and efficiently implement the [Chao Rule]." 74 Fed. Reg. 11409. This was allegedly causing unspecified "processing delays." *Id.* "The [DOL] has been unable to implement the sequence of operational events required to avoid confusion and application processing delays." *Id.* The only specific "resource" issue or "operational event"

cited was the DOL's failure to develop an automated application review system and to train users, SWAs, and federal staff in its use. *Id.* However, the DOL apparently *never* had an automated system for reviewing applications for H-2A workers, and, as discussed below, an automated system was far less of a problem under the Chao Rule, which provided for attestation with "spot" reviews, than under the 1987 Rule, which provided for thorough reviews of every application.

The other problems cited by the DOL seem reasonable at first glance but do not withstand scrutiny. The DOL said that it had "increasing evidence" that introducing a new, complex regulatory system "is proving unnecessarily disruptive and confusing to the [DOL]'s administration of the H-2A program, SWAs, agricultural employers, and domestic and foreign workers." *Id.* "It is particularly important to avoid such disruption, if possible, in light of the severe economic conditions the country is now facing." *Id.* This rationale falls apart in view of the fact that the DOL allowed the Chao Rule to remain in place for applications filed before June 29, 2009. By leaving the Chao Rule in place until the mid-summer, the DOL's attempted rescission did nothing to reduce "disruption" or "confusion." The DOL, SWAs, employers, and workers would all have to learn and become familiar with the new "complex regulatory system" anyway. Indeed, in light of the DOL's action, the DOL, SWAs, employers, and workers would have to deal with two different systems in a single season, making their work doubly complex,

"unnecessarily disruptive[,] and confusing." The DOL provided no evidence, explanation or supporting facts for its conclusory statements, which prevented interested parties from providing meaningful comments that might call into question the factual basis for the DOL's conclusions. (J.A. 442) (pointing out complete lack of substantiation for DOL's rationale); (J.A. 445) (calling DOL's rationale "HOG WASH" [sic], with exception of DOL's statement that new administration disagreed with policy of its predecessor).

The 2009 NPRM provided the public with only 10 days to comment on the proposed change because of "time constraints" and unspecified "concerns inherent" in the administration of the H-2A program. *Id.* The DOL went on to say, "Growers require clear and consistent guidance on the rules governing the processing of their applications so that they can plan and staff their operations appropriately for the impending growing season." *Id.* This rationale makes no sense whatsoever, given that the DOL was proposing to leave the Chao Rule in place for the first half of the 2009 farming season and reinstate the 1987 Rule for the latter half. It is difficult to imagine anything that would be less "clear and consistent" for growers than such an approach. Moreover, the 2009 NPRM was issued after most farmers had already "plan[ned] and staff[ed] their operations appropriately for the impending growing season" based on their understanding that the Chao Rule would apply for 2009. The DOL seems to have been willfully blind

about this obvious fact: "A longer comment period would stretch the uncertainty over the applicable rules further into the upcoming growing season." *Id.* "Confusion or delay in the administration of the program will result in the disruption of agricultural production, sales and market conditions in areas traditionally served by H-2A workers, which could have further deleterious effects on an already unstable economic environment." *Id.* In fact, a longer comment period with resulting delay would have been significantly less disruptive for farmers because it would have allowed the farmers to continue to operate under the already-in-place Chao Rule for 2009 while leaving the DOL free to *legally* restore the equivalent of the 1987 Rule for the 2010 season.

The 10-day comment period in the 2009 NPRM effectively prevented farmers from commenting because the suspension was issued in the thick of many farmers' seeding and planting time. (J.A. 354) (J.A. 362) ("Early Spring is not the time to have only a 10 day comment period . . . with only 10 days to make comments, there will be several logical comments that will never be heard"); (J.A. 344, 364). (J.A. 369) ("suspension" in late season can only promote hiring of undocumented workers). (J.A. 338) (10-day comment period unacceptable to loggers); (J.A. 372) (10-day period seems intended to "silence the voice of stakeholders, especially NCGA"). The unreasonably short comment period also prevented employers' associations from thoroughly reviewing the NPRM and

being able to make reasoned recommendations to their membership. (J.A. 375) ("Ten days is not sufficient to educate our members about the proposal, ask them evaluate it on [sic] their farms, or make well reasoned suggestions . . ."); (J.A. 379) (10-day period "does not provide AFBF with sufficient time to reach out to its membership, educate members about the proposal, ask them to analyze how it would affect them in their operations, ask them to evaluate the difference between utilizing the new rule and the old set of standards, calculate the financial impact to them on this suspension and ask them to set down these figures and analyses in a manner that is useful to AFBF and in a format we can then use in summarizing and articulating those assessments to the [DOL]"). *See also* (J.A. 388) ("Obviously, [Solis] wants to ramrod these unreasonable requirements on us without giving NCGA or the public at large any opportunity to consider the details of her plans"). *Cf.* (J.A. 393) (although generally supporting efforts of Obama Administration to overturn Chao Rule, noting that 10-day comment period "is creating justifiable consternation" among Washington farmers).

