and unenforceable against public policy in restraint of trade or commerce in the State of North Carolina.

Section 20.5 amends North Carolina's already existing "right-to-work" law

by adding sweeping new obstacles to farmworkers'

FACTUAL BACKGROUND

I. Farmworkers in North Carolina.

Each year, more than 100,000 farmworkers work in North Carolina, handling labor-intensive crops like tobacco. Ex. 2 at 71; Ex. 3 ¶¶ 12, 24; Ex. 4 ¶ 7; Ex. 24 ¶ 4. Plaintiffs Toledo Vences and Alvarado Hernandez ("Farmworker Plaintiffs") are two of these farmworkers. They are citizens of Mexico who perform agricultural work in North Carolina pursuant to visas authorized by 8 U.S.C. § 1101(a)(15)(H)(ii)(a), commonly referred to as "H-2A guestworker visas." Ex. 5 ¶¶ 5–6; Ex. 6 ¶¶ 4–6.

Approximately 95% of North Carolina farmworkers are Latino. Ex. 2 at 71. Most are of Mexican national origin and speak Spanish as their first language. Id.; Ex. 16 ¶ 12. In contrast, 95% of agricultural operators in the state are white. Ex. 7 at 3; Ex. 24 ¶ 5. Nationwide, nearly 70% of farmworkers are not U.S. citizens. Ex. 8 at 4–5; Ex. 24 ¶ 6.

Despite their important role in North Carolina's economy, farmworkers are among the lowest paid workers in the state and face high levels of poverty. Ex. 3 ¶¶ 15–17; Ex. 8 at 37. Farmworkers also suffer high rates of exposure to unsafe working and living conditions, including high rates of work-related injuries and death. Ex. 3 ¶ 15; Ex. 9 at 262; Ex. 10; Ex. 11 at 23–31, 35–39; Ex. 24 ¶¶ 7–9. Migrant farmworkers, including H-2A workers, have long been vulnerable to severe labor exploitation such as human trafficking. Ex. 12 ¶¶ 24–26; Ex. 13 at 31–33; Ex. 14 at 1–2, 9–41; Ex. 24 ¶¶ 10–11. H-2A workers who protest illegal working conditions have frequently been fired, deported, and blacklisted. Ex. 12 ¶¶ 16–19; Ex. 14 at 14–17, 41. Despite these documented abuses,

farmworkers have historically been excluded from many labor protections. Ex. 12 ¶¶ 8–10, 21. These exclusions were substantially motivated by the fact that a high percentage of the workforce at the time of enactment, particularly in the South, was African American. Id. ¶¶ 8–10; see generally Juan F. Perea, The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural & Domestic Worker Exclusion from the National Labor Relations Act, 72 Ohio St. L.J. 95 (2011); Marc Linder, Farm Workers & the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Tex. L. Rev. 1335 (1987). Such exclusions were significantly maintained as the nation's agricultural workforce became predominantly foreign-born and Latino. Ex. 12 ¶ 2.

II. FLOC's Advocacy.

For over twenty years, FLOC has been the only union organizing farmworkers yd.vo

authorize their employers to deduct dues from their pay and divert those funds to FLOC. Id.

No federal or state law requires union elections or any other mandatory recognition of farmworker unions. Id. ¶ 11. Therefore, all union recognition or representation agreements between FLOC and North Carolina employers, including any agreements by employers to administer dues checkoffs for FLOC members, are voluntarily entered into. Id.

FLOC currently has two CBAs with agricultural producers in the state, due to expire in November 2019 and December 2020. Id. ¶ 19. The CBAs provide significant benefits to workers and employers, such as guaranteed hourly wages, an orderly process for recruitment, and procedures for dispute resolution. Id. ¶¶ 12-13.

FLOC uses various strategies to achieve CBAs and other improvements to working conditions, including public campaigns to pressure industry actors like tobacco corporations, and assisting members in bringing litigation to challenge illegal practices. Id. ¶¶ 14-18, 30–31. Additionally, FLOC participates in public events to advocate for the rights of farmworkers and other immigrants. Id. ¶¶ 24-26.