Even more troubling than the short comment period was the "content restriction" imposed by the DOL. The 2009 NPRM explicitly stated that the DOL would not consider any comments regarding the substance or merits of the Chao Rule or the 1987 Rule. *See* 74 Fed. Reg. at 11408. This prevented the DOL from receiving information directly relevant to the decision regarding which regulatory

provisions should govern the H-2A program and had a chilling effect on interested parties who otherwise would have submitted comments. *See*, *e.g.*, (J.A. 395); (J.A. 402) ("We strongly object to the [DOL]'s attempt to adopt new regulations without taking public comment on the very regulations proposed to be adopted"); (J.A. 424) ("Unfortunately, DOL is not seeking comments on the Proposed Regulation or the many issues that made it unworkable. . . . By refusing to take comments on the Proposed regulation, the Department is in violation of the Administrative Procedures [sic] Act"). The content restriction also allowed the DOL to arbitrarily determine which comments it would "consider" and made judicial review of its determinations nearly impossible. (J.A. 251)

The Preamble to the 2009 Rule issued on May 29, 2009 (to take effect June 29, 2009), confirms that the DOL reviewed but did not consider comments that discussed the merits of individual provisions of the Chao Rule or of the 2009 NPRM/1987 Rule. *See* 74 Fed. Reg. 25973. How the DOL managed to make these distinctions among comments, given that views about the merits of individual provisions are inextricably intertwined with views about what provisions should be changed, is not explained. Upon information and belief, the DOL used this artificial and arbitrary restriction to achieve the result it wanted: to nullify the Chao Rule without having to consider or address substantive and relevant information. Indeed, although 11,000 interested parties submitted comments in response to the

Chao NPRM, only 800 were able to comment on the 2009 NPRM, and most of those 800 comments – not surprisingly – were form letters.

The DOL in the 2009 Rule essentially restated the same sham rationales provided in the 2009 NPRM. Several examples are particularly noteworthy:

A. "Insufficient technological resources." The 1987 Rule and the 2009 Rule required the DOL to review every application for H-2A workers and to ensure that every application met all of the requirements of the program. The Chao Rule replaced this system with an "attestation" system, by which the applicant could certify, under penalty of perjury, that he had complied with the H-2A requirements. Compliance under the attestation system would be monitored through random and focused audits of selected applicants. Putting aside the merits of these two systems, it is obvious that the attestation system requires fewer, not more, information technology resources. (J.A. 448, 380) Yet the DOL illogically contended that attestation required more because technology was needed to select applicants for audit. 74 Fed. Reg. 25974.

B. "Lack of Training." The DOL acknowledged and did not dispute comments pointing out, contrary to the assertion in the 2009 NPRM, that the DOL had in fact conducted training sessions for SWA staff and employers on the Chao Rule before the rule took effect. *Id.* "Another commenter indicated that extensive training was conducted and materials were provided at no charge to stakeholders

and had been available in PDF on the DOL's website." *Id.* Indeed, the DOL admitted that it "made attempts to educate both stakeholders and SWAs as well as its own staff, holding not only briefing sessions for the public (in which some SWA staff participated) but also for SWAs, limiting the latter to the transition procedures." 74 Fed. Reg. 25974-75. However, the DOL conclusorily stated, in essence, that this was not enough to ensure that these groups would be able to "understand, implement, and adapt to the changes." 74 Fed. Reg. 25975. The DOL did not explain how leaving the Chao Rule in place and then abruptly switching rules mid-season would alleviate this alleged problem.

C. "Processing Delays." The DOL used "median," rather than average, delays in determining that there were greater delays in February and March 2009 under the Chao Rule. 74 Fed. Reg. 25975. As the Court is no doubt aware, a "median" is simply the middle number in a sequence of numbers (or, in the event that the sequence is even, the average of the two middle numbers). It is telling that the DOL did not use averages, which would have provided a more accurate assessment of the alleged "processing delay" problem.

D. "Disruption and Confusion." Some commenters, according to the DOL, agreed with the DOL that the Chao Rule had caused disruption and confusion. *Id.* Others disagreed. (It should be noted that, of the approximately 800 comments received by the DOL in response to the 2009 NPRM, more than 600

were opposed to the proposed rule.) However, the DOL made no effort to explain how changing the rule midstream would be *less* disruptive or confusing than waiting until the end of the season to change it. 74 Fed. Reg. 25975-77.

E. "Impetus for the Timing of the Suspension [sic]." The DOL admitted that "most commenters" criticized the timing of the rule change. 74 Fed. Reg. 25978. The DOL dealt with these criticisms by noting that the "Grandfather Clause" meant that the new rule would not be effective for applications filed before the effective date of the 2009 Rule (June 29, 2009). What the DOL did not address was the fact that this also undercut all of its other rationales: the 10-day comment period with content restriction, "insufficient technological resources," "inability to implement the sequence of operational events," lack of training, processing delays, and "disruption and confusion."

Although the DOL did acknowledge and to a degree address comments from farmers who had said that they had planned for the 2009 season in reliance on the Chao Rule, 74 Fed. Reg. 25980, the DOL summarily responded that it did not think the disruption would be as dramatic as predicted because agriculture did not "grind to a halt" during the 20 years that the 1987 Rule was in effect. *Id.* This statement – that the proposed rule was not so bad because it might not drive an industry out of existence – was incredibly insensitive to an entire class of employers, many of whom are small businesses, and particularly in a bad economy

when jobs were (and still are) at a premium. That point aside, the DOL failed or refused to acknowledge that, during the 20 years that the 1987 Rule was in effect, farmers had prior notice of it and conducted their business planning based on the provisions of the 1987 Rule. The year 2009 was unique because the farmers had conducted their planning in reliance on the Chao Rule, only to have the DOL propose jerking the rug out from under them in mid-season when it was too late for them to adjust their plans.

In many instances the DOL failed to engage, much less rebut, comments criticizing the proposed 2009 Rule or its rationales. For example, commenters pointed out that applications were being processed faster under the Chao Rule (J.A. 437), and that the lack of "resources" the DOL alleged would be more of a problem under the 2009 Rule than under the Chao Rule because of the streamlined application process and lack of duplicative government effort in the latter. (J.A. 382, 452) The DOL failed to address those comments. Commenters also pointed out that, contrary to the DOL's statements in the 2009 NPRM about insufficient resources, the DOL actually received approximately 50 percent more funding than the year before. (J.A. 655, 463) (noting no evidence that DOL lacks sufficient funding and that Chao Rule provides for cost recovery from H-2A employers in any event); (Supp. Appx. 1; DOL 000702) ("perhaps the money being lavishly expended in order to re-invent the wheel could be much better spent"). The DOL's

response was a conclusory assertion that the funding was "irrelevant." *See* 74 Fed. Reg. 25973.

The "Grandfather Clause" would not have helped those farmers who applied for workers later in the year, or who applied for workers in "waves" throughout the season; nor would it have helped the loggers in October 2009 when they would have had to apply for their 2010 work force under the inadequate H-2B program. Indeed, for some farmers, their 2009 work forces would have been governed by two very different, and even inconsistent, sets of rules that among other things could have led to significant labor strife resulting from workers performing the same work side by side, yet subject to differing standards and rates of pay. (J.A. 349, 469) The 2009 Rule also would have subjected the NCGA themselves to inconsistent requirements, standards, obligations, and penalties. (J.A. 469) The DOL failed to adequately address this result of its regulatory changes. Moreover, the Grandfather Clause would have done nothing to alleviate harm that would have been suffered by farmers who made irreversible business commitments before March 17, 2009, in reliance on the Chao Rule. (J.A. 471) (changes proposed in 2009 NPRM would add approximately $750,000 to operating expenses, and work undergone for 2009 season was almost complete and was irreversible); (J.A. 472) (H-2A labor costs for North Carolina melon farmer in 2009 would increase by $250,000 if wage rates in 2009 Rule went into effect); (J.A. 474) (higher wage

rates and transportation costs under 2009 Rule would cost North Carolina farmer additional $136,000); (J.A. 479) (estimating increased costs in 2009 for farmer in Nash County, North Carolina, at $153,000 and for farmer in Sampson County, North Carolina, at $250,000, not including increased transportation costs); (J.A. 482) (Tennessee farmer estimating his labor costs would increase $20,000 for 2009). *See also generally*, *e.g.*, (J.A. 485, 488, 491) (planning for 2009 season was completed in December 2008).

For all of these reasons, NCGA submits that the District Court properly granted summary judgment on the merits of its APA claims and properly denied the UFW's cross-motion for summary judgment. NCGA respectfully requests that the District Court's decision be affirmed.

SUMMARY OF THE ARGUMENT

Certainly a new administration has the right to change course, but when changing a rule that was validly promulgated by its predecessor, it must comply with the Administrative Procedure Act. Otherwise, the regulated community would be whipsawed every time there was a change in presidential administrations. In this case, although the DOL termed the 2009 Rule a "suspension," the DOL actually revoked the validly promulgated Chao Rule and then replaced it with the void 1987 Rule. This constituted new rulemaking and had to be carried out in compliance with the notice and comment provisions of the APA.

The APA's "good cause" exception does not apply here because the DOL never invoked it, either in the 2009 NPRM, the 2009 Rule, or in the District Court litigation when it was still a party. The UFW cannot invoke the exception if the government itself did not invoke it. In any event, there were no circumstances that would justify use of the exception.