FLOC also participates in litigation as a party, or assists its members in bringing litigation, in order to educate the public about farmworkers and achieve tangible gains for members. Id. ¶¶ 14-18, 31-32; see also Ex. 6 ¶¶ 9, 20. As part of settlements with agricultural producers, FLOC members have negotiated for voluntary union recognition, entry into a CBA, or expanded collective bargaining rights. Ex. 4 ¶¶ 17-18.

III. Events Leading to Enactment of the Farm Act.

In the past fifteen years, FLOC has won CBAs that cover approximately 50-60% of the H-2A workers in North Carolina. Id. ¶ 27. It has also conducted public campaigns to

Attorney General Stein if they enter into such agreements. N.C. Gen. Stat. § 75-1, 75-9 – 75-15.2; see also Ex. 4 ¶¶ 49, 51.

The Act's prohibition on dues checkoffs devastates FLOC's operations. Dues constitute approximately 50-60% of FLOC's annual budget. Ex. 4 ¶ 56. Consistent collection of dues is essential to FLOC's ability to administer CBAs and provide services to its members. Id.; see also Ex. 23 ¶¶ 6–18.

The vast majority of FLOC's dues-paying members are H-2A guestworkers from Mexico who come to North Carolina each year for six to ten months. Ex. 4 ¶ 7. H-2A guestworkers live in employer-provided housing, mostly located in rural, isolated areas. Id. ¶ 40; Ex. 3 ¶¶ 8–23. Farmworkers' transient jobs and limited access to banking are obstacles to making recurring payments like weekly union dues. Ex. 3 ¶¶ 24–32; Ex. 4 ¶¶ 41-45. FLOC members rely on dues checkoffs to maintain their membership. Ex. 4 ¶¶ 57-58; Ex. 5 ¶¶ 20–23; Ex. 6 ¶¶ 14-17.

With only four full time staff members, FLOC cannot collect dues individually from each of 2,000 dues paying members who work in the state during a given week. Ex. 4 ¶¶ 39, 55. Because the Farm Act now criminalizes and renders invalid any agreements by agricultural employers to honor their employees' requests for dues checkoffs, FLOC's efforts to organize new members are severely hindered. Id. ¶¶ 49, 63; see also Ex. 23 ¶¶ 16–28. Since filing this lawsuit, FLOC has had at least one opportunity to negotiate a new CBA, but is unable to negotiate for inclusion of a dues checkoff provision. Ex. 4 ¶ 49.

Prior to the Act, FLOC's standard practice was to negotiate dues checkoffs as part of every new CBA. Id.

FLOC will also be unable to collect dues from most of its current members once its existing CBAs are renewed, which will gut its ability to administer CBAs, assist members, and join new members. Id. ¶¶59-63. As a result, FLOC will be forced to provide less individualized assistance to members like the Farmworker Plaintiffs. Id. ¶61. Other farmworkers will have fewer opportunities to meet with FLOC representatives and learn about the benefits of union representation. Id. ¶62.

The Act also severely impairs the ability of FLOC and its members to participate in litigation. On its face, the Act invalidates any settlement agreement between an agricultural producer and FLOC, no matter the context. Ex. 23 ¶34. The Act also invalidates a settlement agreement by any individual that is conditioned on union recognition, agreements to remain neutral about employee union choice, or entry into CBAs. Id. ¶31.

This restriction curtails FLOC's ability to engage in expressive advocacy, particularly litigation, on behalf of farmworkers. Id. ¶35. Like many other advocacy organizations, unions engage in litigation to advance their political goals in addition to enforcing members' statutory rights. Id. ¶38. Moreover, when a union helps workers find counsel and file litigation to protect their interests, that can powerfully demonstrate the value of union membership for individual workers. Id. ¶39.