The DOL failed to comply with the APA in three key respects. First, it provided an unreasonably short 10-day comment period that fell in the midst of the planting season for many of the affected farmers. Second, the DOL imposed an arbitrary "content restriction" on the subject matter of the comments submitted, saying that it would consider comments that addressed the "suspension" but not comments that addressed the relative merits of the "suspended" Chao Rule or the void-but-soon-to-be reinstated 1987 Rule. This comment restriction (1) deterred the regulated community from submitting comments at all, either because they understandably believed that they were being presented with a *fait accompli* or because they could not determine how to comment on the wisdom of the "suspension" without addressing the relative merits of the two competing rules; (2) made it possible for the DOL to arbitrarily decide which comments it would "consider" because they almost all contained a mix of "suspension" and "merits" content; and (3) prevented or severely hampered judicial review by making it nearly impossible for a court to determine which comments had been considered

by the DOL and which had not. Finally, the DOL failed to provide a reasoned analysis for the 2009 Rule. Thus, the 2009 Rule was issued in violation of the notice and comment provisions of the APA.

In addition, the DOL's Christmas Tree Rule – providing that Christmas trees are "agriculture" for H-2A purposes but are "forestry" for FLSA overtime purposes – is arbitrary and capricious, and is not entitled to deference under *Chevron* or *Skidmore*, for the reasons set forth in this Court's *NCGA* decision.

For all of the foregoing reasons, the Appellee-Plaintiffs submit that the District Court correctly granted their Motion for Summary Judgment and denied the Motion for Partial Summary Judgment of the Appellant-Defendant Intervenors, and respectfully request that the District Court decision be affirmed.

ARGUMENT

I. Standard of review.

NCGA agrees with the UFW's discussion of the appropriate standard of review. *See* Appellant-Defendant Intervenors' Brief at 15-16.

II. The revocation of the Chao Rule and its replacement with the 1987 Rule had to be carried out in compliance with the APA.

In her haste to dispense with a rule that she opposed, Secretary Solis attempted some regulatory sleight of hand, but she fumbled. First, she announced that she was temporarily "suspending" the Chao Rule. Clearly, though, she could not carry out a *genuine* suspension because farmers and workers could not proceed

with nothing in place to govern the working conditions of H-2A workers. Therefore, Secretary Solis simply declared that the now-void 1987 Rule would apply to "fill the regulatory void" that she created until the "suspension" period was over. In short, she did not "suspend" anything – she *replaced* the Chao Rule with the 1987 Rule.

A. The Chao Rule was not "suspended" but revoked.

NCGA does not dispute that a regulatory agency has the authority to "suspend" a rule in appropriate circumstances. *See*, *e.g.*, *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2859 (1983)[5]. What an agency does not have the right to do, however, is to carry out an ersatz "suspension" that replaces a validly promulgated rule with a predecessor version that the new administration prefers.

Because the 2009 Rule was in actuality a complete nullification or revocation (slightly mitigated by the Grandfather Clause) of the validly promulgated Chao Rule and its replacement with an entirely different regulatory regime, the 2009 Rule had to be issued in compliance with all of the pertinent

[5] The Supreme Court in *Motor Vehicle Mfrs. Ass'n* said that suspension of an existing rule pending further study would be permissible. *See* 463 U.S. at 50 n.15, 103 S. Ct. at 2870 n.15. However, the Court was referring to suspension of a rule that had not yet taken effect – in other words, in that case a suspension would have created nothing more than a delay. In this case, the Chao Rule had already been in effect for two months and farmers had already acted in reliance on it. Moreover, the Secretary did much more than simply "suspend" the Chao Rule: rather, she has affirmatively and substantively reversed course.

requirements of the APA. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42, 103 S. Ct. at 2866 (revocation of a validly promulgated regulation is not the same as a failure to act in the first instance; revocation must be supported by "reasoned analysis").

Although the current administration certainly has the right to disagree with its predecessor, it cannot simply put the 1987 Rule back into place once the 1987 Rule has been replaced by a validly promulgated successor rule. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 41-42, 103 S. Ct. at 2866. *See also Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795, 798 (D.C. Cir. 1983) (rule cannot be revoked "without new rulemaking in accordance with" APA); *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (suspension of effective date of rule is new rule, as is repeal of rule, and both are subject to notice and comment requirements of APA); *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agriculture*, 566 F. Supp. 2d 995, 1004 (D. S.D. 2008) ("The effective date of a rule generally is more than procedural and its suspension or delay usually is subject to rulemaking"); *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (indefinite suspension is a revocation no matter what agency chooses to call it); *Consumer Energy Council of America v. F.E.R.C.*, 673 F.2d 425 (D.C. Cir. 1982) (revocation of regulation requires notice and comment under APA), *aff'd*, 463 U.S. 1216, 103 S. Ct. 3556 (1983). Lest the UFW contend that

these cases are inapposite because they involve indefinite suspensions or actual revocations, *see Council of Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981) (seven-month deferral of rule constituted new rule that was subject to APA requirements).

> Scrutiny of a claimed exemption [from the APA requirements] should be exacting where an agency seeks . . . to "undo all it accomplished through its rulemaking without giving all parties an opportunity to comment on the wisdom of repeal."

Environmental Defense Fund, 713 F.2d at 816-17, *quoting Consumer Energy Council*, 673 F.2d at 446.

If the agency fails to provide a reasoned analysis for what is, in effect, a new rule, the court should not create one for it, *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, 103 S. Ct. 2867, nor should it allow the agency to advance a *post hoc* justification. *Id.*, 463 U.S. at 50, 103 S. Ct. at 2867. *Cf. Bedford Mem. Hosp. v. Health and Human Services*, 769 F.2d 1017, 1024 (4th Cir. 1985) (agency cannot make retroactive correction to invalidly promulgated rule).

Most of the "suspension" cases cited by the UFW at 16-17 involved genuine suspensions and thus highlight the fact that the 2009 Rule was not a true suspension. *See Motor Vehicle Mfgrs. Ass'n*, 463 U.S. at 50 n.15 (in noting that suspension would be different from revocation, Supreme Court did not approve replacement of "suspended" rule with a conflicting rule); *Nat'l Fed'n of Fed. Empls. v. Devine*, 671 F.2d 607 (D.C. Cir. 1982) (Office of Personnel Management

postponed "open season" for employees to change health insurance plans because of lack of pertinent information and potentially devastating financial effect; OPM did not propose to revoke "open season" or replace it with a different method for selecting health insurance plans); *Public Citizen v. Dep't of Health and Human Svcs.*, 671 F.2d 518 (D.C. Cir. 1981) (suspension but not revocation of rule requiring package inserts to be included with certain prescription medications; no replacement during the suspension period of the "package insert" rule with a conflicting rule); *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974) (low-income housing program was suspended for further study but not revoked, and not replaced with a different program during suspension period).

This Court's decision in *Consolidation Coal v. Costle*, 604 F.2d 239, 248 (4th Cir. 1979), cited by the UFW at 16, is not a "suspension" case at all. In *Consolidation Coal*, this Court merely upheld an agency's decision to study relevant material before *issuing* a rule. Because a rule had not yet to be promulgated, the nonexistent rule could hardly have been "suspended."

B. Having implemented a sham "suspension," the DOL was not allowed to fill its own self-created "regulatory vacuum" by reinstating the now-void 1987 Rule.

Absent compliance with the APA, the Secretary is not permitted to revoke a validly promulgated rule and fill the "vacuum" that her own actions have created by replacing the valid rule with a new one.

The UFW relies on *Associated Builders & Contractors, Inc. v. Herman*, 976 F. Supp. 1 (D.D.C. 1997). However, this case is inapposite. In *Associated Builders*, Congress – which clearly had the right to do so – prohibited the DOL from expending funds to implement or administer certain regulations under the Davis-Bacon Act. Accordingly, the DOL suspended the regulations in compliance with the congressional directive. Because compliance with the congressional directive meant that there was no regulatory regime in place, the DOL restored the predecessor rule. However, the plaintiffs in *Associated Builders* were not challenging this decision. They were challenging the DOL's failure to immediately reinstate the suspended regulations after the appropriations ban expired, two and a half years later. *See Associated Builders*, 976 F. Supp. at 6.

The court in *Associated Builders* found that the DOL *unlawfully* failed to immediately reinstate the suspended rule once the congressional appropriations ban expired. In other words, even assuming a legitimate emergency justified suspension of the rule, once that emergency no longer existed, *the DOL was required to implement the rule that it had validly promulgated*. The court found in favor of the DOL only because of mootness, because the DOL had issued a new Notice of Proposed Rulemaking for a revised rule, and had sought notice and comment in accordance with the APA. *Id.*, 976 F. Supp. at 7-8.

The cases cited by the UFW at 34-35 do not support its position; rather, they involve regulatory regimes that had been put into place after notice and comment, then suspended for various reasons, then put back into place with no new rule in the interim. *See American Mining Congress v. EPA*, 907 F.2d 1179, 1191 (D.C. Cir. 1990) (rule that was reinstated without new notice-and-comment period had never been supplanted by new rule); *American Federation of Gov't Employees v. Office of Personnel Mgmt*, 821 F.2d 761, 764 (D.C. Cir. 1987) (same); *Associated Builders*, 976 F. Supp. at 3 (same). *Cf. Frederick County Fruit Growers Ass'n v. Martin*, 968 F.2d 1265, 1271 (D.C. Cir. 1992) (agency did not issue new rule at all but changed interpretation of existing rule in compliance with court order).