The Farm Act substantially impairs FLOC's ability to engage in this kind of advocacy by impairing its right to settle. Settlements offer an efficient and expeditious resolution to litigation. Id. ¶ 43. Indeed, settlements can result in outcomes that are better than court-

injunction serves the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). Plaintiffs satisfy these requirements.

I. Plaintiffs Are Likely to Succeed on the Merits.

A. The Farm Act Violates the First Amendment.

"The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley, Cal., 454 U.S. 290, 294 (1981). Labor unions, such as FLOC, are "an archetype of an expressive association." Kidwell v. Transp. Commc'ns Int'l Union, 946 F.2d 283, 301 (4th Cir. 1991). Given the important role unions play in advocating for their members' political, economic, and social interests, "it cannot be questioned that the First Amendment's protection of speech and associational rights extends to labor union activities." State Emp. Bargaining Agent Coal. v. Rowland, 718 F.3d 126, 132 (2d Cir. 2013) (citations omitted).

The First Amendment prohibits the government from erecting obstacles to protected expression and association. The government cannot "single[] out expressive activity for special regulation" or taxation. United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 475 (1995); see also Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583 (1983) (striking down a tax imposed on large quantities of newsprint and ink because it disproportionately targeted large newspapers). Nor can the government take steps that effectively suppress participation in expressive association. NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958). The government also

cannot prevent expressive associations from participating in litigation to advance their causes. See NAACP v. Button, 371 U.S. 415, 429–31 (1963) (NAACP had a First Amendment right to solicit clients for lawsuits).

Here, the Act unconstitutionally imposes special burdens on the expression and association of FLOC and its members by restricting their ability to benefit from dues checkoff and settlement agreements.

1. The Act Unconstitutionally Prohibits Dues Checkoffs.

The Act violates the First Amendment by criminalizing and otherwise prohibiting voluntary agreements by employers to administer union dues deductions at the written request of union members. Dues checkoffs are an essential tool for union organizing, particularly where, as here, FLOC and its farmworker members face extreme logistical obstacles to regular dues payment and collection. FLOC and its members rely on dues checkoffs to enable timely and consistent payment of dues. See supra at 7–9.

The First Amendment prohibits the state from imposing this severe burden on the speech and association rights of FLOC and its members. See Patterson, 357 U.S. at 460–61; see also Boddie v. City of Columbus, Miss., 989 F.2d 745, 749 (5th Cir. 1993) ("[T]he first amendment is violated by state action whose purpose is either to intimidate public employees from joining a union or from taking an active part in its affairs or to retaliate against those who do so.") (citation omitted).

The Supreme Court's recent decision in Ysura v. Pocatello Educ. Ass'n, 555 U.S. 353 (2009), and its progeny are instructive. In

that banned payroll deductions for private sector unions’ political action committee funds

this interference in private agreements

protected by the First Amendment because "[t]he ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public" about civil liberties. Id. at 431.

By the same token, "unions and union members have rights under the First Amendment to associate and to act collectively to pursue legal action." Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of N.Y., 852 F.3d 178, 187 (2d Cir. 2017). "This right has attached to the activities of workers who associate with each other to obtain counsel and further their litigation ends, and to the union as a proxy for the workers in their exercise of associational rights." Id. at 185. The Supreme Court has broadly upheld unions' rights to provide legal advice, representation, and other legal services for the benefit of their members. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 579–80 (1971);

The ability to enter into settlement agreements provides significant benefits to parties and the judicial system. See Evans v. Jeff D., 475 U.S. 717, 736–37 (1986) ("[F]orcing more cases to trial" would "disserv[e] civil rights litigants"); Marek v. Chesny, 473 U.S. 1, 10 (1985) ("[E]ven for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation."). Settlements may also enable parties to achieve their goals better than court-ordered relief. Ex. 23 ¶¶ 44–46.