C. The DOL did not have "good cause" to unilaterally replace the Chao Rule with the 1987 Rule.

The "good cause" exception to § 553 of the APA applies "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." 5 U.S.C. § 553(b)(B). "[I]t is well established that the 'good cause' exception to notice-and-comment should be 'read narrowly to avoid providing agencies with an "escape clause" from the requirements Congress prescribed.'" *See U.S. v. Johnson*, 632 F.3d 912 (5th Cir. 2011), *quoting U.S. v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985). "[V]arious exceptions to the notice-and-comment provisions of Section 553 will be

narrowly construed and only reluctantly countenanced." *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980). Use of the "good cause" exception "should be limited to emergency situations." *American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

In the case of the 2009 Rule, the Secretary did not invoke the good cause exception at all. The agency seeking to use the good cause exception must normally invoke it and provide its reasons for invoking it. *See*, *e.g.*, *Levesque v. Block*, 723 F.2d 175, 179 (1st Cir. 1983). *Compare U.S. v. Gould*, 568 F.3d 459, 469 (4th Cir. 2009) (with respect to Sex Offender Registration and Notification Act, attorney general specifically invoked exception and explained rationale). In this case, the DOL never invoked the exception, even when it was a party to the instant lawsuit. (J.A. 250) If the DOL itself did not invoke the good cause exception, then certainly the UFW cannot "invoke" it now.

In any event, the cases cited by the UFW at 38, where courts allowed the agencies to rely on the good-faith exception, are distinguishable. *See Nat'l Customs Brokers & Forwarders Ass'n of America v. United States*, 59 F.3d 1219, 1224 (Fed. Cir. 1995) (agency provided notice that it was invoking good-cause exception and explanation but failed only to specifically cite to § 553(b)(B)); *Central Lincoln Peoples' Utility Dist. v. Johnson*, 735 F.2d 1101 (9th Cir. 1984) (agency was under severe time constraints due to contractual commitments and

relevant statutory requirements); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (Temp. Emer. Ct. App. 1974) (dire consequences of providing advance notice of price freeze were so obvious as to allow court to take judicial notice that emergency condition existed); *Tasty Baking Co. v. Cost of Living Council*, 529 F.2d 1005 (Emer. App. 1975) (implementing partial removal of stringent price controls).

The circumstances surrounding the 2009 NPRM and 2009 Rule are nothing like the circumstances involved in the above-cited cases. Unlike *Gould*, there was no threat to the public safety or risk of retroactive application of criminal statutes. Unlike *Central Lincoln*, the DOL was under no contractual or statutory time constraints.

Nor are *DeRieux* and *Tasty Baking Co.*, both of which involved price freezes, applicable to this case. *DeRieux* and *Tasty Baking* involved price freezes implemented by the Nixon Administration during a time of severe inflation. In *DeRieux*, the court was concerned that dramatic price increases might be imposed in an effort to "beat" the freeze if notice were given, which would defeat the purpose of the freeze and might make prices even higher than they would have been absent the freeze. In *Tasty Baking*, the agency was trying to quickly implement an abatement of the freeze, and so, again, emergency action was required.

Although in this case the wage rates paid to H-2A workers was at issue, it is clear that the DOL perceived no real emergency. If there had been an emergency, the Secretary would not have included the "Grandfather Clause," which provided that the Chao Rule would remain in effect for all applications for H-2A workers filed before June 29, 2009. The only real emergency was from the standpoint of the farmers and loggers, who were required to undergo a substantive change in the applicable rule after they had budgeted and planned for 2009 based on the provisions of the Chao Rule. But the fate of the farmers and loggers under the 2009 Rule is not a justification for dispensing with notice and comment requirements; rather, it is precisely the opposite.

As the District Court correctly noted, "[T]he suspension process urged by the Federal Defendants, if taken to its extreme, would permit a complete circumvention of the APA and judicial review by the enactment of suspensions and temporary implementations." (J.A. 257) It would also cause the regulated community to be whipsawed after every change in presidential administrations. Following APA procedures, on the other hand, ensures that any changes occur in an orderly and predictable fashion. Because the 2009 Rule was not a "suspension," and because the good cause exception to the APA did not apply, the DOL could not promulgate the 2009 Rule without complying with the APA's notice and comment provisions.

II. The District Court correctly found that the 2009 NPRM and the 2009 Final Rule did not comply with the notice-and-comment provisions of the APA, and was arbitrary and capricious.

An agency rule must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Administration*, 494 F.3d 188 (D.C. Cir. 2007), *citing* APA at 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if "[1] the agency has relied on factors that Congress did not intend for it to consider; [2] [if the agency] entirely ignored important aspects of the problem; [3] [if the agency] offered an explanation for its decision that runs counter to the evidence before the agency; or [4] [if the agency reaches a decision] that is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2867 (1983). Although the scope of the court's review of agency action is narrow, the agency must "explain the evidence which is available, and must offer a rational connection between the facts found and the choice made." *Id.*, 463 U.S. at 52, 103 S. Ct. at 2871, *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 at 168, 83 S. Ct. 239 at 246, 9 L. Ed. 2d 207 (1962). This Court has not hesitated to affirm judgments against agency action in circumstances similar to those here. *See*, *e.g.*, *Ohio River Valley Environmental Coalition, Inc. v. Kempthorne*, 473 F.3d 94 (4th Cir. 2006)

(affirming summary judgment for plaintiff); *Bedford Mem. Hosp. v. Health and Human Services*, 769 F.2d 1017, 1024 (4th Cir. 1985) (affirming two judgments against agency).[6]

The 2009 Rule suffered from numerous procedural and technical deficiencies, which highlight its arbitrary and capricious nature. A compartmentalized approach does not provide an accurate picture – the defects must be viewed in their totality. Although a 10-day comment period is not a *per se* violation of the APA, it is insufficient in this context, where the DOL was seeking to revoke a rule that was promulgated properly and after a 60-day notice and comment period, and the receipt of more than 11,000 comments. The short comment period is more egregious when considered with the completely arbitrary (and, as the District Court noted, unreviewable) "content" restriction.

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[6] Two decisions in which this Court upheld agency action are distinguishable. In the first case, *Virginia Agricultural Growers Ass'n, Inc. v. Donovan*, 774 F.2d 89 (4th Cir. 1985), the plaintiffs were challenging the DOL's methodology for calculating the AEWR. It was undisputed that the DOL had the authority to set the AEWR for any given year, and the Court found that the DOL had adequately explained its methodology and the reasons for adopting it. In the second case, *Virginia Agricultural Growers Ass'n, Inc. v. Dep't of Labor*, 756 F.2d 1025 (4th Cir. 1985), the plaintiffs had challenged a rule requiring H-2A employers to continue to accept U.S. workers until the "50% point" of the season had been reached. However, the rule was within the scope of the DOL's statutory authority to ensure that employment of H-2A workers did not adversely affect U.S. workers, and it was adopted as a compromise between worker advocates and growers after a number of hearings were held involving interested parties. *See* 756 F.2d at 102-03.

These deficiencies, taken together, deterred input from the regulated community and their advocates, and allowed the DOL to make after-the-fact capricious rejections of comments it received. *Cf.* APA, 5 U.S.C. § 553(c) (agency promulgating a rule must consider "relevant material"). But this was not all that was wrong with the 2009 Rule. The Preamble's vague reasons supporting the DOL regulatory changes, including the "sequence of operational events," "insufficient technological resources," "disruption and confusion," and "processing delays," indicated that the DOL relied on data not subject to public comment and, in addition, gave no serious consideration to any comments offering counter evidence and opposing the 2009 NPRM[7].

Cases where courts approved short comment periods are distinguishable from this case. *See*, *e.g.*, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629-30 (D.C. Cir. 1996) (seven-day comment period held adequate where agency was under congressional mandate to act promptly, failure to do so could harm existing business relationships and delay competition, agency had provided actual notice of more than seven days, and petitioner failed to identify any substantive change it would have made); *Florida Power and Light Co. v. United States*, 846 F.2d 765, 772 (D.C. Cir. 1988) (15-day comment period held adequate where Congress

[7]The 2009 NPRM also failed to comply with various statutory and executive order requirements applicable to a rulemaking, which deprived the public of relevant information about the Department's position and rationale and the opportunity to provide relevant information in response.

imposed expedited time frame for promulgating rule, and agency not only considered but also acted upon comments received); *Northwest Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1321 (8th Cir. 1981) (seven-day comment period for allocation of flights into Washington National Airport held adequate where agency had only two weeks to develop schedule and get it to publication). Although the DOL cited these cases in its attempt to justify the 10-day comment period in the 2009 NPRM, see 74 Fed. Reg. 25978, the cases are clearly distinguishable from this case and do not support the DOL's action.

The "content restriction" in the 2009 NPRM violated the APA for at least three reasons. First, it could reasonably be expected to deter comments from interested parties, either because it created the impression that the 2009 Rule was a *fait accompli* or because commenters were unsure how they could comment about the wisdom of the "suspension" without making "forbidden" comments about the relative merits of the Chao Rule and the 1987 Rule. Second, the restriction allowed the DOL to make arbitrary and capricious determinations regarding which comments were to be "considered" and which were not. Third, as the District Court noted, the restriction made it nearly impossible for a court to determine which comments were about the wisdom of the "suspension" – and therefore considered by the DOL – and which comments were about the relative merits of the two rules – and therefore not considered by the DOL. In other words, the content restriction

effectively rendered the administrative record unreviewable. (J.A. 251) (characterizing restriction as "evasive").

As the District Court correctly noted,

> DOL's refusal to consider [substantive] comments constitutes a failure to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments. See 5 U.S.C. Section 553(c). Additionally, the refusal to consider the merits of the two rules constitutes a "fail[ure] to consider . . . important aspect[s] of the problem."

(J.A.), *citing Motor Vehicles Mfrs. Ass'n*, 463 U.S. at 43 (ellipsis in District Court Order).