By precluding any settlement conditioned on an agricultural producer's recognition of or entry into an agreement with the union, the Act denies these benefits to FLOC. The Act prevents FLOC and its members from using litigation to secure important benefits, such as union recognition, entry into a CBA, or other labor-related benefits such as an agreement to remain neutral during a union campaign. Id. ¶¶31–32. Indeed, because the Act bars any settlement that stipulates to an agreement between an agricultural producer and a labor union, it prevents FLOC from entering into any kind of

NAACP v. Duval Cty. Sch. Bd., 978 F.2d 1574, 1576 (11th Cir. 1992) (desegregation consent decree entered into by NAACP and school board).

3. The Farm Act Violates the Prohibition Against Speaker- and Viewpoint- Based Discrimination.

The First Amendment violations outlined above are compounded by the Farm Act's discriminatory scope. The provisions at issue here effectively apply to one, and only one, organization: FLOC. Ex. 4 ¶6. "A law that targets a small handful of speakers for discriminatory treatment suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Time Warner Cable, Inc. v. Hudson, 667 F.3d 630, 640 (5th Cir. 2012) (quoting Minneapolis Star, 460 U.S. at 585). The connection between discrimination against certain speakers and suppression of expression is particularly evident when the government targets labor unions for special burdens, because union speech is as political as it is economic. See State Emp. Bargaining Agent Coal., 718 F.3d at 134 ("Opposition to labor unions, similarly, has at times been based not only on the perceived economic interests of employers, consumers, and workers, but on the perception that unions advocate radical political ideas.").

Like the Arizona law at issue in United Food, the Farm Act "singles out a specific group," FLOC, "to be subject to harsh penalties," including criminal and civil enforcement and practically insurmountable obstacles to fundraising. 934 F. Supp. 2d at 1186. These penalties amount to a limitation on speech and association "by particular

speakers to which other speakers are not subject, thereby imposing costs on a particular view"—in this case, the distinct view of FLOC and its farmworker members. Id.

Viewpoint discrimination of the sort at issue here is subject to strict scrutiny. See id. at 1186–87; see also Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2226–27 (2015). As discussed below, Section 20.5 is not rationally related to any legitimate government interest, and it certainly is not the least restrictive means for furthering any compelling government interest. It thus fails strict scrutiny.

B. The Farm Act Violates Equal Protection and is a Bill of Attainder.

The Act violates the Equal Protection Clause of the Fourteenth Amendment and the Bill of Attainder Clause (Article I, § 10) of the Constitution by uniquely and punitively stripping from farmworkers and their union the right to make certain legally binding agreements. As this Court has recognized, equal protection and bill of attainder claims may involve analysis of similar and overlapping facts. See, e.g., Planned Parenthood of Cent. N.C. v. Cansler, 804 F. Supp. 2d 482, 495-

Mich. Chamber of Commerce, 494 U.S. 652, 666 (1990), overruled in relevant part by Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) ("[S]tatutory classifications impinging upon [the fundamental right to engage in political expression] must be narrowly tailored to serve a compelling governmental interest.").

But even if this Court were to apply more deferential rational basis review, the Act violates the Equal Protection Clause, as well as the Bill of Attainder Clause, because it arbitrarily imposes harsh legal penalties and disabilities on farmworkers and their unions. Under rational basis review applicable to equal protection claims, courts "will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631 (1996). Rational basis review is deferential but not toothless. It is designed "to ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." Id. at 633.

Section 20.5 was deliberately introduced in a way that guaranteed it received no public hearing and scant debate. See supra at 6–7. Section 20.5's sponsor, Representative Dixon, described FLOC's activities as "making a good living coming around and getting people to be dissatisfied." Ex. 17 at 3–4. At the same time, Dixon affirmed that his fellow agricultural producers were "not afraid of anything," rather, "a few of us" were "getting a little bit tired" of FLOC's organizing activities. Id. In statements to the press, Dixon made clear that he was acting at the behest of the Farm Bureau and a few other employers to quell the "undue pressure" posed by FLOC's speech. Ex. 18.

The openly expressed purpose of Section 20.5 is to silence FLOC and its members. See supra at 6-7. Agricultural producers in the state are evidently frustrated that FLOC and its members are exercising their First Amendment rights, e.g., "getting people to be dissatisfied" and successfully convincing agricultural producers to enter dues checkoff and settlement agreements. But agricultural producers' desire to silence speech they dislike is not a compelling government interest. See Kelo v. City of New London, Conn., 545 U.S. 469, 491 (2005) (Kennedy, J., concurring) ("A[] court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.").

There is no rational relation between the Act's sweeping penalization of voluntary agreements and any legitimate outcome. "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."

FLOC and its members without plausible justification, the Act raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer, 517 U.S. at 634–35; see also Moreno,

582, 594 n.11 (4th Cir. 1998)). To be a bill of attainder, the legislation must 1) specify affected persons, 2) impose punishment, and 3) fail to provide for judicial trial. Planned Parenthood, 804 F. Supp 2d at 495. Section 20.5 meets each requirement.

First, although FLOC is not identified by name in the Act, it has been the only farmworker union operating in the state for over twenty years. Ex. 4 ¶ 6. By specifying that FLOC cannot benefit from dues checkoffs available to other unions nor enter into settlement agreements available to other unions in the state, Section 20.5 violates the principle that legislatures must accomplish their objectives by "rules of general applicability." United States v. Brown, 381 U.S. 437, 461 (1965).

Second, Section 20.5 is punitive. To determine this, courts look at whether a statute falls within the traditional meaning of legislative punishment, fails to further a non-punitive purpose, or is based on a legislative intent to punish. Planned Parenthood, 804 F. Supp 2d at 495; see also Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473–78 (1977). When the purported punishment does not fall within the traditional understanding of punishment, the courts apply "a functional test . . . analyzing whether the law under challenge viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." Nixon, 433 U.S. at 475–76.

As explained above, Section 20.5 serves no legitimate purpose, and its severe burdens — which include the invalidation of agreements that are valid for every union in North Carolina — are disproportionate to and attenuated from any legitimate end. See id. at 475 ("Where such legitimate legislative purposes do not appear, it is reasonable to

conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers."); ACORN v. United States, 618 F.3d 125, 138 (2d Cir. 2010) ("A grave imbalance of disproportion between the burden and the purported nonpunitive purpose suggest punitiveness, even where the statute bears some minimal relation to nonpunitive ends.") (internal citations omitted). Section 20.5 meets the functional test of punishment.

Third, Section 20.5 imposes its punishment—sweeping deprivation of previously held contractual rights—without any provision for judicial trial.

Because Section 20.5 functions to punish FLOC without a trial, it is an unconstitutional bill of attainder.

II. Plaintiffs Are Irreparably Harmed.

Entry of a preliminary injunction is necessary to prevent irreparable harm to Plaintiffs. "[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). Moreover, the Act subjects FLOC, its representatives, and its members to criminal prosecution and civil liability for entering into voluntary agreements that are central to its mission. Ex. 4 ¶¶ 49, 51. FLOC is already unable to engage in collective bargaining activity that was its standard practice prior to the Act. ¶ 49. Absent an injunction, FLOC will be unable to sustain the levels of assistance it currently provides to its members. Id. ¶¶ 49-63. See Planned Parenthood, 804 F. Supp. 2d at 498-99 (recognizing that such harms are irreparable).

III. Equities Favor an Injunction.

The Farm Act obstructs Plaintiffs' exercise of their constitutional rights through harsh criminal and civil penalties. No harm will come to Defendants if Plaintiffs are allowed to continue engaging in the same protected speech activities that they engaged in prior to the Act. *See* *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (injunction of a likely unconstitutional law does not harm the state). The public interest is served by ensuring that Plaintiffs are no longer subjected to this unconstitutional law. *See id.*

CONCLUSION

For the reasons stated, Plaintiffs' Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LENGTH LIMITATIONS OF LR 7.3(d)

Relying on the word count function of Microsoft Word, I hereby certify that this brief complies