Nor is the DOL's action excused by the fact that most of the Appellees-Plaintiffs managed to submit comments in the 10-day time frame. At least one commenter said that he would have liked to address the relative merits of the Chao rule and the 1987 Rule but was not doing so in an attempt to comply with the DOL's content restriction. (J.A. 654) The DOL acknowledged this in the 2009 Rule. *See* 74 Fed. Reg. 25979 ("An agricultural association objected to the Department's limitation of the scope of comments to the suspension itself, as opposed to comments on the merits or substance. . . . The association stated that it has numerous comments it would like to offer on both the current regulations, as well as the prior regulations. . . .").

Thus, this is not a case where an agency technically failed to comply with notice requirements but provided ample actual notice. By contrast, in *Columbia*

Venture, LLC v. S.C. Wildlife Federation, 562 F.3d 290, 295 and n.5 (4th Cir. 2009), this Court approved an agency action, even though the agency had technically missed the notice deadline, where the agency had provided actual notice of 140 days, including "individualized" extensions of time to the plaintiff to comment and actively participate in rulemaking. Similarly, in *Friends of Iwo Jima v. Nat'l Capital Planning Commission*, 176 F.3d 768, 774 (4th Cir. 1999), this Court upheld the agency action where the Commission had technically provided faulty notice but had cured the defect. This Court also found that plaintiffs had submitted no comments despite "*numerous* instances of adequate notice." (Emphasis added.)

The short comment period, with the arbitrary content restriction, as well as the DOL's lack of a reasoned analysis, leads to the inexorable conclusion that the DOL failed to comply with the notice and comment provisions of the APA, and was arbitrary and capricious. 5 U.S.C. §§ 553, 706(2)(A).

III. The District Court correctly found that the Christmas Tree Rule in the 2009 Final Rule was not reasonable or entitled to judicial deference.

With respect to the validity of the Christmas Tree Rule, NCGA respectfully refers the Court to its decision in *U.S. Dep't of Labor v. N.C. Growers' Ass'n, Inc.*, 377 F.3d 345 (4th Cir. 2004). The Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, exempts agricultural employees from its overtime requirements. *See* 29 U.S.C. § 203(f). The statutory definition of "agriculture" includes "cultivation,

growing, or harvesting of any agricultural or horticultural commodities." *Id.* The definition excludes "forestry" unless it falls under certain exceptions not relevant to Christmas tree farming. However, because Christmas trees are clearly "commodities" (in that they are sold as products in themselves and are not used as supplies for other products) and are obviously "ornamental" and therefore "horticultural," they just as clearly fall within the statutory definition of agriculture. *See NCGA*, 377 F.3d at 352.

Under the 1987 Rule, the DOL took the position that Christmas tree farming was "agricultural" for H-2A purposes but "non-agricultural" for FLSA purposes. Regarding the latter, the DOL began taking the position in Interpretive Bulletins in the 1950's that Christmas tree farming was "forestry." These interpretations were based on the state of the Christmas tree industry in the 1950's, during which time the trees were planted, provided with minimal cultivation, pest control, or pruning, and were then cut down and sold "as is" to customers. In other words, the process was similar to that used in forestry, except that Christmas trees were harvested much earlier and used as ornamental commodities. The Christmas tree industry has undergone significant changes beginning in the 1960's, and the trees are now treated to fertilizers, irrigation, regular scheduled pest control, and regular pruning and shearing into the familiar "conical" shape, before being harvested and sold. *See NCGA*, 377 F.3d at 355. Given the changes in the industry since the 1950's,

and the fact that the DOL's position was conclusory and lacked the necessary "power to persuade," among other reasons, this Court found that the DOL's interpretation was not worthy of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161 (1944) and its progeny. *See NCGA*, 377 F.3d at 353-54. NCGA is not aware of any case law that conflicts with the *NCGA* decision.

The 2009 Rule would have reinstated the DOL's illegitimate interpretations by regulatory fiat[8]. However, even under the more-deferential standard that applies to notice-and-comment rulemaking, a regulation may not exceed or conflict with the plain language of the enabling statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778 (1984). For the reasons already discussed, the DOL's position that Christmas tree farming is "not agriculture" puts the DOL in conflict with the FLSA, not to mention positions taken by other federal agencies. Thus, the District Court correctly found that the 2009 Rule, which conclusorily stated that Christmas trees were "non-agriculture," was arbitrary and capricious. *Cf. NCGA*, 377 F.3d at 354 (finding that DOL exclusion of Christmas trees from "agriculture," while including nursery trees, is "arbitrary").

[8] The DOL has acknowledged that the *NCGA* case would continue to govern in this Circuit.

CONCLUSION

For all of the reasons set forth above, the Appellee-Plaintiffs respectfully request that the decision of the District Court be affirmed.

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Dated: April 13, 2012

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CERTIFICATE OF FILING AND SERVICE

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